



State of Idaho  
DEPARTMENT OF ENVIRONMENTAL QUALITY  
BOARD OF ENVIRONMENTAL QUALITY

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

C. L. "Butch" Otter, Governor  
Curt Fransen, Director

**MEMBERS OF THE BOARD**

John McCreedy  
Chairman  
1951 S. Saturn Way  
Ste. 100  
Boise, ID 83709

Kevin C. Boling  
Vice-Chairman  
5881 N. Ferdinand Court  
Coeur d'Alene, ID 83814

Beth Elroy  
Secretary  
P.O. Box 6  
Mail Stop 01-602  
Boise, ID 83707

L. Nicholas "Nick" Purdy  
Box 686  
Highway 20  
Picabo, ID 83348

Dr. John R. MacMillan  
P.O. Box 712  
Buhl, ID 83316

Kermit V. Kiebert  
P.O. Box 970  
Ponderay, ID 83852

Carol Mascareñas  
5000 Baltimore Circle  
Idaho Falls, ID 83401

**LEGAL COUNSEL**

Douglas M. Conde  
Harriet A. Hensley

**BOARD ASSISTANT**

Rosie Alonzo  
(208) 373-0240

**IDAHO BOARD OF ENVIRONMENTAL QUALITY**

**MINUTES**

**November 19, 2014**

The Idaho Board of Environmental Quality convened on November 19, 2014 at 8:30 a.m. at:

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

**BOARD MEMBERS PRESENT**

John McCreedy, Chairman  
Kevin Boling, Vice-Chairman  
Beth Elroy, Secretary  
Nick Purdy, Member  
Dr. John R. "Randy" MacMillan, Member  
Kermit Kiebert, Member  
Carol Mascareñas, Member

**DEPARTMENT OF ENVIRONMENTAL QUALITY STAFF PRESENT**

Curt Fransen, Director  
Douglas Conde, Senior Deputy Attorney General, DEQ  
Paula Wilson, Rules Coordinator  
Rosie Alonzo, Management Assistant, Assistant to the Board  
Jess Byrne, Deputy Director  
Barry Burnell, Water Quality Division Administrator  
Tiffany Floyd, Air Quality Division Administrator  
Orville Green, Waste Management & Remediation Division Administrator  
Carl Brown, Air Quality Toxicologist  
John Brueck, Hazardous Waste Regulation & Policy Coordinator  
Darrell Early, Deputy Attorney General, DEQ  
Kari Kostka, Policy Analyst  
Dennis Meier, Staff Engineer  
Mike Simon, Stationary Source Program Manager

**OTHERS PRESENT:**

Jim Werntz, Environmental Protection Agency, Idaho Operations Office  
Cyndi Grafe, Environmental Protection Agency, Idaho Operations Office  
Justin Hayes, Idaho Conservation League  
Courtney Washburn, Idaho Conservation League  
Jane Wittmeyer, Wittmeyer and Associates, LLC  
Bruce Smith, Moore Smith Buxton & Tureke  
Suzanne Budge, SBS Associates, LLC

Lynn Tominaga, Idaho Ground Water Association, Idaho Rural Water Association  
David Mabe, National Oceanic and Atmospheric Administration (NOAA)  
Kevin Beaton, Stoel Rives, LLP  
John Foster, Kestrel West  
Elizabeth Criner, Veritas Advisors, LLP  
Roy Eiguren, Eiguren Fisher Ellis Public Policy  
Brent Olmstead, Idahoans for Sensible Water Regulation

- ❖ All attachments referenced in these minutes are permanent attachments to the minutes on file at the Idaho Department of Environmental Quality.

### **CALL TO ORDER AND ROLL CALL**

Chairman Carol Mascareñas called the meeting of the Idaho Board of Environmental Quality (Board) to order at 8:30 a.m. Roll call was taken with all Board members present.

Chairman Mascareñas opened the floor for the public to address the Board on topics not specifically on the agenda. No topics were raised.

### **AGENDA ITEM NO. 1: ELECTION OF OFFICERS**

Chairman Mascareñas opened the floor to nominations:

- **MOTION:** Dr. Randy MacMillan nominated Ms. Beth Elroy as Secretary of the Board of Environmental Quality.
- **SECOND:** Mr. Nick Purdy.  
**VOICE VOTE:** Motion carried unanimously.
  
- **MOTION:** Dr. MacMillan nominated Mr. Kevin Boling as Vice-Chairman of the Board of Environmental Quality.
- **SECOND:** Mr. Kermit Kiebert.  
**VOICE VOTE:** Motion carried unanimously.
  
- **MOTION:** Mr. Purdy nominated Mr. John McCreedy as Chairman of the Board of Environmental Quality.
- **SECOND:** Dr. MacMillan.  
**VOICE VOTE:** Motion carried unanimously.

Following the election of officers, the newly-elected Chairman McCreedy took over chairing the meeting.

### **AGENDA ITEM NO. 2: DIRECTOR'S REPORT**

Director Curt Fransen thanked Chairman McCreedy and Mr. Kiebert for their willingness to continue serving on the Board and congratulated them for being reappointed to the Board by Governor Otter. He continued by providing an overview of the Board's agenda and followed with several brief updates:

**Personnel Changes** – Mr. Bill Allred, DEQ's Regional Administrator in Twin Falls retired and Mr. Dave Anderson was appointed as the new Regional Administrator. Another significant retirement recently announced for the end of the year is Ms. Sharon Keene, Administrator of DEQ's Environmental Management & Information Division.

**Proposed Legislation and Budget for FY2016** – DEQ has three proposed pieces of legislation in addition to our FY2016 budget proposal:

- RS23205 – legislation to amend a state revolving fund provision to allow for 30 year repayment terms for all for drinking water loans.
- RS23226 – legislation to amend Community Reinvestment Pilot Initiative fund provisions to allow for the use of unobligated funds and accumulated interest to provide financial assistance to additional eligible property owners conducting remediation.
- RS (not yet assigned) – legislation to recognize and approve a revision to Idaho Water Quality Standards (WQS) that addresses Outstanding Resource Waters (ORW). The revision deletes the ORW section from the mixing zone policy within Idaho WQS.
- DEQ's budget proposal includes three new proposed decision units:
  - IPDES Program – Consistent with the general schedule for this program, DEQ is proposing adding three additional FTEs at a cost of \$263,700: one Analyst 4 position (Compliance Monitoring and Enforcement Lead) and two Analyst 3 positions (Municipal Permit Specialist and Database Coordinator).
  - Air Quality Program – EPA is proposing new requirements to control greenhouse gas emissions with the goal of rolling back carbon emission from power production nationwide by 33% by 2030. These proposed regulations would apply to new or modified power plants under 111(b) of the Clean Air Act (CAA) and to existing power plants under 111(d) of the CAA. In view of these timelines and to meet these challenges, DEQ is proposing the addition of 1 FTE at a cost of \$85,700 to address this work and other CAA planning and implementation work.
  - Lakes Commission – The Lakes Commission is seeking \$40,000 to conduct an economic analysis on the impacts of lowering lake levels in Lake Pend Oreille for downstream power and fisheries interests. It is also seeking an additional \$33,700 to fund a part-time staff person to address increasing workloads.

**Future Rulemaking** – For next year, the Board can expect to see annual updates to hazardous waste and air rules. DEQ also foresees a significant number of rulemakings for 2016. Two water quality rulemakings will address the human health criteria for toxics related to DEQ's ongoing fish consumption study and rules for the new IPDES Program. There will be two air quality rulemakings as well; one to develop and implement a state plan under the 111(d) rule of the CAA and the second related to EPA's pending action to revise the Ozone NAAQs. This will have a significant impact to farmers in DEQ's crop residue burning program.

Director Fransen stood for and responded to questions from Board members.

**AGENDA ITEM NO. 3: APPROVAL OF MEETING MINUTES**  
*MINUTES OF MAY 7 & 8, 2014.*

- **MOTION:** Mr. Boling moved that the Board adopt the May 7 & 8, 2014 minutes as prepared.
- **SECOND:** Mr. Kiebert.
- VOICE VOTE:** Motion carried unanimously.

**AGENDA ITEM No. 4: WATER QUALITY STANDARDS, DOCKET NO. 58-0102-1401 (PENDING RULE)**

*RULEMAKING INITIATED TO UPDATE DEQ'S MIXING ZONE POLICY IN THE WATER QUALITY STANDARDS.*

Mr. Barry Burnell, Water Quality Division Administrator, gave a PowerPoint presentation (attached) on Docket No. 58-0102-140, Mixing Zone Rules in Idaho's Water Quality Standards. During his presentation, he responded to questions from Board members.

After the presentation Chairman McCreedy asked if there were further comments from the public on this temporary rule. There were none.

- **MOTION:** Dr. MacMillan moved that the Idaho Board of Environmental Quality adopt as pending rules the Water Quality Standards as presented in the final proposal under Docket No. 58-0102-1401, with the pending rules becoming final and effective upon the adjournment *sine die* of the First Regular Session of the Sixty-third Idaho Legislature if approved by the legislature.
- **SECOND:** Ms. Elroy.
- VOICE VOTE:** Motion carried unanimously.

**AGENDA ITEM No. 5: REPORT ON WATER QUALITY STANDARDS NEGOTIATED RULEMAKING, HUMAN HEALTH CRITERIA FOR TOXICS/IDAHO FISH CONSUMPTION RATE**

Mr. Burnell proceeded with an update on the Water Quality Standards negotiated rulemaking involving Human Health Criteria for Toxics and the Idaho Fish Consumption Rate. He gave a recap of policy discussions held since his last report and outlined future activities, mentioning that in the spring of 2015, there will be discussion on implementation tools and methods as well as data analysis. Mr. Burnell also touched on the progress and demographics of the fish consumption survey. He indicated that the Nez Perce and Shoshone-Bannock Tribes will be conducting their own surveys though the other three Idaho tribes will only do a heritage rate study of fish consumption. Mr. Burnell then stood for and responded to questions from the Board.

**AGENDA ITEM No. 6: UPDATE ON IDAHO POLLUTANT DISCHARGE ELIMINATION SYSTEM (IPDES) PROGRAM**

Mr. Burnell introduced Dr. Mary Anne Nelson, Idaho Pollutant Discharge Elimination System (IPDES) Program Manager. He proceeded to update the Board on IPDES progress to date, including two recent program hires; Mr. A.J. Maupin, IPDES Permit Lead, and Mr. Troy Smith, Rules and Guidance Coordinator. Mr. Burnell indicated that by statute, DEQ must submit a primacy application to EPA by September 1, 2016 which necessitates an aggressive rulemaking schedule. Mr. Burnell touched on various other factors requiring the program to keep to this timetable as well. Mr. Burnell and Dr. Nelson then responded to questions from the Board.

**AGENDA ITEM No. 7: RULES AND STANDARDS FOR HAZARDOUS WASTE, DOCKET NO. 58-0105-1401 (PENDING RULE)**

*UPDATE OF FEDERAL REGULATIONS INCORPORATED BY REFERENCE.*

Mr. Orville Green, Waste Management & Remediation Division Administrator, presented the Rules and Standards for Hazardous Waste under Docket No. 58-0105-1401 as a pending rule. He described the adoption of these federal hazardous waste regulations by reference with effective dates between July 1, 2013 and June 30, 2014. He also explained that DEQ preforms this routine procedure to satisfy consistency and stringency requirements contained in the Idaho Hazardous Waste Management Act which are necessary for maintaining program primacy. One rule change relates to the exclusion of solvent-contaminated cloths when cleaned and reused. It also conditionally excludes solvent-contaminated cloths from being classified as a hazardous waste if they do not contain trichloroethylene and can therefore be

disposed in a municipal landfill. The second rule change relates to the conditional exclusion for carbon dioxide streams injected into Class IV wells for geological sequestration. Finally, several corrections were made to reinstate regulatory language which was inadvertently removed in 2005. Mr. Green responded to questions from the Board.

- **MOTION:** Ms. Mascareñas moved that the Idaho Board of Environmental Quality adopt as pending rules the Rules and Standards for Hazardous Waste as presented in the final proposal under Docket No. 58-0105-1401, with the pending rules becoming final and effective upon the adjournment *sine die* of the First Regular Session of the Sixty-third Idaho Legislature if approved by the legislature.
- **SECOND:** Mr. Nick Purdy.
- VOICE VOTE:** Motion carried unanimously.

**AGENDA ITEM NO. 8: RULES REGULATING THE DISPOSAL OF RADIOACTIVE MATERIAL NOT REGULATED UNDER THE ATOMIC ENERGY ACT OF 1954, AS AMENDED, DOCKET NO. 58-0110-1401 (TEMPORARY/PENDING RULE)**

*RULEMAKING INITIATED TO IMPLEMENT SENATE BILL 1260 (2014) WHEREIN THE IDAHO LEGISLATURE REVISED THE DEFINITION OF "RESTRICTED HAZARDOUS WASTE" IN IDAHO CODE §39-4403.*

Mr. Green continued with Docket No. 58-0110-1401, Rules Regulating the Disposal of Radioactive Material Not Regulated Under the Atomic Energy Act of 1954 as Amended. He explained that this rulemaking is to implement Senate Bill 1260 which passed during the 2014 session and revised the definition of restricted hazardous waste in Idaho in Idaho Code §39-4403. He indicated that no public hearing was requested or held, no public comments were received, and there are no increased costs for the regulated public. Mr. Green noted that this action will allow several facilities to dispose of certain low-activity contaminated soils at U.S. Ecology Idaho or any other permitted hazardous waste facility. He did acknowledge that this rule *is* broader in scope than federal regulations, but it is required by Idaho statute. Mr. Green responded to questions from the Board.

With no further questions, Chairman McCreedy asked for a motion.

- **MOTION:** Ms. Beth Elroy moved that the Idaho Board of Environmental Quality adopt as temporary/pending rules the Rules Regulating the Disposal of Radioactive Material Not Regulated under the Atomic Energy Act of 1954 as presented under Docket No. 58-0110-1401, with the temporary rules becoming effective on December 3, 2014, and the pending rules becoming final and effective upon the adjournment *sine die* of the First Regular Session of the Sixty-third Idaho Legislature if approved by the legislature.
- **SECOND:** Dr. MacMillan.
- VOICE VOTE:** Motion carried unanimously.

**AGENDA ITEM NO. 9: RULES FOR THE CONTROL OF AIR POLLUTION IN IDAHO, DOCKET NO. 58-0101-1401 (PENDING RULE)**

*RULEMAKING INITIATED TO CLARIFY THE APPLICATION OF FUGITIVE DUST RULES TO AGRICULTURAL ACTIVITIES.*

Ms. Tiffany Floyd, Air Quality Division Administrator, presented a PowerPoint (attached) on the Rules for the Control of Air Pollution in Idaho, Docket No. 58-0101-1401. Before starting, Ms. Floyd introduced Mr. Carl Brown, Air Quality Rules Coordinator, who was there to assist her. At the conclusion of the Docket No. 58-0101-1401 portion of her presentation (slides 1-8), Ms. Floyd and Mr. Brown responded to questions from the Board.

Chairman McCreedy asked if there was public comment. There was none.

- **MOTION:** Dr. MacMillan moved the Idaho Board of Environmental Quality adopt as pending rules the Rules for the Control of Air Pollution in Idaho as presented in the final proposal under Docket 58-0101-1401, with the rules becoming final and effective upon the adjournment *sine die* of the First Regular Session of the Sixty-third Idaho Legislature if approved by the legislature.
- **SECOND:** Ms. Elroy.
- VOICE VOTE:** Motion carried unanimously.

**AGENDA ITEM NO. 10: RULES FOR THE CONTROL OF AIR POLLUTION IN IDAHO, DOCKET NO. 58-0101-1402 (PENDING RULE)**

*RULEMAKING INITIATED TO (1) ADDRESS FEEDBACK RECEIVED FROM EPA REGARDING MINOR CLARIFICATIONS THAT ARE NECESSARY TO MAKE CERTAIN RULES APPROVABLE FOR IDAHO'S SIP (FACILITY EMISSION CAP, SULFUR CONTENT IN FUELS ALTERNATIVE, AND NONMETALLIC MINERAL PROCESSING PLANTS); (2) ADD REFERENCE TO PM2.5 IN ORDER TO CAPTURE UPDATED FEDERAL REQUIREMENTS; AND (3) UPDATE A SOURCE TEST REPORTING DEADLINE TO MORE REALISTICALLY REFLECT EXISTING PRACTICES.*

Ms. Floyd continued with her PowerPoint presentation (slides 9-18) on the Rules for the Control of Air Pollution in Idaho, Docket No. 58-0101-1402. Ms. Floyd stood for and responded to questions from the Board.

Chairman McCreedy asked for a motion from the Board.

- **MOTION:** Mr. Kiebert moved that the Idaho Board of Environmental Quality adopt as pending rules the Rules for the Control of Air Pollution in Idaho as presented in the final proposal under Docket 58-0101-1402, with the rules becoming final and effective upon the adjournment *sine die* of the First Regular Session of the Sixty-third Idaho Legislature if approved by the legislature.
- **SECOND:** Mr. Nick Purdy.
- VOICE VOTE:** Motion carried unanimously.

Chairman McCreedy paused to see if anyone in the audience wished to comment on rules already adopted. There were no comments.

**AGENDA ITEM NO. 11: RULES FOR THE CONTROL OF AIR POLLUTION IN IDAHO, DOCKET NO. 58-0101-1403 (PENDING RULE)**

*UPDATE OF FEDERAL REGULATIONS INCORPORATED BY REFERENCE.*

Ms. Floyd continued with her PowerPoint presentation (slides 19-25) on the Rules for the Control of Air Pollution in Idaho, Docket No. 58-0101-1403. Ms. Floyd stood for and responded to questions from the Board.

There was lengthy discussion about federal regulations adopted by DEQ that are incorporated by reference and how DEQ could help the Board and the public understand what is actually being adopted. The Board provided feedback to the Department indicating that providing summaries and overview materials to the public and Board similar to the spreadsheet developed by the Air Quality Program would be helpful. After the discussion, Chairman McCreedy asked for any additional comments or questions regarding the agenda item and then asked for a motion from the Board.

- **MOTION:** Ms. Mascareñas moved that the Idaho Board of Environmental Quality adopt as pending rules the Rules for the Control of Air Pollution in Idaho as presented in the final proposal under

Docket 58-0101-1403, with the rules becoming final and effective upon the adjournment *sine die* of the First Regular Session of the Sixty-Third Idaho Legislature if approved by the legislature.

➤ **SECOND:** Mr. Boling.

**VOICE VOTE:** Motion carried unanimously.

**AGENDA ITEM NO. 12:    CONTESTED CASE AND RULE DOCKET STATUS REPORT**

Ms. Paula Wilson, DEQ Rules Coordinator, reviewed the current contested case and rule docket status report (attached).

**AGENDA ITEM NO. 13:    SET 2015 BOARD MEETING SCHEDULE**

2015 Board meetings were scheduled for the following dates:

- May 20 & 21
- October 7 & 8
- November 18 & 19

**AGENDA ITEM NO. 14:    LOCAL REPORTS AND ITEMS BOARD MEMBERS MAY WISH TO PRESENT**

Chairman McCreedy expressed his appreciation to Ms. Mascareñas for her chairmanship over the past two years.

There were no other items to present.

**THE MEETING ADJOURNED AT 2:10 P.M.**

# IDAHO BOARD OF ENVIRONMENTAL QUALITY

November 20, 2014

The Idaho Board of Environmental Quality reconvened on November 20, 2014 at 9:00 a.m. in the Department of Environmental Quality Conference Center located at 1410 N. Hilton in Boise, Idaho.

## BOARD MEMBERS PRESENT

John McCreedy, Chairman  
Kevin Boling, Vice-Chairman  
Beth Elroy, Secretary  
Nick Purdy, Member  
Dr. John R. "Randy" MacMillan, Member  
Kermit Kiebert, Member  
Carol Mascareñas, Member

## DEPARTMENT OF ENVIRONMENTAL QUALITY STAFF PRESENT

Curt Fransen, Director  
Harriet A. Hensley, Deputy Attorney General, Legal Counsel for the Board  
Ann Vonde, Deputy Attorney General, Office of the Attorney General  
Paula Wilson, Rules Coordinator  
Rosie Alonzo, Management Assistant, Assistant to the Board  
Lisa Carlson, Deputy Attorney General, DEQ  
Barry Burnell, Water Quality Division Administrator  
Tiffany Floyd, Air Quality Division Administrator  
Orville Green, Waste Management & Remediation Division Administrator  
Andrea Courtney, Deputy Attorney General, DEQ  
Cris Riggs, Legal Assistant  
Kari Kostka, Policy Analyst  
Mike Simon, Stationary Source Program Manager  
Dan Pitman, Air Quality Permitting Engineer Tech 1  
Kevin Shilling, Air Quality Dispersion Modeling Coordinator  
Melissa Gibbs, SIP/Airshed Coordinator, Pocatello Regional Office

## OTHERS PRESENT:

Rachelle Cahoon, Tucker & Associates, Reporter  
Erika Malmen, Perkins, Coie, LLP, representing ConAgra Lamb Weston  
Eric Groten, Vinson & Elkins, representing Magnida  
Dylan Lawrence, Varin Wardwell, representing Magnida  
Stephanie Regenold, Perkins Coie, LLP  
Pat Sullivan, Sullivan & Associates  
Taylor Holcomb, Vinson & Elkins, representing Magnida (*via teleconference*)  
Jim Lehmann, Magnida (*via teleconference*)  
Ric Sorbo, Magnida (*via teleconference*)  
Joe McCarthy, (*via teleconference*)  
Kristen Jensen, City Council, City of American Falls (*via teleconference*)  
Mark Mendiola, Green Market (*via teleconference*)

- ❖ All attachments referenced in these minutes are permanent attachments to the minutes on file at the Idaho Department of Environmental Quality.

## CALL TO ORDER AND ROLL CALL

Chairman John McCreedy called the meeting of the Idaho Board of Environmental Quality (Board) to order at 9:00 a.m. Roll call was taken with all Board members present.

### **AGENDA ITEM NO. 1: CONTESTED CASE HEARING**

*CONAGRA FOODS LAMB WESTON, INC. V. DEQ, DOCKET NO. 0101-14-01  
ORAL ARGUMENT ON RECOMMENDED ORDER GRANTING MOTION FOR SUMMARY  
JUDGMENT*

*(Pursuant to Idaho Code §67-0345(f), the Board may convene an executive session during the contested case hearing).*

Chairman McCreedy explained that this meeting of the Board was called for a hearing in the matter of Air Quality Permit to Construct No. P-2013-0030 issued to Magnolia Nitrogen Idaho, LLC, Docket No. 0101-14-01. He further explained that this hearing is based on the record and the arguments of the parties, and that no public testimony will be taken.

Erika Malmen, Counsel, Perkins Coie, LLP, appeared on behalf of ConAgra Foods.

Lisa Carlson, Deputy Attorney General, appeared on behalf of the Idaho Department of Environmental Quality.

Eric Groten, Counsel, Vinson & Elkins, was present via teleconference on behalf of Magnida.

Dylan Lawrence, Counsel, Varin Wardell, appeared on behalf of Magnida.

Harriet Hensley, Deputy Attorney General, appeared on behalf of the Idaho Board of Environmental Quality.

***NOTE: A verbatim transcript of this hearing as prepared by a court reporter is attached to these minutes as part of the record. Only motions by the Board are listed in these minutes.***

- **MOTION:** Mr. Kevin Boling moved that pursuant to Idaho Code §67-2345(1)(f), the Idaho Board of Environmental Quality move into executive session to communicate with legal counsel to discuss the ramifications of and legal options for this pending litigation.
- **SECOND:** Dr. Randy MacMillan.  
**ROLL CALL VOTE:** Chairman McCreedy, aye; Mr. Boling, aye; Ms. Beth Elroy, aye; Ms. Carol Mascareñas, aye; Mr. Nick Purdy, aye; Dr. MacMillan, aye; and Mr. Kermit Kiebert, aye. Motion carried unanimously.

The meeting room was cleared for the Board to enter executive session with legal counsel. No votes were taken and no deliberation was conducted during the executive session.

Following the executive session, the public meeting resumed. All Board members were present. Roll call was taken of phone participants. All participants returned to the teleconference.

- **MOTION:** Ms. Elroy moved that pursuant to Idaho Code §67-5244(2c), the Idaho Board of Environmental Quality extend oral argument to December 4, 2014 at 1:00 p.m. to allow time for comprehensive review of the record and arguments presented today. At the December 4, 2014 hearing, the Board may have additional questions for the parties and will deliberate towards a decision at that time.
- **SECOND:** Ms. Mascareñas.  
**ROLL CALL VOTE:** Chairman McCreedy, aye; Mr. Boling, aye; Ms. Elroy, aye; Mr. Purdy, aye; Dr. MacMillan, aye; Ms. Mascareñas, aye; and Mr. Kiebert, aye. Motion carried unanimously.

There were no further questions or comments.

**ADJOURNMENT**

- **MOTION:** Dr. MacMillan moved to adjourn the meeting of the Idaho Board of Environmental Quality.
- **SECOND:** Mr. Boiling, Mr. Kiebert, Mr. Purdy and Ms. Mascareñas.

**THE MEETING ADJOURNED AT 1:21 P.M.**

  
\_\_\_\_\_  
John McCreedy, Chairman

  
\_\_\_\_\_  
Beth Elroy, Secretary

  
\_\_\_\_\_  
Rosie Alonzo, Assistant to the Board and Recorder

BEFORE THE BOARD OF ENVIRONMENTAL QUALITY  
STATE OF IDAHO

IN THE MATTER OF AIR QUALITY )  
PERMIT TO CONSTRUCT )  
NO. P-2013,0030 ISSUED TO )  
MAGNOLIA NITROGEN IDAHO, LLC )  
\_\_\_\_\_ )

Docket No. 0101-14-01

CONAGRA FOODS LAMB WESTON, INC., )  
 )  
Petitioner, )

vs. )

IDAHO DEPARTMENT OF )  
ENVIRONMENTAL QUALITY, )  
 )  
Respondent, )

and )

MAGNOLIA NITROGEN IDAHO, LLC, )  
 )  
Respondent-Intervenor. )  
\_\_\_\_\_ )

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Held on November 20, 2014, 9:00 a.m.

Department of Environmental Quality  
1410 North Hilton  
Boise, Idaho 83706

Reported by  
Rachelle C. Cahoon  
SRT No. 1026

11/20/2014 11:11 AM

## 1 A P P E A R A N C E S

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22 egroten@velaw.com

23 Dylan Lawrence  
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## FOR THE BOARD OF ENVIRONMENTAL QUALITY

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## 24 BOARD MEMBERS PRESENT

25 John McCreedy, Chairman  
Kevin Boling, Vice-Chairman  
Beth Elroy, Member  
Kermit Kiebert, Member  
Randy MacMillan, Member  
Carol Mascarenas, Member

1 DEPARTMENT OF ENVIRONMENTAL QUALITY STAFF PRESENT

- 2 Rosie Alonzo
- 3 Barry Burnell
- 4 Andrea Courtney
- 5 Tiffany Floyd
- 6 Curt Fransen
- 7 Melissa Gibbs
- 8 Orvilk Green
- 9 Kari Kostka
- 10 Kevin Schilling
- 11 Michael Simon
- 12 Paula Wilson

13 ALSO PRESENT

- 14 Taylor Holcomb, Magnida (via phone)
- 15 Kristen Jensen, City of American Falls, City
- 16 Council (via phone)
- 17 Jim Lehman, Magnida (via phone)
- 18 Mark Mendiola, Green Markets (via phone)
- 19 Stephanie Regenold, Perkins Coie
- 20 Ric Sorbo, Magnida (via phone)
- 21 Ann Vonde, Idaho Attorney General's Office

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1  
2 BEFORE THE BOARD OF ENVIRONMENTAL QUALITY  
STATE OF IDAHO  
3  
4 IN THE MATTER OF AIR QUALITY )  
PERMIT TO CONSTRUCT )  
5 NO. P-2013,0030 ISSUED TO )  
MAGNOLIA NITROGEN IDAHO, LLC )  
6 \_\_\_\_\_ ) Docket No. 0101-14-01  
) )  
7 CONAGRA FOODS LAMB WESTON, INC., )  
) )  
8 Petitioner, )  
) )  
9 vs. )  
) )  
10 IDAHO DEPARTMENT OF )  
ENVIRONMENTAL QUALITY, )  
11 ) )  
Respondent, )  
12 ) )  
and )  
13 ) )  
MAGNOLIA NITROGEN IDAHO, LLC, )  
14 ) )  
Respondent-Intervenor. )  
15 \_\_\_\_\_ )  
16 ) )  
17  
REPORTER'S TRANSCRIPT OF PROCEEDINGS  
18  
19 Held on November 20, 2014, 9:00 a.m.  
20 Department of Environmental Quality  
1410 North Hilton  
21 Boise, Idaho 83706  
22  
23 Reported by  
Rachelle C. Cahoon  
24 SRT No. 1026  
25

1 APPEARANCES  
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FOR THE BOARD OF ENVIRONMENTAL QUALITY  
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21  
BOARD MEMBERS PRESENT  
22  
John McCreedy, Chairman  
23 Kevin Boling, Vice-Chairman  
Beth Elroy, Member  
24 Kermit Kiebert, Member  
Randy MacMillan, Member  
25 Carol Mascarenas, Member

1 DEPARTMENT OF ENVIRONMENTAL QUALITY STAFF PRESENT  
Rosie Alonzo  
2 Barry Burnell  
Andrea Courtney  
3 Tiffany Floyd  
Curt Fransen  
4 Melissa Gibbs  
Orvil Green  
5 Kari Kostka  
Kevin Schilling  
6 Michael Simon  
Paula Wilson  
7  
ALSO PRESENT  
8 Taylor Holcomb, Magnida (via phone)  
Kristen Jensen, City of American Falls, City  
9 Council (via phone)  
Jim Lehman, Magnida (via phone)  
10 Mark Mendiola, Green Markets (via phone)  
Stephanie Regenold, Perkins Coie  
11 Ric Sorbo, Magnida (via phone)  
Ann Vonde, Idaho Attorney General's Office  
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1 BOISE, IDAHO  
2 NOVEMBER 20, 2014, 9:00 a.m.  
3  
4 MR. MCCREEDY: Good morning. This is the  
5 time and place for the hearing before the Board of  
6 Environmental Quality in the matter of Air Quality  
7 Permit to Construct No. P-2013-0030 issued to Magnolia  
8 Nitrogen Idaho, LLC. It's Docket No. 0101-14-01.  
9 This hearing is based on the record and the  
10 arguments of the parties, and no public testimony will  
11 be taken.  
12 The parties are each allowed 30 minutes for  
13 oral argument. That includes rebuttal.  
14 As you come up, Petitioner, ConAgra Foods  
15 Lamb Weston, please identify yourself and let us know if  
16 you want to reserve rebuttal.  
17 Followed by Lamb Weston's oral argument,  
18 we'll hear from, first, DEQ, and then Magnolia Nitrogen  
19 Idaho.  
20 All board members are present today.  
21 Rosie or Paula, do you want to identify the  
22 folks who are on the phone? Is that necessary?  
23 MS. ALONZO: Okay.  
24 MR. MCCREEDY: Okay.  
25 MS. ALONZO: Do we have Ric Sorbo?

1 MR. SORBO: Yes, you do. This is Ric Sorbo  
 2 on the phone.  
 3 MS. ALONZO: Okay. How about Jim Lehmann?  
 4 MR. SORBO: Jim Lehmann is with me here in  
 5 Houston.  
 6 MS. ALONZO: How about Joe McCarthy?  
 7 MR. SORBO: Yes. Joe McCarthy is with me as  
 8 well.  
 9 MS. ALONZO: Okay. Taylor Holcomb.  
 10 MR. HOLCOMB: On the phone.  
 11 MS. JENSEN: Kristen Jensen.  
 12 MS. ALONZO: Kristen Jensen?  
 13 MS. JENSEN: City of American Falls.  
 14 MS. ALONZO: Okay. Mark Mendiola.  
 15 MR. MENDIOLE: This is.  
 16 MS. ALONZO: Do we have any others?  
 17 MR. MCCREEDY: Okay. Thanks, Rosie.  
 18 The Board may allow additional time for oral  
 19 argument today depending on how many questions board  
 20 members have. The Board is certainly free to question  
 21 the parties at any time.  
 22 The procedure is that the Board will issue a  
 23 final order within 56 days of today, if that's correct.  
 24 Is that not right?  
 25 MS. HENSLEY: Of whenever the oral argument

1 Today we are here regarding the hearing  
 2 officer's decision granting DEQ's Motion for Summary  
 3 Judgment.  
 4 It's important to understand that summary  
 5 judgment is not about whether a party has proven its  
 6 case. There is a time and a place for that, and it's  
 7 called a hearing. Summary judgment simply asks the  
 8 judge, or the hearing officer in this case, to evaluate  
 9 whether there are disputed facts that warrant hearing on  
 10 the merits of the claims or defenses raised in the  
 11 proceeding.  
 12 If you read the Recommended Order issued by  
 13 the hearing officer, it is clear that the hearing  
 14 officer did not apply the Rule 56 Summary Judgment  
 15 Standard or engage in the appropriate summary judgment  
 16 analysis. Instead, the hearing officer essentially  
 17 said, "Yes. There are disputed issues of fact." But  
 18 instead of stopping there, as he should have, granting  
 19 -- or denying DEQ's Motion for Summary Judgment and  
 20 proceeding to listen to experts and witnesses from both  
 21 sides, he resolved those disputed facts as if he had  
 22 listened to testimony and rebuttal and cross-examination  
 23 and arguments of the parties. He went ahead and weighed  
 24 the evidence and facts and credibility of the witnesses  
 25 without the benefit of testimony or evidence.

1 is completed, Mr. Chairman.  
 2 MR. MCCREEDY: All right. Now, that time  
 3 frame can be waived or extended by the parties for good  
 4 cause shown.  
 5 The Board may hold additional hearings or  
 6 may remand the matter for further evidentiary hearings  
 7 if further factual development of the record is  
 8 necessary before issuing a final order.  
 9 Any other procedural matters, Board Members?  
 10 Okay. I think it's ConAgra Foods Lamb  
 11 Weston. Would you come up, please, and identify  
 12 yourself.  
 13 MS. MALMEN: Good morning, Members of the  
 14 Board, Mr. Chairman. My name is Erica Malmen. I am  
 15 legal counsel for ConAgra Foods Lamb Weston. And I  
 16 would like to reserve some time for rebuttal. I don't  
 17 expect that my initial presentation's going to take  
 18 long. Is there any timekeeper that I should be looking  
 19 at, or are we on our own merits on this?  
 20 MR. MCCREEDY: We're on the honor system.  
 21 MS. MALMEN: Okay. All right. Well, that  
 22 should be no problem then.  
 23 All right. Good morning. As I said, my  
 24 name is Erica Malmen. I am legal counsel for ConAgra  
 25 Foods Lamb Weston.

1 This is clear legal error. The hearing  
 2 officer should not be deciding these disputed issues at  
 3 the summary judgment stage. All the summary judgment  
 4 stage is intended to do is simply to make sure that  
 5 there are disputes that warrant a trial or a hearing,  
 6 and the hearing officer clearly went beyond that in this  
 7 opinion.  
 8 At the outset, it is important to clear up  
 9 what appears to be a misunderstanding of the parties.  
 10 The DEQ and Magnida briefs attempt to suggest that we  
 11 agreed that the Idaho Code ' 67.5279, which is the Idaho  
 12 Administrative Procedures Act, governs the summary  
 13 judgment motion. It does not. That standard applies  
 14 after the hearing officer has evaluated testimony and  
 15 evidence. That standard gets applied later.  
 16 The only standard that applies at this  
 17 summary judgment stage is the standard stated in Idaho  
 18 Rules of Civil Procedure Rule 56. Idaho Rules of Civil  
 19 Procedure Rule 56(c) places the burden on DEQ, the  
 20 movant, to show the absence of disputed facts and  
 21 requires the hearing officer to liberally construe all  
 22 converted facts and draw all reasonable inferences in  
 23 favor of ConAgra. The hearing officer, by his own  
 24 admission in the preliminary order, did not apply these  
 25 standards.

1 The burden in the summary judgment stage is  
2 on DEQ to show an absence of disputed fact. The burden  
3 is not on ConAgra at the summary judgment stage to prove  
4 its case. The affidavits that are submitted in the  
5 summary judgment process are only submitted to show that  
6 there is a dispute of fact. Once that is found, it is  
7 appropriate, and indeed required, to move on to the  
8 hearing on the merits.

9 You will read a lot in DEQ and Magnida's  
10 briefs about ConAgra didn't allege that it was  
11 irrational for DEQ and they did not have a significant,  
12 protectable interest. They can make those arguments at  
13 the hearing. At the summary judgment stage, the  
14 question is are there disputed issues of material fact.

15 I think it's clear, based on the affidavits  
16 and other evidence that the hearing officer had in front  
17 of him, that there are legitimate disputes in this case.  
18 That is all that is needed to survive a summary judgment  
19 motion. And it is really important to remember that the  
20 burden is on the party seeking summary judgment to prove  
21 there are no disputes. The hearing officer did not  
22 place that burden on DEQ. The hearing officer thought,  
23 "Well, I think I have enough information to decide the  
24 case at this point." That's wrong.

25 In the preliminary order, the hearing

1 officer suggests that there is something called a  
2 Modified Standard for Summary Judgment. The Recommended  
3 Order indicates that although none of the parties  
4 briefed this, it exists. I do not think it's  
5 coincidence or omission that no party briefed this issue  
6 of Modified Summary Judgment because it simply does not  
7 exist. The cases that the hearing officer cites for the  
8 proposition that there is a modified standard are cases  
9 where the parties agree -- went into the hearing  
10 agreeing that there were no disputes and that the issues  
11 could be decided as a matter of law.

12 That was not the case here. This was not a  
13 cross -- ConAgra did not file a Cross Motion For Summary  
14 Judgment. ConAgra has never alleged that there are no  
15 issues of disputed fact. In fact, quite the opposite.  
16 There are lots of issues of disputed fact in this case  
17 that warrant a hearing.

18 The hearing officer, in his Recommended  
19 Order, and the other parties, in their briefing with  
20 regard to the Recommended Order, jumped the gun. It's  
21 as simple as that. And in doing so, completely ignored  
22 the applicable IRCP 56 Summary Judgment Standard.

23 Counsel for DEQ and Magnida are probably  
24 going to get up here and try to argue that the results  
25 of the Recommended Order are correct; that although

1 there may be disputes of facts -- or are going to lose  
2 the hearing because of X, Y, and Z; and attempt to  
3 otherwise engage in debate about the merits of this  
4 case.

5 I have no intention of arguing the merits of  
6 the case today, and we had no intention of arguing the  
7 merits of the case at the summary judgment hearing. The  
8 purpose of that hearing was to show there are disputes  
9 of fact that warrant a trial, period.

10 If the correct standard was not applied in  
11 the Recommended Order, which it is clear it was not, the  
12 analysis that follows, by definition, is flawed.

13 I would like to just make one final note on  
14 the substantial interest issue. The hearing officer  
15 indicates that ConAgra has failed to show a substantial  
16 interest that is prejudiced in this matter. I find that  
17 to be a ludicrous assertion, and I ask you to use your  
18 common sense when you're thinking about this issue. If  
19 ConAgra, a food-processing facility that uses air and  
20 has air intakes within 500 yards away of a proposed  
21 fertilizer facility, does not have standing or  
22 substantial interest in this case, I ask you to think  
23 about who would.

24 That's all I have to offer at this time, and  
25 I'm happy to proceed with questions. Or, if the Board

1 would like to hear from DEQ or Magnida, I will step  
2 aside.

3 MR. MCCREEDY: Board Members, questions for  
4 ConAgra Lamb Weston?

5 I do have a few questions myself.

6 MS. MALMEN: Okay.

7 MR. MCCREEDY: In reading your brief and in  
8 reading the hearing officer's decision, what I need to  
9 know today is what are these disputed issues of fact  
10 that you would like a trial on, a hearing on? And  
11 please be as specific as you can as to what are the  
12 disputed issues of fact.

13 I mean, I understand your argument on  
14 summary judgment standard. I fully am following your  
15 presentation. But I need additional detail on what are,  
16 specifically, the disputed issues of fact that you want  
17 the hearing officer to hold a hearing on and resolve.

18 MS. MALMEN: Okay. Thank you, Chairman  
19 McCreeedy and Members of the Board.

20 One of the disputes that we would like the  
21 hearing officer to address is whether the particulate  
22 matter limits that were set in the permit for the  
23 reformer heater are reasonable and rational and whether,  
24 in fact, the process for determining BACT, or the Best  
25 Available Control Technologies --

1 I will note that the hearing officer  
2 described this as an unfortunate morass of acronyms, and  
3 I couldn't agree with him more on that point. The Clean  
4 Air Act is full of an unfortunate morass of acronyms  
5 that makes it very difficult, I think, to follow some of  
6 the arguments.

7 But, in essence, in its most simple terms,  
8 the first issue we would like the hearing officer to  
9 address and we believe there are disputed facts  
10 surrounding is the issue of whether the particulate  
11 matter limits for the primary reformer heater were  
12 adequately set and whether DEQ, in fact, followed the  
13 proper procedures in setting those limits, the proper  
14 procedures being defined by the Best Available Control  
15 Technology and all the other considerations that go into  
16 making the determination about whether the Best  
17 Available Control Technology was utilized.

18 MR. MCCREEDY: I understand -- and I know  
19 we'll get back to the other disputed issues of fact --  
20 but I understand that that's an issue. But what are the  
21 disputed facts on that issue? That's what I'm looking  
22 for is for you to inform the Board as to where in the  
23 record, okay, we can find these disputed issues of fact  
24 where DEQ and Magnida or the permit that was issued says  
25 one thing and you've got testimony or documents or

1 the record -- and I'm not going to get the books out,  
2 but I'll look later --

3 MS. MALMEN: Okay.

4 MR. MCCREEDY: -- for support for the  
5 hearing officer's position on page 5 of his Recommended  
6 Order that the parties agree that the standard of review  
7 set forth in 67.5279 Idaho Code applies? This is the  
8 arbitrary, capricious, constitutional, et cetera,  
9 standard. And, according to the hearing officer, the  
10 parties agreed that that was the applicable standard.  
11 Do you know where in the record he drew that conclusion  
12 from?

13 MS. MALMEN: That conversation or dialogue  
14 occurred at the beginning of the hearing, and that can  
15 be found in the transcript of the hearing. But  
16 essentially what happened was the hearing officer was  
17 questioning the parties about ultimately what standard  
18 is going to apply at the hearing. And we agreed that  
19 that is the applicable standard. That's the Idaho  
20 Administrative Procedure Act. That standard applies at  
21 the hearing.

22 Towards the end of the hearing -- and if  
23 you'd like, I could probably find it -- it became clear  
24 to me that we were getting off course at the summary  
25 judgment hearing because we were getting into all these

1 evidence that says another thing and, therefore, you've  
2 created a disputed issue of fact that we need to remand  
3 this matter back for the hearing officer to resolve. I  
4 mean, what you gave me was an issue, not the disputed  
5 issues of fact.

6 MS. MALMEN: Okay. I'm going to do my best,  
7 Chairman McCreedy, to answer your question. Now, it's  
8 really something that I would refer you to our expert  
9 testimony. They can probably articulate that much  
10 better than I can. He's got a scientific background.

11 The facts are whether DEQ is reasonable.  
12 The dispute is whether it was reasonable for DEQ to  
13 dismiss BACT that was used for an Iowa permit. So  
14 that's one issue of fact: whether that was reasonable  
15 or not, whether DEQ properly followed the BACT guidance  
16 when they decided that no, we're not going to utilize  
17 the Iowa limits for this.

18 Another issue has to deal with something  
19 called ammonia slip and whether ammonia slip should have  
20 been accounted for in setting the limits for particulate  
21 matter.

22 Those are the two that I can easily come up  
23 with regard to disputed issues of fact for particulate  
24 matter.

25 MR. MCCREEDY: Can you point me to where in

1 issues when really we were supposed to be focusing on  
2 the standard of Idaho Rules of Civil Procedure 56. So  
3 the -- towards the end of the hearing, I asked the  
4 hearing officer if we could get back on track and start  
5 talking about the standard that actually applies at  
6 summary judgment.

7 I'm happy to provide references to the  
8 record of the transcript to the Board, as well as  
9 opposing counsel, if that would be helpful in  
10 understanding why there was, perhaps, some  
11 misunderstanding.

12 MR. MCCREEDY: Well, look. Even if the  
13 parties did agree that 67.5279 applies, if it's a matter  
14 of law, it doesn't apply. I'm not sure we can bind you  
15 to that agreement.

16 But I'm looking for where the hearing  
17 officer found that supposed agreement or stipulation  
18 between the parties. And I'll ask the same question of  
19 DEQ counsel and Magnida counsel when they come up. I  
20 just wanted to clarify that.

21 MS. MALMEN: Okay. Thank you.

22 MR. MCCREEDY: My final question is this:  
23 You've given a couple of issues of disputed fact. Given  
24 the volume of the record, the amount of work that DEQ  
25 put into the file, the amount of work that you put into

1 the file, and the amount of work that Magnida has put  
 2 into the file, it would seem reasonable to me that if  
 3 you're asking this Board to remand it back to the  
 4 hearing officer, that we identify for the hearing  
 5 officer, much like a Rule 56(f) proceeding, exactly what  
 6 it is that he's supposed to determine.

7 And so, you know, I offer that to you,  
 8 Ms. Malmen, just as a procedural opportunity, not at all  
 9 saying that's the way the Board's going. But, you know,  
 10 we need to, I guess, tighten up these disputed issues of  
 11 fact a little bit so that we know why we're sending this  
 12 back to the hearing officer if that's what you're asking  
 13 us to do.

14 MS. MALMEN: Okay. Thank you, Mr. Chairman.

15 I need to just ask for one clarification to  
 16 make sure I understand. In terms of information that  
 17 would be useful for the hearing officer, are you asking  
 18 that if we were -- if the Board were to remand it for a  
 19 hearing, we needed to identify what the issues for  
 20 hearing are? Or are you suggesting that we need to  
 21 identify what the disputed issues of fact are for a  
 22 reconsideration of the summary judgment order?

23 MR. MCCREEDY: What I'm asking is if the  
 24 Board were to conclude that the standard of review  
 25 applied by the hearing officer was erroneous and you're

1 asking this Board to remand it to the hearing officer,  
 2 what do you want him to decide? Because he thinks he's  
 3 already decided. I mean, he's already gone through and  
 4 told you why he thinks one state standard should apply  
 5 and another state standard shouldn't apply. And he's  
 6 already said, "I don't think DEQ behaved irrationally in  
 7 this matter." I just want to know -- so that this thing  
 8 doesn't drag on for another two years, okay -- why we're  
 9 sending this back and what you want the hearing officer  
 10 to decide. And you've only given me a couple of small  
 11 things on disputed issues of fact given the rather large  
 12 size of the record.

13 MS. MALMEN: Understood, Mr. Chairman,  
 14 Members of the Board. That was one example. I have  
 15 more for you if you are interested in having me do NOx  
 16 emissions or the nitric acid plants, some other things  
 17 that I don't know are useful for your time at this  
 18 point. But, really, more than happy to provide those  
 19 requests directly to the Board or the hearing officer if  
 20 it will make for more efficient resolution of this case.

21 MR. MCCREEDY: Okay. Thank you.

22 Any other questions of the Board for  
 23 Ms. Malmen?

24 Okay. Thank you.

25 MS. MALMEN: Thank you.

1 MR. MCCREEDY: I think DEQ counsel is next.

2 MS. CARLSON: Thank you. My name is Lisa  
 3 Carlson, and I'm a deputy attorney general, and I  
 4 represent the Department of Environmental Quality in  
 5 this case.

6 Some of you may recall back in 2008,  
 7 Southeast Idaho Energy obtained a permit to construct a  
 8 coal-fired fertilizer plant in the exact same location  
 9 that we're talking about today. That Permit to  
 10 Construct was contested by Sierra Club and Idaho  
 11 Conservation League. We sat down and worked with those  
 12 parties, and we came to a settlement of that case, and  
 13 we revised the permit and issued the permit. That  
 14 facility was never built. ConAgra was not involved in  
 15 that contested case.

16 So here we are today with Magnida building,  
 17 in the same location, not a coal-fired plant but a  
 18 natural gas fertilizer plant. Same site. Less  
 19 emissions. ICL is happy with the permit -- I don't know  
 20 if happy is the right word, but very satisfied with the  
 21 permit. And Magnida's [sic] appealing the permit.  
 22 That's where the real mystery is if you want to find a  
 23 mystery in an environmental case. I don't understand  
 24 it, but let me go forward.

25 Throughout this contested case, DEQ has bent

1 over backwards to respond to each of ConAgra's concerns,  
 2 and at times we have struggled trying to understand what  
 3 the concerns were.

4 I want to provide you a little background on  
 5 the process that we go through and what has occurred in  
 6 this case. Then I will get to the legal standards that  
 7 apply. And then I am going to go through the five  
 8 issues and explain to you why there are no disputed  
 9 issues of material fact and why DEQ is entitled to  
 10 summary judgment as a matter of law.

11 When I'm served a petition, the first thing  
 12 I do is sit down and go through the petition and call in  
 13 the permit engineer that wrote the petition; call in  
 14 Mike Simon, the permitting manager; call in the modeling  
 15 person, which was Kevin Schilling in this case; permit  
 16 writer, Dan Pitman. We sit down and we look at the  
 17 petition and we look at the issues and say, okay, did we  
 18 make any mistakes. If there are mistakes made, those  
 19 are freely admitted.

20 We had a couple mistakes in an -- you all  
 21 reviewed yesterday the contested case docket, and there  
 22 were a couple mistakes made in some of the Ada County  
 23 Landfill permits, and we are working on revising those  
 24 right now. If there's mistakes, we'll admit it and  
 25 we'll fix it. I mean, that's the way DEQ operates.

1 In this case, we couldn't find any mistakes.  
 2 The previous permit had been appealed. So there was an  
 3 issue by me: Make sure this issue is bulletproof  
 4 because it's likely to be appealed by Sierra Club. I  
 5 just thought they'd -- I never thought ConAgra would be.  
 6 But we worked really hard. We had Mike  
 7 Simon, Dan Pitman, and Kevin Schilling, who have 60-plus  
 8 years of technical experience in this field, and they  
 9 spent over 2500 hours on this permitting action.  
 10 So after we'd looked at that permit, we  
 11 said, well, we don't see any issues, but let's sit down  
 12 with ConAgra and see if there's some ability to settle  
 13 or come to agreement on, you know, something different,  
 14 or maybe they need to be explained as to why we came to  
 15 the position that we did and why the permit conditions.  
 16 This is what occurred, like I said, in the SIE permit,  
 17 and this is what we're working on for the landfill  
 18 permits.  
 19 ConAgra was not interested. I contacted  
 20 ConAgra numerous times saying, "Hey. Do you want to sit  
 21 down? Do you want to talk about it? Is there any  
 22 chance for settlement?" No. It was weird. Again, it's  
 23 a mystery. If there's an issue with the permit term or  
 24 condition, we would like to sit down and explain why the  
 25 permit term or condition is -- why it is the way it is

1 party. I mean, that was how difficult it was to even  
 2 respond to the petition. It was -- you know, you had to  
 3 kind of figure out what you think they meant and then  
 4 respond.  
 5 But we spent a lot of time on it, and we  
 6 worked on it. We put together three affidavits, all of  
 7 them experts in their field, and we worked hard to  
 8 demonstrate and explain the position. I encourage you  
 9 to read the affidavits filed by the DEQ staff. They're  
 10 excellent. These guys know what their job is, and it's  
 11 really great to represent them.  
 12 Two months later, ConAgra filed its response  
 13 to DEQ's motion and didn't even attempt to defend  
 14 approximately a third of the claims it had in the  
 15 petition. And they added a couple new things  
 16 acknowledged by their newly hired expert.  
 17 I will discuss these claims in a moment.  
 18 But, briefly, they have to do with detected emissions  
 19 from flares that are permitted to operate 7 days, 12  
 20 hours -- 7 days out of the year for 12 hours. That is  
 21 84 hours a year.  
 22 ConAgra didn't move to amend the petition.  
 23 They just made the new arguments in the briefing.  
 24 Again, this is a mystery as to why they would take the  
 25 -- follow this process.

1 or hear their side of the story. We didn't have those  
 2 negotiations.  
 3 So I had no choice. I moved to dismiss with  
 4 an alternative for summary judgment. The petition was  
 5 so vague and speculative, it was difficult to even  
 6 ascertain what it is that was being pled. Essentially,  
 7 the petition claims DEQ should be required to do more.  
 8 I encourage you to read the hearing  
 9 officer's -- Tab -- under Tab 32 on page 8, where the  
 10 hearing officer -- and this was in regard to the Motion  
 11 to Dismiss on Standing.  
 12 The hearing officer notes, "For the most  
 13 part, ConAgra's petition is a parade of allegations that  
 14 DEQ did not require enough of Magnida before it issued  
 15 the permit, rushed to grant the permit without  
 16 sufficient analysis, or deferred to Magnida's analysis  
 17 without a reason to do so. Singularly lacking as to the  
 18 bulk of these actions is a statement of a direct injury  
 19 resulting from DEQ's alleged failings."  
 20 And then the hearing officer did go on to  
 21 allege that the only allegation the petitioner meets the  
 22 test under the Board's precedential orders is the claim  
 23 involving ammonia odors. And that was just for ConAgra  
 24 to hang in the game, to say that they had pled enough to  
 25 keep standing, to allege that they are an aggrieved

1 In the seven days allotted, DEQ responded to  
 2 the new claims. They were not legally required to do  
 3 so, but they did. They conducted additional modeling to  
 4 assure ConAgra that even using the assumptions that  
 5 ConAgra espoused in the new claims that the permit terms  
 6 and conditions complied with the law. This is noted in  
 7 the Reply Brief at Tab 41 and page 14.  
 8 Why ConAgra contends they didn't realize new  
 9 modeling took place until the depositions continues to  
 10 be a mystery to me. And, certainly, DEQ is willing to  
 11 sit down and talk to ConAgra at any time throughout this  
 12 process.  
 13 Now, I think this is another important point  
 14 to note in regard to the process of this case. DEQ did  
 15 not find out that ConAgra had decided to drop some of  
 16 the claims in the petition until Magnida told DEQ that  
 17 in response to some discovery requests, ConAgra stated  
 18 they were dropping some of the claims. ConAgra didn't  
 19 tell DEQ, didn't tell the hearing officer. It told  
 20 Magnida, the intervening party, that, "Oh, we're not  
 21 pursuing those claims anymore." This was after DEQ had  
 22 spent an inordinate amount of time defending the claims  
 23 and writing the affidavits. Again, it's a mystery.  
 24 At the summary judgment hearing then,  
 25 though, for (indiscernible), ConAgra announced it was

1 dropping yet another claim. Yet again, a claim that DEQ  
 2 had spent a considerable amount of time explaining and  
 3 actually conducted an additional modeling exercise to  
 4 show that -- and this had to do with the receptor grid  
 5 spacing -- that the receptor grid spacing that was used  
 6 was the correct spacing to use.

7 The point is your binders are large. DEQ  
 8 spent a considerable amount of time on this contested  
 9 case. Issues ConAgra chose to pursue constitute a much  
 10 smaller set.

11 The lessons are: Hire an expert before you  
 12 make meritless claims. Sit down and talk to DEQ about  
 13 issues to make sure you understand why DEQ decided upon  
 14 the permit terms and conditions. That would save  
 15 everybody a lot of time and money. We are open to  
 16 discuss anything. Always have been.

17 The hearing officer issued a Recommended  
 18 Order granting DEQ and Magnida's Motion for Summary  
 19 Judgment. The briefing schedule was set. Unsatisfied  
 20 with this schedule, ConAgra asked to file a Reply Brief  
 21 claiming they had new information about BACTs that it  
 22 needed to set straight or something. I'm not even  
 23 exactly sure why. But there was nothing new filed in  
 24 this Reply Brief. This is, yet again, another waste of  
 25 time.

1 summary judgment demonstrates that the law is on their  
 2 side. Then they win. So it's a two-step process.

3 The Rule 56 that Ms. Malmen was talking --  
 4 was discussing, that is the "no disputed issues of fact"  
 5 and "the law is on your side." Okay?

6 "The law is on your side." That's when you  
 7 take the second step and you look at the Idaho  
 8 Administrative Procedures Act. Ms. Malmen doesn't want  
 9 you to take that second step because she argues summary  
 10 judgment is inappropriate from the get-go because there  
 11 are disputed issues of fact. I argue there are no  
 12 disputed issues of fact. Time to go to the legal  
 13 standard to apply, and that is under the Idaho  
 14 Administrative Procedures Act. And that, as fully  
 15 briefed, is set out in Idaho Code ' 67.5279.

16 Now, the Chairman asked how was it that the  
 17 parties agreed to what the standard was. And I want to  
 18 go to -- it's under Tab 51, the Recommended Order on  
 19 page 5.

20 First of all, in the petition, ConAgra  
 21 specifically cited this statute and said this is the  
 22 legal standard that applies. I don't think anybody  
 23 disagrees that 67.5279 is the legal standard that  
 24 applies.

25 So when you go down to the first, second,

1 Here we are today. The case has been fully  
 2 briefed, and I encourage you to read the Summary  
 3 Judgment Briefs and the Briefs in Support of the  
 4 Recommended Order.

5 Now I'm ready to get into the legal standard  
 6 and the five issues, and I'd encourage you to ask any  
 7 questions as I'm talking because I want to make sure  
 8 that you all understand the standard and the issues.

9 THE COURT REPORTER: Lisa?

10 MS. CARLSON: Yes.

11 THE COURT REPORTER: Sorry to interrupt.  
 12 I'll need you to speak a little more slowly, please.

13 MS. CARLSON: Okay. Thirty minutes, you  
 14 know.

15 THE COURT REPORTER: Sorry.

16 MS. CARLSON: I'll say this very slowly.  
 17 There are no disputed issues of fact in this case.  
 18 There are only differing opinions.

19 ConAgra attempts to twist its allegations  
 20 into one of factual issues, but that is simply not the  
 21 case. And I will go through each of the issues to  
 22 explain why.

23 Summary judgment is appropriate when there  
 24 are no disputed issues of material fact and when the  
 25 party that's moving for summary judgment or asking for

1 third -- as to the first part of the analysis, there  
 2 are five parts that you look at to determine what  
 3 applies.

4 ConAgra didn't argue that there is a  
 5 violation of the Constitution in its petition.

6 ConAgra didn't argue that there was a  
 7 statutory violation.

8 ConAgra did not argue that the permit  
 9 procedures were unlawful.

10 And then the hearing officer  
 11 states, "Although there is no record to be looked at in  
 12 the sense of previous hearings, there is little question  
 13 that there is substantial evidence demonstrating the  
 14 time and effort that went into the decisions pertinent  
 15 to granting the Permit to Construct and its latter  
 16 extension. There is no credible argument that the  
 17 decisions made by DEQ are not supported by substantial  
 18 evidence. Hence, the parties seem to agree that the  
 19 main question is whether DEQ acted in an arbitrary or  
 20 capricious fashion or otherwise abused its discretion."

21 So let's talk about what does arbitrary and  
 22 capricious mean? Arbitrary and capricious means did DEQ  
 23 create an irrational permit term? Was the permit term  
 24 -- were any of the permit terms at issue irrational?  
 25 If a rational basis exists for the permit

1 term or condition, you must find that that permit  
 2 condition is correct. They must be upheld.  
 3 ConAgra's expert never concluded or stated  
 4 that DEQ acted irrational, let alone attempted to prove  
 5 it. That is because DEQ rationally and substantially  
 6 supported the terms and conditions in the permit.  
 7 Now, the law requires ConAgra to prove even  
 8 more. Under the Administrative Procedures Act, if one  
 9 of the permit terms or conditions is determined  
 10 irrational, ConAgra must also demonstrate that its  
 11 substantial rights have been prejudiced as a result of  
 12 that irrational permit term.  
 13 ConAgra has not pled or established that as  
 14 a result of the permit terms and conditions, substantial  
 15 rights have been prejudiced. ConAgra barely pled enough  
 16 to establish standing, as discussed in the hearing  
 17 officer's decision under Tab 32, page 8.  
 18 And I think I already quoted that to you,  
 19 but I'll just quote it again quickly. "ConAgra's  
 20 petition is a parade of allegations... it said that DEQ  
 21 rushed the permit without sufficient analysis...  
 22 delivered it without reason to do so...Singularly  
 23 lacking as to the fault of these allegations is the  
 24 statement of a direct injury resulting from DEQ's  
 25 alleged failings."

1 have any specific questions that you might want to ask  
 2 as I'm going through it.  
 3 The request is made due to the size and  
 4 complexity of the project. There's no dispute. ConAgra  
 5 agrees the project is massive, and that's what they said  
 6 in the petition.  
 7 The extension request was made in Magnida's  
 8 Comments on the Draft Permit. I refer you to Tab 43.  
 9 And it's an affidavit of Dan Pitman. It's Exhibit No.  
 10 7, Condition 15.5. "We request that DEQ extend the  
 11 deadline for commencing construction for this large and  
 12 complex project to 30 months rather than the default 18  
 13 months." And then it goes on.  
 14 This document was also supplied to ConAgra  
 15 through a public records request, and it is documented  
 16 and noted in the CD behind Tab No. 33.  
 17 And I super apologize for this, and it's not  
 18 really relevant, but I wanted to point it out because  
 19 ConAgra, for some reason, doesn't seem to -- well,  
 20 doesn't think the request was asked. At page 36 of the  
 21 5,703 pages that are included in that CD, No. 220 -- so  
 22 page 36 -- so Tab 33, CD, page 36 of 5,703, No. 220  
 23 references this Extension Request document.  
 24 But it's almost ridiculous. It is -- in the  
 25 Reply Brief that ConAgra submitted, it stated that there

1 How does ConAgra get from "Yes. Our  
 2 substantial interest, a substantial right, has been  
 3 prejudiced," yet they can't -- they don't even allege  
 4 what exactly their injury is as a result of the permit  
 5 terms or terms and conditions?  
 6 The final legal issue that you need to  
 7 have -- keep in your mind as we go through the five  
 8 issues, as noted in the Garnet Energy precedential order  
 9 and in the Idaho Code ' 67.5251(5) of the Idaho  
 10 Administrative Procedures Act: "Determining summary  
 11 judgment motions in agency matters, due deference must  
 12 be accorded to the technical expertise and special skill  
 13 of the agency."  
 14 As I have previously stated, Mike Simon, Dan  
 15 Pitman, and Kevin Schilling have technical expertise and  
 16 special skills that must be accorded deference.  
 17 Okay. So let's talk about the five issues.  
 18 First issue. The extension request. Okay.  
 19 Magnida requested an extension to commence construction  
 20 of its facility. This request is allowed pursuant to 40  
 21 CFR 52.21(r) which is incorporated into the air rules at  
 22 Section 205. And this is all briefed. I -- my very  
 23 last brief -- it's only 17 pages -- In Support of the  
 24 Recommended Order pretty much includes this information.  
 25 But I wanted to orally state to you guys in case you

1 continues to be disagreement about whether Magnida even  
 2 submitted a request for extension in the first place.  
 3 If Magnida didn't want an extension, I don't  
 4 think this would be an issue before you today. I just  
 5 don't even understand that. I don't.  
 6 DEQ determined, based on EPA guidance, to  
 7 grant the extension. There are no facts in dispute.  
 8 DEQ's determination was rational, and DEQ consulted with  
 9 the EPA on this decision. They didn't have to, but they  
 10 did. And it doesn't matter that the consultation wasn't  
 11 documented into some sort of right.  
 12 And, finally, I mean, the argument is almost  
 13 a little bit silly because Magnida could put a shovel in  
 14 the ground today and say "we are commencing  
 15 construction" if this request was denied by DEQ. It's  
 16 strange to argue that you don't want a facility, but  
 17 then, on the other hand, argue you must build the  
 18 facility sooner rather than later.  
 19 There are no issues of fact in this issue,  
 20 and DEQ is entitled to summary judgment on this issue.  
 21 Next issue. The particulate matter limit  
 22 for the primary reformer heater. So what is it? I was  
 23 asked what a primary reformer heater was in the summary  
 24 judgment hearing, and I'm, like, oh. So let me tell you  
 25 what a primary reformer heater is. It is the process

1 heater for the ammonia production. It heats up the  
 2 natural gas which must be hot and under pressure to make  
 3 the ammonia. It's just a heater.  
 4 It's undisputed that the primary reformer  
 5 heater must comply with MACT, Maximum Achievable Control  
 6 Technology, because it's a heater. The quad-D (DDDDD)  
 7 -- 40 CFR, Subpart 63 quad-D (DDDDD) is the boiler and  
 8 primary heater MACT. And under that MACT, the owners  
 9 and operators must ensure good control -- good pollution  
 10 control practices and they must annually tune up the  
 11 heater. Those are the requirements under MACT.  
 12 The 0.007 pounds of particulate matter per  
 13 Million British Thermal Units, MBTU, is equivalent to  
 14 the Best Available Control Limit in the PSD, Prevention  
 15 of Significant Deterioration, permit issued by Indiana.  
 16 0.0075 is the permit limit that DEQ  
 17 established in the permit. Performance testing of the  
 18 primary reformer heater is required. ConAgra suggests  
 19 that DEQ should have used as the permit limit, permit  
 20 limits that were in two Iowa permits.  
 21 There's not a disputed issue of fact here.  
 22 DEQ reviewed those permit limits, and DEQ determined  
 23 that those permit limits would not ensure compliance  
 24 with the emission limit at all times because they were  
 25 based on the 95 percent Confidence Interval. That is

1 DEQ is entitled to summary judgment on this  
 2 issue as it rationally and substantially justified its  
 3 decision to limit the particulate matter from the  
 4 primary reformer heater to 0.0075 MBTU.  
 5 Third issue, nitric acid plant. And on this  
 6 issue, I do encourage you to read the Statement of Basis  
 7 on page 20 through 21, and I think that's under Tab 1.  
 8 The Statement of Basis is the document that explains the  
 9 permit terms and conditions. And the permit writer, Dan  
 10 Pitman, did an excellent job explaining why he arrived  
 11 at the permit limit that he did in the nitric acid  
 12 plant.  
 13 Again, the facts are undisputed.  
 14 Selective Catalytic Reduction, SCR, is the  
 15 perfect control technology for the nitric acid plant.  
 16 Undisputed. Undisputed.  
 17 All recent PSD permits contained the  
 18 emission limit of 0.5 lbs of NOx/ton of nitric acid on a  
 19 30-day average -- determined on a 30-day average and  
 20 including startup, shutdown, and malfunction emissions.  
 21 The 5 parts per million, 30-day average, not  
 22 including startup, shutdown, and malfunction that  
 23 ConAgra asserts should also be included as an emission  
 24 limit was depicted on a web page of marketing materials.  
 25 DEQ asked Magnida if they could meet that

1 not an issue of fact. DEQ knew the facts. DEQ decided  
 2 to go with the permit limit that was in the Indiana  
 3 permit, not in the Iowa permit, because DEQ wanted to  
 4 ensure that the permit limit was achieved at all times.  
 5 The other point to bring up -- and this is  
 6 not a disputed fact -- the Iowa permit limits were set  
 7 from two tests from a single boiler, not a reformer  
 8 heater. ConAgra's expert did not review the Iowa test  
 9 reports but instead stated he had faith in the  
 10 permitting agency.  
 11 DEQ policy provides applicants the option to  
 12 include a compliance buffer to ensure compliance with  
 13 the emission limit. An emission limit must be achieved  
 14 at all times.  
 15 Modeling an emission limit that is not  
 16 achieved at all times ensures underestimation of ambient  
 17 impact on air quality.  
 18 Magnida's particulate matter ambient impacts  
 19 are below a significant contribution. They're a small  
 20 fraction of the allowable increment air quality  
 21 degradation. There are no material issues of fact in  
 22 regard to this particulate matter permit. DEQ reviewed  
 23 the limits that ConAgra suggested should be used and  
 24 determined, no, those were not accurate limits to be  
 25 used.

1 number, if they could get the manufacturer to guarantee  
 2 that number, the manufacturer of the nitric acid plant.  
 3 They said no. And that document is also in your  
 4 materials.  
 5 Weatherly -- and I don't know if I'm  
 6 pronouncing this right -- Weatherly and ThyssenKrupp.  
 7 They manufactured the nitric acid plant -- would only  
 8 provide manufacturing guarantees of the 0.5 lbs/ton on a  
 9 30-day average including startup, shutdown, and  
 10 malfunction.  
 11 A Continuous Emission Rate Monitoring  
 12 System, CERMS, will be installed on the nitric acid  
 13 plant. We'll know what the emissions are on a  
 14 continuous basis. 0.5 is consistent with EPA's recent  
 15 study and conclusion for New Source Performance  
 16 purposes.  
 17 Now, some of you with facilities that have  
 18 facilities subject to New Source Performance Standards  
 19 might be questioning, well, but a New Source Performance  
 20 Standard may not be the same as the Best Available  
 21 Control Technology, which is required for the nitric  
 22 acid plant.  
 23 The reason why this is important to discuss  
 24 today -- and it's explained in the Statement of Basis --  
 25 is New Source Performance Standards are required to be

1 reviewed -- I don't know how often, but EPA's always  
2 late on everything anyway. But they have to be reviewed  
3 at certain times, and that New Source Performance  
4 Standard was just recently reviewed. And the standard  
5 that EPA looks at in making a determination as to what  
6 should be the new standard is whether the -- is what's  
7 the best system of emission reduction.

8 And you heard that term thrown out, maybe, a  
9 little bit yesterday under the 1.11(d) discussion for  
10 the natural gas plants. But the best system of emission  
11 reduction. It sounds a lot less -- like Best Available  
12 Control Technology.

13 EPA said, after looking at everything and  
14 looking at the information that was available, that 0.5  
15 is the number for new boilers and new primary -- no, new  
16 nitric acid plants. Sorry.

17 The permit does contain a short-term limit  
18 of 20.8 lbs/hr of NOx; so it doesn't -- it does contain  
19 more than just the 0.5 including startup, shutdown, and  
20 maintenance. And it was only a recommendation by  
21 ConAgra's expert that DEQ set short- and long-term NOx  
22 emission limits.

23 There is no material issue of fact. DEQ  
24 reviewed the different limits and made a determination  
25 that we are going -- only going to require permit limits

1 ConAgra does not know what effect enclosing  
2 the flare would have on NOx emissions.

3 No other PSD permits require that the flare  
4 be tested.

5 For NOx purpose, BACT for an unenclosed  
6 flare is the work practice standard set out in the NSPS.  
7 That's Section 60.18. And this is also explained in the  
8 Statement of Basis.

9 The flares are -- this is kind of technical,  
10 but, hopefully, I will explain it on a level that I  
11 don't mess it up. The flares operate at -- again  
12 they're only for 7 days out of the year for 12 hours.  
13 They operate at a heat input of 1700 million BTU, which  
14 is really hot. It's a hot -- it's -- so -- so why  
15 that's important to know is this very high content  
16 results in a conservative estimate of NOx emissions.

17 ConAgra, in its opposition to DEQ's Motion  
18 for Summary Judgment, brought up these new issues  
19 regarding the flare. So, you know, as in the petition,  
20 DEQ took a look and said, "Okay. ConAgra's alleging  
21 that there is an additional NOx component that DEQ has  
22 not considered." And they called it a fuel-bound NOx.

23 MR. MCCREEDY: Ms. Carlson, I have you  
24 starting at 9:22, and even though I told us we'd be on  
25 the honor system, we're getting close to the honor

1 that the manufacturer can guarantee. We don't even  
2 technically understand how to test or get to the 5 parts  
3 per million on the 30-day average not including the  
4 startup, shutdown, and malfunction.

5 The Best Available Control Technology does  
6 not require that tiered emission limits are set for a  
7 source.

8 DEQ -- so, again, no material issues of  
9 fact. DEQ's entitled to summary judgment on this issue.  
10 BACT does not require tiered limits. And DEQ rationally  
11 and substantially justified its decision to include the  
12 limits it did and to not include the baseless NOx limit  
13 that no manufacturer would even guarantee.

14 Fourth issue. Flares.

15 ConAgra's expert recommended a more robust  
16 design of the flare and stated it was very possible that  
17 NOx and ammonia emissions were underestimated from the  
18 flares.

19 Let's talk about the undisputed facts.

20 Again, the flare's only permitted to operate  
21 7 days out of the year for 12 hours.

22 No other PSD fertilizer plants have enclosed  
23 ground flares.

24 ConAgra's expert did not review any of the  
25 fertilizer PSU permits handling flares.

1 system --

2 MS. CARLSON: Okay.

3 MR. MCCREEDY: -- and so if you could  
4 package it up here in the next few minutes --

5 MS. CARLSON: Okay.

6 MR. MCCREEDY: -- it'd be greatly  
7 appreciated.

8 MS. CARLSON: Sure. Sure. I am --

9 MR. MCCREEDY: Because I do have a few  
10 questions for you.

11 MS. CARLSON: I knew you would.

12 Well, so to not get into flares any further,  
13 I'll just ask you to read the briefing on the flares and  
14 acknowledge that DEQ did remodel, even using ConAgra's  
15 expert-suggested assumptions, and the flare values still  
16 showed that the NOx -- predicted NOx emissions were  
17 below the SILs, which is another term which means,  
18 basically, that they're below a screening level to  
19 require additional monitoring. And the ammonia  
20 emissions were below -- using ConAgra's Destruction  
21 Efficiency Level -- were below the AACS.

22 Okay. Final issue. Odor. It's undisputed.

23 No other PSD fertilizer plants require an  
24 odor management plan.

25 Permit Conditions 14.6 and 14.7 are the same

1 conditions that are in ConAgra's permit.  
 2 With the exception of rendering plants, DEQ  
 3 does not include specific odor control requirements in  
 4 the PTC process.  
 5 ConAgra pointed to no other fertilizer  
 6 plants that have odor issues.  
 7 Odor rule is a stand-alone rule that is not  
 8 even required to be included in a Permit to Construct.  
 9 It could simply be removed from the PTC today.  
 10 DEQ, again, bent over backwards, compared  
 11 the ammonia increment allowed under the TAPs rules, and  
 12 conducted some analysis and showed that even on a 1-hour  
 13 concentration that the detection level was below -- of  
 14 ammonia -- at the point of maximum concentration was  
 15 below the threshold detection as established under OSHA  
 16 study. And, remember, the flares are only allowed to  
 17 operate 7 days out of the year for 12 hours a day.  
 18 In summary, there are no disputed issues of  
 19 material fact. DEQ is entitled to summary judgment on  
 20 all five issues.  
 21 The permit terms and conditions at issue are  
 22 fully supported with rational and substantial evidence.  
 23 DEQ properly exercised its discretion in granting the  
 24 extension to commence construction.  
 25 Particulate matter limit of the primary

1 don't think he needed to go there. My -- I think he  
 2 acknowledged at the very beginning of the Recommended  
 3 Order that summary judgment is appropriate. When there  
 4 are undisputed facts, then the moving party is entitled  
 5 to summary judgment.  
 6 The inferences -- then he went a step  
 7 further and said if there are any inferences to be  
 8 made -- because ConAgra essentially laid its case out,  
 9 he couldn't even -- based on information of the entire  
 10 case laid out by ConAgra -- couldn't create an inference  
 11 that somehow DEQ acted irrationally or didn't have a  
 12 substantial basis for the decisions that it made.  
 13 So -- and I think they -- the case law is  
 14 clear that -- and there's no question that it hasn't  
 15 been overturned. There's no question that if there are  
 16 undisputed facts -- as there are -- there are no  
 17 disputed facts in this case. There aren't -- that  
 18 you're entitled to summary judgment if you can prove  
 19 that the law is on your side.  
 20 And then, when you look at inferences --  
 21 because they were all laid out for the hearing  
 22 officer -- they never -- ConAgra never inferred, never  
 23 stated that DEQ acted irrationally.  
 24 So I don't think they needed to even -- I  
 25 don't think they needed to get -- he needed to go to

1 heater is supported by substantial and rational  
 2 evidence.  
 3 The NOx limits for the nitric acid limit --  
 4 nitric acid plant are supported by substantial and  
 5 rational evidence. An additional limit is not  
 6 technically supportable or legally required.  
 7 The estimated NOx and ammonia emissions from  
 8 the flares are below the Significant Impact Level and  
 9 AAC, respectively, even using ConAgra's assumptions.  
 10 Odor is a stand-alone rule that is not even  
 11 required to be in a Permit to Construct.  
 12 I respectfully urge you to adopt the  
 13 findings of the hearing officer in this matter and  
 14 conclude that summary judgment is appropriate on all  
 15 issues. Thank you.  
 16 MR. MCCREEDY: Questions for Ms. Carlson  
 17 from the Board Members.  
 18 MR. BOLING: Mr. Chairman.  
 19 MR. MCCREEDY: Yes.  
 20 MR. BOLING: Ms. Carlson, what's your  
 21 opinion of the assertion by ConAgra in regards to the  
 22 Modified Summary Judgment Standard the hearing officer  
 23 cited as a reason why he could proceed to decide this  
 24 case on the summary judgment basis?  
 25 MS. CARLSON: Chairman, Mr. Boling. So I

1 this, you know, alleged modified standard. I think it  
 2 was clear that there were no issues of disputed fact,  
 3 and DEQ is entitled to summary judgment as a matter of  
 4 law.  
 5 MR. BOLING: So -- so --  
 6 MR. MCCREEDY: Mr. Boling.  
 7 MR. BOLING: Is there or is there not a  
 8 legal standard known as a Modified Summary Judgment?  
 9 MS. CARLSON: No. I guess I wouldn't call it  
 10 a Modified Summary Judgment. I really wouldn't. And I  
 11 don't think that's what the court called it in the case  
 12 that he cited. I think instead he said -- the court  
 13 case said, if I have everything available before me and  
 14 there's no inference that shows in any way that the  
 15 party can prevail, then summary judgment is appropriate.  
 16 MR. BOLING: Thank you.  
 17 MS. CARLSON: Good question.  
 18 MR. MCCREEDY: Further questions for  
 19 Ms. Carlson.  
 20 MR. PURDY: Mr. Chairman.  
 21 MR. MCCREEDY: Mr. Purdy.  
 22 MR. PURDY: Ms. Carlson, if you -- if you  
 23 don't have a hearing or have a quasi-trial where they're  
 24 able to present witnesses and evidence, how can you be  
 25 so certain that there are no disputed facts?

1 MS. CARLSON: Mr. Chairman, Mr. Purdy.  
 2 Well, the burden is to show that there are disputed  
 3 facts. And so the petitioners have the burden of  
 4 showing that there are somehow disputed facts. And we  
 5 moved saying there are no disputed facts. So they have  
 6 to come back and say, yes, there are, because we said  
 7 there are no disputed facts. We moved saying there are  
 8 no disputed facts. And I went through each of the  
 9 issues and each of the stances by DEQ and each of the  
 10 stances by ConAgra. And none of the facts are in  
 11 dispute.

12 What's in dispute is to opinions as to which  
 13 expert has the best answer. But it's not -- it's not a  
 14 factual issue. DEQ reviewed those permit limits. DEQ  
 15 made a determination that those permit limits were not  
 16 the correct limits to be placed in the permit. DEQ made  
 17 a determination. And in regard to the extension  
 18 request, I mean, DEQ had the authority to grant that  
 19 extension request and there was a rational basis  
 20 supplied for it and there's no disputed fact there.

21 So you don't have to go to -- and, I mean --  
 22 and, really, on an air quality permit they -- I mean,  
 23 you're almost always going to get those kind of cases in  
 24 a summary judgment motion because there's not  
 25 necessarily a disputed fact. You know, it's more our

1 expert thinks it should be this and our expert thinks it  
 2 should be that. We reviewed what your expert says. The  
 3 facts aren't in dispute. We think this is the more  
 4 correct permit term or condition. And that's what we  
 5 have chosen.

6 So we know as part of the summary judgment  
 7 hearing -- and that's why your binders are so full -- we  
 8 know what their experts are going to say because they  
 9 were required to point that out in their summary  
 10 judgment because we said there are no issue of fact.  
 11 And they have to come back and say, "Well, this is the  
 12 issue of fact." And they didn't.

13 MR. MCCREEDY: Mr. Purdy.

14 MR. PURDY: So you agree there's a dispute,  
 15 though?

16 MS. CARLSON: Absolutely.

17 MR. PURDY: Okay.

18 MS. CARLSON: Absolutely. There are --  
 19 absolutely. There are differing opinions as to what the  
 20 permit terms and conditions should be.

21 MR. PURDY: Thank you.

22 MR. MCCREEDY: Any further questions for  
 23 Ms. Carlson.

24 DR. MACMILLAN: Mr. Chairman.

25 MR. MCCREEDY: Dr. MacMillan.

1 DR. MACMILLAN: Thank you.  
 2 Ms. Carlson, a very simple question. Where  
 3 in the hearing officer's summary judgment decision does  
 4 it refer to a modified -- I'm looking for it right now.  
 5 I can't place my finger on it. I'm assuming I'm looking  
 6 at the correct file, which is 51?

7 MS. CARLSON: So -- yeah. It's under Tab  
 8 51.

9 DR. MACMILLAN: Okay.

10 MR. MCCREEDY: Page 4.

11 MS. CARLSON: Page 3 and page 4. With an  
 12 action -- so he explains at the beginning that the  
 13 standard for summary judgment is universal. There's an  
 14 important corollary to this standard, and that is  
 15 because in this unusual circumstance, all the  
 16 information -- ConAgra had supplied its entire case.

17 Now, you heard Ms. Malmen argue that they  
 18 didn't get a chance to make their case. Well, one of  
 19 the things that is important to know and understand in  
 20 this proceeding is the parties agreed to prepare direct  
 21 testimony as part of their pretrial order; and so the  
 22 direct testimony constitutes what that expert witness is  
 23 going to say at trial. You have that information. The  
 24 only thing you don't have is DEQ and Magnida's  
 25 cross-examination. Okay?

1 And so the hearing officer really kind of  
 2 had everything. I mean, they did. They had everything  
 3 in front of them. They didn't have -- they had  
 4 ConAgra's case. And as you, maybe, you would see, you  
 5 know, like in Law and Order or something, you know,  
 6 people move for dismissal after the case is presented  
 7 because they haven't presented enough. I mean, in a  
 8 sense, that's a little bit like what you have before you  
 9 here.

10 But you don't have to go there. And I don't  
 11 want you to get messed up in that because I don't think  
 12 it's necessary. But it is a fact. Their case was  
 13 before us. You have their entire case in these binders.  
 14 You have what their witness is going to say on the stand  
 15 because they were required and agreed to supply that  
 16 information in the direct testimony.

17 But still the question is, are there  
 18 disputed issues of fact? No. And is DEQ entitled to  
 19 summary judgment as a matter of law? And DEQ proved  
 20 that the law is on their side. DEQ proved that the  
 21 permit terms and conditions are rational. And then --  
 22 but you know substantial interests -- go ahead.

23 DR. MACMILLAN: Mr. Chairman.

24 MR. MCCREEDY: Dr. MacMillan.

25 DR. MACMILLAN: So when the hearing officer

1 states on page 4, the top of the page, because of IDAPA  
2 58, et cetera, specifically contemplates that the  
3 standards applied to IRCP 56 apply to this hearing, "I  
4 can think of no reason why this modified standard should  
5 not be applied," what is he referring to when he says  
6 modified standard? Because he does state, "And I will  
7 do so as it makes eminent sense." I assume that's what  
8 we're talking about with regard to a modified summary  
9 judgment standard?

10 MS. CARLSON: Yes. And I -- and, honestly,  
11 I can't -- I'm not inside his mind; so I can't really  
12 explain what he's trying to say. But I think what he's  
13 getting at is "I had the full case in front of me  
14 already." He didn't say that there are disputed facts.  
15 He didn't say that DEQ's not entitled to summary  
16 judgment, and I made this decision based on -- but he  
17 said -- but he did call it a modified standard. And I  
18 don't know that he needed to go there. And I don't  
19 think you as a Board need to go there either.

20 DR. MACMILLAN: So -- so -- Mr. Chairman.

21 MR. MCCREEDY: Doctor MacMillan.

22 DR. MACMILLAN: So, Lisa, did he actually  
23 apply a modified standard, or was he compliant with  
24 IDAPA 58, et cetera?

25 MS. CARLSON: I think he was -- I think he

1 complied with Rule 56 and the Administrative Procedures  
2 Act. I think he did use those standards and make a  
3 determination that DEQ was entitled to summary judgment.  
4 And I think you can make that decision too based on the  
5 briefing.

6 I didn't even -- as you will review and  
7 you'll look at in my briefing, I didn't even go into  
8 this modified standard because I didn't think we needed  
9 to go there and I didn't think he needed to go there  
10 because I think we -- our decision was based on  
11 undisputed facts and was rationally and substantially  
12 supported.

13 DR. MACMILLAN: So -- so -- Mr. Chairman,  
14 Lisa. You would argue then that he really didn't need  
15 to put into his decision that a modified standard would  
16 make eminent sense?

17 MS. CARLSON: I don't think it was  
18 necessary.

19 DR. MACMILLAN: Thank you.

20 MR. MCCREEDY: Further questions for DEQ  
21 counsel?

22 Ms. Carlson, I have a couple of concerns  
23 with the hearing officer's decision. And I certainly  
24 don't want to give you the impression that I've  
25 concluded this, but I do have a few concerns.

1 My concern, specifically, is that he applied  
2 a judicial standard of review instead of, in fact, being  
3 a fact-finder. And this is an administrative  
4 proceeding; it's not a judicial proceeding. I think he  
5 was required, or I suspect he may have been required,  
6 subject to further research, to dig into the record and  
7 to resolve these highly technical issues.

8 So, for instance, if a company is a permit  
9 applicant, okay, not ConAgra but Magnida --

10 MS. CARLSON: Sure.

11 MR. MCCREEDY: -- and they want to file a  
12 petition challenging DEQ's decision --

13 MS. CARLSON: Sure.

14 MR. MCCREEDY: -- at the administrative  
15 level, aren't they entitled to know not just that DEQ  
16 wasn't behaving irrationally but that, in fact, the  
17 emission standards are correct?

18 MS. CARLSON: Chairman, Members of the  
19 Board, absolutely. Absolutely. And I think that's what  
20 these two binders demonstrate, and that's what is  
21 established in the Statement of Basis and what was  
22 explained in the Summary Judgment Briefs and in the  
23 affidavits that were filed --

24 MR. MCCREEDY: Well, let's go one step  
25 further. I understand you think that he concluded, even

1 with this somewhat mysterious Modified Standard of  
2 Summary Judgment, okay, that DEQ made the correct  
3 decisions. Not simply that they weren't irrational,  
4 but, in fact, they were right. I get that part of your  
5 argument.

6 MS. CARLSON: Okay.

7 MR. MCCREEDY: But how can a trial judge or  
8 an administrative hearing officer make that decision  
9 when he hasn't heard all of the cross-examination and  
10 all of the rebuttal testimony? I mean, he didn't hear  
11 all the evidence because he didn't give Lamb Weston the  
12 opportunity to engage in detailed and probing and  
13 thorough cross-examination of expert witnesses. That's  
14 my concern.

15 I'm not as concerned about the extension of  
16 time. That's a discretionary matter. If DEQ in its  
17 reasonable judgment concluded that, you know, Magnida  
18 couldn't get the facility built, I'm not as concerned  
19 about that. I'm also not as concerned, necessarily,  
20 about the odor issues because I think that's probably  
21 also a little bit discretionary.

22 But when it comes to specific emission  
23 limits and the application of BACT, I'm concerned that  
24 he didn't hear all the testimony. And in that regard,  
25 I'm having a little conflict with his Modified Summary

1 Judgment Standard.

2 MS. CARLSON: Chairman, Members of the  
3 Board, let's talk about the emission limits then. So --

4 MR. MCCREEDY: And let's do so just briefly  
5 --

6 MS. CARLSON: Okay.

7 MR. MCCREEDY: -- if you could because I  
8 know I'm going to hear a little bit of this from the  
9 counsel for Magnida -- or we're going to hear a little  
10 bit about it.

11 MS. CARLSON: So the particulate matter  
12 limit from the primary reformer heater. That issue has  
13 been fully vetted. ConAgra asserts the limit should be  
14 0.0024. DEQ asserts the limit should be 0.0075.

15 MR. MCCREEDY: But did ConAgra have an  
16 opportunity to cross-examine DEQ's experts on that  
17 issue? And that's a fairly simple yes or no question.

18 MS. CARLSON: Well, no.

19 MR. MCCREEDY: It either happened or it  
20 didn't.

21 MS. CARLSON: No. No. No, Chairman, with  
22 all due respect, they did not have the opportunity to  
23 cross-examination. However, in a summary judgment  
24 hearing, they have to -- have to establish that there is  
25 some sort of disputed fact at issue and explain why DEQ

1 that is going to change DEQ's position that they  
2 complied with the law and that 0.0075, which is a limit  
3 that is achievable, which is based on other permit -- on  
4 PSD permit limits, that that is the correct limit.

5 MR. MCCREEDY: Okay. I understand.

6 MS. CARLSON: And --

7 MR. MCCREEDY: I think what you're saying is  
8 cross-examination wouldn't change the fact that the  
9 correct and proper factual conclusions were reached on  
10 emission limits. Is that --

11 MS. CARLSON: Correct.

12 MR. MCCREEDY: Okay.

13 MS. CARLSON: In addition to -- the same  
14 argument that I would have for the nitric acid plant.

15 MR. MCCREEDY: Yeah, again, I'm not as  
16 concerned about the extension of time --

17 MS. CARLSON: Right.

18 MR. MCCREEDY: -- or perhaps even odor. I  
19 would have to study that a little more. But I am  
20 concerned about the actual emission limits that DEQ does  
21 have enforceable standards or at least a process of  
22 achieving enforceable standards. But I do understand  
23 your position.

24 Are there any other questions for  
25 Ms. Carlson? No?

1 is not entitled to summary judgment as a matter of law,  
2 and that they did not do.

3 MR. MCCREEDY: But the concern I have in  
4 that regard is all the hearing officer did was say DEQ's  
5 decision in this regard is not irrational. What I think  
6 he needed to do was say DEQ's decision in this regard  
7 complies with the regulations, is supported by  
8 substantial evidence, and is, in fact, correct. Which  
9 is a different standard than saying, well, it's just not  
10 irrational. And that's -- that's my concern is that he  
11 applied the wrong standard and didn't allow detailed  
12 cross-examination even if it is highly technical. I  
13 mean, we know -- we all know environmental law and  
14 regulation is a highly technical matter, and that's why  
15 we hire hearing officers who can handle it.

16 MS. CARLSON: May I say --

17 MR. MCCREEDY: Please.

18 MS. CARLSON: Thank you. So DEQ in the  
19 summary judgment briefs, they argued -- we argued that  
20 it was the correct limit and that it was substantially  
21 supported. This Board could adopt that decision. I  
22 mean, they could find on its own this is the standard  
23 and DEQ complied with the law. There is nothing -- and  
24 I don't -- whether you have cross-examination or not,  
25 there is nothing in the cross-examination, in my mind,

1 Thank you, very much.

2 MS. CARLSON: Okay. Sorry I went over.

3 MR. MCCREEDY: I am assuming you are counsel  
4 for Magnolia Nitrogen Idaho?

5 MR. GROTEN: I am, Mr. Chairman. Eric  
6 Groten here on behalf of what we'll shorthand as  
7 Magnida. And also with me today is Dylan Lawrence on  
8 behalf of Magnida as well.

9 I'd like to begin with a moment of personal  
10 privilege to say that, indeed, I think this Board has  
11 been extremely well served by this hearing officer.  
12 Mr. Kane gave Lamb Weston absolutely every opportunity  
13 to be heard in this case.

14 There were two Motions to Dismiss filed  
15 based on the, you know, frankly, the mess of the  
16 petition that was filed by ConAgra in this case. The  
17 judge could have but chose not to dismiss the case at  
18 that juncture. Instead, he not only allowed the case,  
19 in a sense, to proceed to summary judgment, which that's  
20 normally how it's been disposed of, in the sense to  
21 almost to proceed to a directed verdict in the sense  
22 that ConAgra Lamb Weston was given the opportunity to  
23 present the entirety of its direct case.

24 And it was unnecessary to reach the stage of  
25 proceedings having heard everything that ConAgra had to

1 say -- Lamb Weston had to say before resting. And  
2 that's, in effect, what it did with a filing of its  
3 direct case. It rested. There was not enough there --  
4 as I will explore in a little bit more detail here in a  
5 minute -- there was not enough there to conclude that  
6 further proceedings were necessary. And -- nonetheless,  
7 though, he did give Lamb Weston the opportunity to  
8 present everything it would have to say.

9 The hearing officer also did a remarkably  
10 good job -- I understand this may have been his first  
11 air quality case. He, nonetheless, mastered extremely  
12 well not just the regulatory acronyms but the technical  
13 issues: Destruction Rule Efficiencies and what ammonia  
14 is and NOx and NOx NAAQS and all other kinds of other  
15 strange things and, with a few minor quibbles, got it  
16 extremely right.

17 One of the things that he -- perhaps the  
18 best service that he did was, at the beginning of our  
19 hearing on the Summary Judgment Motions that led to the  
20 order that's before you today, around this very table  
21 with, Mr. Chairman, Hearing Officer Kane sitting exactly  
22 where you are, he went around the table and had a  
23 fascinating discussion about what is the ultimate  
24 standard of review in these proceedings. And without  
25 exception, as you've heard from both counsel for Lamb

1 to read his binders, issued a very thorough order  
2 applying that standard of review to the summary judgment  
3 evidence that was before him, which, again, consisted in  
4 the entirety of Lamb Weston's direct case. And he  
5 concluded there was no evidence on which Lamb Weston had  
6 proffered any evidence of illegal or irrational action  
7 by DEQ in a way that was injurious to a substantial  
8 interest of Lamb Weston.

9 The Board may have noticed that Magnida was  
10 actually very solicitous of Lamb Weston's interest in  
11 filing a reply in support of its exceptions because --  
12 well, in part, to ensure that they were given every  
13 opportunity to be heard and, in part, because something  
14 was missing. It wasn't clear how it was that Lamb  
15 Weston's exceptions could be supported on the basis of,  
16 well, a specific error in applying the undisputed facts  
17 to the actual issues in the case in coming to an  
18 erroneous conclusion.

19 The exceptions consisted of, and the reply,  
20 ultimately, too, consisted of, instead, allegations that  
21 their witness would have reached a different conclusion  
22 from facts that were either undisputed or irrelevant and  
23 that the mere existence of an opposing expert unwilling  
24 to accept the result sufficed to move them on to a  
25 hearing even though that same expert had already been

1 Weston as well as counsel for DEQ, and, of course, as  
2 expressed in the Recommended Order, there was unanimity  
3 that, indeed, this Board's review of the DEQ decision is  
4 governed by, if not legally, directly, the standards set  
5 forth for you in (indiscernible) 67-5279, at least, by  
6 operation and application and/or precedent including  
7 Young Septic and Sunnyside Park and other precedential  
8 orders.

9 It is clear -- and I definitely want to make  
10 sure, Mr. Chairman, Members of the Board -- that there  
11 is no -- well, I hope there is no confusion on this --  
12 we are not dealing with a, you know, de novo review  
13 where inevitably the burden is on the hearing officer to  
14 develop -- basically to develop the application again  
15 and review the entirety for deficient. Rather, it's to  
16 look for reversible error resulting from an arbitrary  
17 and capricious review of or absence of substantial  
18 evidence that's prejudicial to petitioner's substantial  
19 rights.

20 And I will note, again, that the hearing  
21 officer, so that he was sure we weren't wasting either  
22 his time or yours, made sure that everybody around the  
23 table agreed that that is the correct standard of review  
24 and then applied that standard of review, after having  
25 several hours' worth of arguing here and then retiring

1 heard from in the context of his pre-filed, pre- sworn  
2 direct case testimony. And the exceptions also had, you  
3 know, a number of different, often bowdlerized,  
4 expressions of summary judgment standards never quite  
5 consistent.

6 Our invitation to submit a reply, I think,  
7 was certainly helpful to Magnida to understand what was  
8 going on here. I hope as well, at least in a, perhaps,  
9 perverse way, helped the Board in understanding that I  
10 think Lamb Weston proceeds from a fundamental  
11 misunderstanding about the standard of review and  
12 summary judgment. And I think we can look at an  
13 expression of the issue in its reply as sort of being  
14 the Rosetta Stone, I guess, that helps clear up what  
15 they're misunderstanding.

16 And, Dylan, if you wouldn't mind -- I  
17 present -- I think, just so it's in front of you.  
18 (Posters displayed.)

19 You can also find it in the Lamb Weston  
20 Reply and Supported Exceptions, which is, I believe, the  
21 last document filed in this docket on page 1, where, you  
22 know, again, there's innumerable incantations in the  
23 Exceptions document and the Reply about what the summary  
24 judgment standard is. Here, it was expressed in the  
25 very first line of the first paragraph under Heading I

1 and in Heading 1 itself and in Heading 2. There's an  
2 expression of the standard of summary judgment as being  
3 one where there are material issues of disputed fact  
4 that warrant hearing on the merits.

5 That is, in fact, not what Rule 56 in this  
6 case is construing to say. What's critically missing  
7 here is the understanding that the word material  
8 modifies fact. If the fact does not have anything to do  
9 with what is material in the case, what is relevant,  
10 what is probative of the standard or the issues in the  
11 case, it's not a material fact.

12 And so if you correct it -- I mean, it helps  
13 to understand why it was that Lamb Weston kept thinking  
14 and keeps arguing that, you know, just the simple  
15 existence of factual disputes suffices. There is still  
16 no attempt to connect anything that is actually disputed  
17 -- and I'm not really sure if there is much -- but to  
18 connect a disputed fact to a legal requirement for  
19 permit issuance. And there are innumerable undisputed  
20 facts. And, as Ms. Carlson was saying, you know, those  
21 undisputed facts, you know, provide substantial evidence  
22 in support of the decision, and summary judgment was  
23 appropriate.

24 So the consequence of, again --  
25 If you could do the second slide or second

1 quick run through as to each of those issues.

2 Remember that there is concurrence -- and I  
3 hope as well, Mr. Chairman, to bring you to the same  
4 result -- that the ultimate standard of review in this  
5 case, both for the hearing officer on your behalf and  
6 then, of course, ultimately, the Board on its own  
7 behalf, there needs to be proof provided that DEQ acted  
8 illegally, arbitrarily, or without reason, meaning  
9 without substantial evidence, to the detriment of  
10 petitioner's substantial rights. And, again, that's an  
11 expression of the standard of review here that comes  
12 straight from Lamb Weston's brief.

13 Let's very quickly peruse, then, the five  
14 issues and whether or not there was any disputed  
15 evidence that bore on a material fact starting with the  
16 decision of the Board to allow 30 months instead of 18  
17 months for Magnida to commence construction.

18 There is no dispute, whatsoever, that  
19 Magnida made such a request. There is no dispute that  
20 granting such a request is contemplated by the Board  
21 rules. There is no dispute that the request was made on  
22 the basis of the size and complexity of Magnida's plant.  
23 The disputed plant is indeed large and complex. And no  
24 dispute that that is the basis, as expressed in the  
25 Statement of Basis that DEQ prepared, that that was the

1 document.

2 Again, just to highlight what I think is a  
3 mistake in -- a fundamental mistake in Lamb Weston's  
4 view of the standard of review here, look to the second  
5 page of its reply in support of its exceptions where it  
6 says that the -- that it was error for DEQ and Magnida  
7 to focus on the legal standard that would have applied  
8 at the hearing on the merits, you know, whether Lamb  
9 Weston can prove that DEQ acted illegally, arbitrarily,  
10 without reason, et cetera, instead of the correct  
11 summary judgment standard.

12 No, that is precisely the correct summary  
13 judgment standard. And if you look at one of the cases  
14 that came up in the discussion -- and in the briefing it  
15 sets forth a -- you know, you can find almost any case  
16 to set forth even the most obvious proposition. But the  
17 materiality of a fact is determined through -- by its  
18 relationship to legal theories presented by the parties.

19 And so to survive summary judgment here, it  
20 is Lamb Weston's burden to show that there was a  
21 disputed fact, the resolution of which would lead to a  
22 different conclusion as to the -- a legal theory in the  
23 case. That was -- having misapprehended its burden to  
24 do so, it didn't do that, and that's why its exceptions  
25 are inadequate, which I would now do, at least, a very

1 basis on which it set that permit condition at 30 months  
2 instead of 18 months. There, frankly, are no -- that's  
3 sufficient to uphold the Board's -- or DEQ's decision.

4 There are -- there's a lot of smoke in the  
5 exceptions and the (indiscernible). The board of  
6 exceptions, about conversations with EPA, all very  
7 interesting but about as, you know, relevant to the  
8 adequacy of the Board -- of the DEQ's decision here as,  
9 you know, whether my tie is blue or gray. And so,  
10 again, sound and furious signifying nothing, there are  
11 no material issues -- or no disputed facts material to  
12 any legal question here.

13 On the other related permit conditions. The  
14 Reply in Support of Exceptions has absolutely no reply  
15 at the final point here, which is that, you know, there  
16 doesn't have to be any odor-related conditions of the  
17 permit. The inclusion of them reflects not only DEQ's  
18 willingness to go the extra mile but Magnida's as well  
19 to volunteer for and accept that permit condition as a  
20 means of providing some additional assurance to its  
21 neighbor. So there cannot be any fact there that is --  
22 can undo that permit condition.

23 Next, we have the PM limit on the reformer  
24 heater. There is no question -- again, if the question  
25 is, is there substantial evidence in the record to

1 support the department's decision to set limits where it  
2 did, there is no question that that -- the evidence in  
3 the record is not just substantial but overwhelming.

4 The 0.0075 pounds per BTU limit that was  
5 imposed on the reformer heater at Magnida is exactly the  
6 same one as imposed on innumerable other natural  
7 gas-fired combustion devices throughout EPA's so-called  
8 -- and I hate this acronym -- but the RACT/BACT/LAER,  
9 R-A-C-T-/B-A-C-T-/L-A-E-R clearinghouse. It's the  
10 limit that was identified by Magnida's own highly expert  
11 consultant as reflecting BACT. It's the limit that the  
12 DEQ permit engineer, having looked at other permits for  
13 similar devices, concluded the BACT. So there is no  
14 question that there was substantial evidence in the  
15 record.

16 Were there facts offered that suggested that  
17 was nonetheless arbitrary and capricious? No. What we  
18 had was a permit -- we had the Lamb Weston expert -- or,  
19 at least, proffered expert -- indicate that he'd seen an  
20 Iowa permit issued that had lower limits in it.

21 There is no dispute that DEQ took a look at  
22 that and concluded that the existence of two data points  
23 or two test runs on a dissimilar unit, on a wholly  
24 dissimilar unit, did not have any bearing on the BACT  
25 determinations that he made.

1 BACT number here was the number that the DEQ permit  
2 engineers set for this reformer preheater.

3 The -- moving on then to the -- and by the  
4 way, he wasn't aware that the runs that the Iowa  
5 engineer were relying on were of a, again, a small  
6 auxiliary boiler at a coal-fired power plant not a  
7 natural gas-fired furnace. Nor was he aware that unlike  
8 the Lamb -- unlike the Magnida furnace, which will be  
9 equipped with a downstream control device called  
10 Selective Catalytic Reduction Unit, which would have an  
11 effect on the particulate matter emissions as well.

12 So his opinion was less than useless to the  
13 determination of the BACT here. DEQ was aware of all  
14 that and made its determination on more than substantial  
15 evidence.

16 I'm sorry. Now I'll move on to the NOx  
17 limit. There are no disputed facts here. No one  
18 disputes that Arkansas and Iowa set a second-tier of  
19 limit on NOx emissions from the nitric acid plant that's  
20 part of this complex. No one disputes that the DEQ  
21 considered that second set of limits. It considered the  
22 context not only of the Iowa permit and the Arkansas  
23 permit, but the issues were exactly the same.

24 And all we have and -- and considered it, by  
25 the way, and rejected the decision of those two agencies

1 There is -- he did -- he did a lot more than  
2 the Lamb Weston expert did because the Lamb Weston  
3 expert didn't even take a look at the data. He  
4 literally had a faith-based opinion that the Iowa permit  
5 engineer did a better job than your permit engineer in  
6 looking at the data.

7 And, frankly, it's -- I mean, it's  
8 borderline absurd to suggest that two data points on  
9 discrete performance testing is a reflection of the  
10 ongoing performance of any combustion device.

11 In fact, there are innumerable cases by the  
12 EPA Environmental Appeals Board, which are cited in our  
13 Response to Summary Judgment -- or our Reply in Support  
14 of Summary Judgment in this case, in which the, again,  
15 the EPA Environmental Appeals Board in Prairie State  
16 case and others have concluded it would be arbitrary and  
17 capricious on the basis of a couple of test runs to  
18 conclude that a permit limit is achievable. You have to  
19 look at the volume of the test data, a great many of  
20 which would show runs above the limit that we're setting  
21 here -- or at or around the level that we're setting  
22 here. And that's the whole purpose of setting the BACT  
23 limit.

24 The -- and so, again, there was not just  
25 substantial but overwhelming evidence that the right

1 for probably half a dozen reasons, many of which  
2 Ms. Carlson's already discussed:

3 The fact that they were relying solely on  
4 the vendor claim.

5 The vendor was unable to guarantee that  
6 limit.

7 The volume of data that DEQ gathered in  
8 setting New Source Performance Standards for nitric acid  
9 plant, which it did just -- coincidentally -- a year or  
10 so before our application went in.

11 The fact that the limits that the Arkansas  
12 and Iowa engineers set were -- were vague and difficult  
13 to understand and enforce.

14 All of those factors went into DEQ's  
15 assessment of the utility or information quality of  
16 those two other agencies.

17 So there is no question that he did his job  
18 exactly as he should, which is to come up with the BACT  
19 number based on the review of this clearinghouse, and,  
20 indeed, it is consistent with those numbers; to look at  
21 other data, other permits that may be lower and  
22 different; and, if rejecting those other lower and  
23 different numbers, have a good reason to do so. There's  
24 no question that's exactly what happened here. He did  
25 his job.

1 There was no basis to conclude that DEQ was  
2 arbitrary or capricious or lack of substantial evidence.  
3 There are no disputed facts about what we've just  
4 described.

5 Moving on then to assumptions about flare  
6 emissions. It's not a factual dispute; it's an opinion  
7 dispute. Magnida's expert believes -- a permit engineer  
8 who, by the way, is about one of the most experienced  
9 PSD permit writers in the United States, a gentleman  
10 from 15 to 20 applications under his belt including some  
11 work on ammonia plants and nitric plants. You know, we  
12 had his opinion supported by the determinations made in  
13 a great many other states including my own home state,  
14 Texas, that flares should actually achieve a 99 percent  
15 DRE, Destruction Removal Efficiency.

16 But DEQ conservatively concluded that, well,  
17 we'll cut that in half, basically, and, say, achieve 98  
18 percent. In other words, 2 percent unconverted. And  
19 it's the Lamb Weston expert opinion that, no, maybe the  
20 right number should be 92 percent. That is not a  
21 factual dispute. That's a dispute about opinions.

22 But, nonetheless, even in that dispute about  
23 opinions, as Ms. Carlson expressed, the department went  
24 the extra mile and said, "Okay. Fine. Let's assume  
25 it's only 98 percent -- or 92 percent destruction of

1 ensure that that flame is always there when you need it  
2 to be. So you design it with ample protections to  
3 ensure the pilot's on and the flame's protected so that  
4 when you need to use it, it's available. And that's all  
5 built into that permit. That is the Best Available  
6 Control Technology for a flare.

7 And then the only question, again, is,  
8 having imposed that BACT requirement, are the impacts  
9 from the flare acceptable? And as I just explained, DEQ  
10 did a very thorough job to ensure that even at lower  
11 DRE, the impacts were acceptable.

12 So, again, no, I don't believe there are any  
13 disputed facts here, only disputed opinions, a disputed  
14 opinion ultimately not leading to any different legal  
15 conclusion about the plant's protection of any legal  
16 standards.

17 The hearing officer also understood the law  
18 to require him, and we agree, as did all the parties, to  
19 reverse the DEQ decision only if any of the errors that  
20 the petitioner alleges are prejudicial to the petitioner  
21 -- a substantial right of the petitioner.

22 If we accept that it has a substantial right  
23 in acceptable air quality, then, indeed, it would have  
24 to show that any of the errors it alleges lead to  
25 impacts that are unacceptable, that are unacceptable

1 ammonia. What would that do to our -- to the projected  
2 impacts?" And concluded that even at an absurdly low --  
3 assumed DRE impacts would be acceptable.

4 And remember that the purpose of setting --  
5 these are not limits in the permit actually. These are  
6 assumptions to be made about assessing the impact of the  
7 plant, ensuring that it is protective of public health  
8 and welfare.

9 DEQ, indeed, did that -- without agreeing  
10 with this expert's opinion that the DRE should be that  
11 low -- remodeled it and concluded, nonetheless, that it  
12 could still make the -- that, you know, that Magnida had  
13 still made the demonstration it needed to about  
14 protecting the ammonia standards.

15 The -- and so given -- I mean, there's not  
16 any obligation with regard to ammonia to establish a  
17 limit at all nor with regard to the NOx. But the Best  
18 Available Control Technology for a flare is simply, as  
19 expressed in EPA rules 60.18 of a New Source Performance  
20 Standard, a readily available go (indiscernible) that  
21 expresses that a flare -- which is, you know, not to put  
22 too fine a point on, is nothing more than -- it's a  
23 sophisticated design, but it's a pipe with a flame on  
24 the end of it.

25 And the important thing about it is to

1 against understood measures of acceptable air quality.

2 And it did not do so -- Lamb Weston did not  
3 do so because it did not understand to be obligated to  
4 do so, notwithstanding Idaho Code ' 67-5752794,  
5 notwithstanding its agreement that it had an obligation  
6 to do so, simply because it believed that having  
7 established standing, it was under no further obligation  
8 to establish that any individual issues that it was  
9 alleging would lead to a consequence that would  
10 prejudice a substantial right. And that's -- that's  
11 clearly a mistake.

12 Standing just means you have the chance to  
13 show your substantial rights have been prejudiced. It  
14 doesn't mean that you made that showing. And having,  
15 again, failed to show what it needed to show here or  
16 understanding what it needed to show here, Lamb Weston  
17 didn't, as to any of these issues, present any evidence,  
18 in its entire direct case, that fixing any -- even if  
19 all of these errors were legit -- that fixing them would  
20 do anything to protect the substantial right. That the  
21 difference in PM emissions from a gas-fired heater would  
22 make a difference in the NOx limits by adding  
23 second-tier NOx limits would make -- none of this  
24 neither did they nor could they show.

25 I believe I'm almost out of time, and so

1 I'll conclude by simply noting that although we believe  
 2 the hearing officer did (indiscernible)work here, there  
 3 were still a couple of less then artful expressions in  
 4 its -- in his Recommended Order, and we would encourage  
 5 the Board and its counsel, in developing any final order  
 6 consistent with the Recommended Order, that you would  
 7 consider some of the errata that we identified in our  
 8 Response to the In Support of the Recommended Order.

9 And with that, I will find out what your  
 10 questions are.

11 MR. MCCREEDY: Thank you, Mr. Groten.  
 12 Any questions for counsel for Magnida?  
 13 Dr. MacMillan.

14 DR. MACMILLAN: Thank you, Mr. Chairman,  
 15 and, I'm sorry, I didn't --

16 MR. GROTEN: I'm Eric Groten.

17 DR. MACMILLAN: Groten. Groten. Thank you.  
 18 Could you -- I'm a biologist. So all this  
 19 is fascinating stuff, but it's kind of over my head.

20 And so could you explain to me what the difference is  
 21 between a presentation of a direct case testimony or a  
 22 direct case presentation versus one where there is  
 23 opportunity for cross-examination?

24 MR. GROTEN: Certainly. The direct case --  
 25 in any trial, you have a party with the burden of proof,

1 whether it's a civil trial with a plaintiff who has the  
 2 burden of proving a negligence case, the existence of a  
 3 duty and the breach of it and the proximate cause and  
 4 damages; you know, whether it's a, you know, a tort case  
 5 in which the plaintiff has the burden of proving, you  
 6 know, the elements of its claim; or this case, an  
 7 administrative case, where, unquestionably, the  
 8 petitioner has the burden of identifying error and  
 9 proving its existence on the basis of the standard of  
 10 review that governs it, which, again, the parties, at  
 11 least, all agree was it arbitrary or capricious or lacks  
 12 substantial evidence or illegal or otherwise irrational.

13 And the party that has the burden -- again,  
 14 you can look at a civil case, you can look at this one  
 15 -- gets to go first. And it puts on its case, its  
 16 witnesses. And it has the ability to pick who -- you  
 17 know, whatever it wants to say to meet its burden of  
 18 proof of going forward.

19 If the party does not do that in its direct  
 20 case, it is subject to this -- it is at risk of a  
 21 directed verdict in the sense that, okay, you had your  
 22 chance to prove everything that you needed to. And even  
 23 without the need to talk to anybody else, there's not  
 24 enough here to meet your burden of, you know, going  
 25 forward with the next part of the case.

1 Summary judgment, you know -- and that's  
 2 more or less in practice what happened here because  
 3 that's -- because Lamb Weston rested. It provided the  
 4 entirety of its direct case. It did so, you know, in  
 5 advance of anybody else's direct case. If it thought  
 6 that there were any evidence it needed to meet its  
 7 burden, it was its obligation in that direct case to  
 8 present it. But it did not do so in the opinion of the  
 9 hearing officer and, certainly, in our opinion as well.

10 And so there's no -- you don't get -- if the  
 11 party that has the burden fails to meet it, there's not  
 12 an obligation then for other parties to go up and, you  
 13 know, subject their witnesses to cross-examination.  
 14 There's not a case to proceed. If Lamb Weston believed  
 15 that its burden could only be met by the  
 16 cross-examination of DEQ witnesses, for example, it was  
 17 incumbent on Lamb Weston to, you know, through what's  
 18 called a Rule 56(f) motion or other procedural  
 19 mechanisms to say hey, we need this. It didn't. It  
 20 filed its direct case believing, and necessarily  
 21 believing, that, you know, what its expert witness had  
 22 to say sufficed to meet its burden. It did not.

23 And I -- please, I'm a chemist who managed  
 24 to get a bachelor's degree in chemistry without even a  
 25 single hour in biology. So I sympathize about what, you

1 know, about how limited you feel. But I did also go to  
 2 law school. So if there's any of this -- any of this  
 3 that doesn't seem clear to you, Dr. MacMillan, please,  
 4 let me know.

5 DR. MACMILLAN: Thank you very much.  
 6 MR. MCCREEDY: Further questions for Mr.  
 7 Groten?

8 I just have a couple. Would you take a  
 9 look, please, at page 18 of the Hearing Officer's  
 10 Recommended Order.

11 MS. ELROY: It's Tab 51.

12 Mr. MCCREEDY: It's Tab 51.

13 MR. GROTEN: I have it thank you.

14 MR. MCCREEDY: Tab 51.

15 MR. GROTEN: Yes, Mr. Chairman, I'm there.

16 MR. MCCREEDY: Very last paragraph, the  
 17 hearing officer says -- and I have tremendous respect  
 18 for this hearing officer. He's an outstanding hearing  
 19 officer.

20 But, at the very bottom, he says, "Although  
 21 there was a great deal of discussion at the hearing  
 22 regarding what facts were disputed and undisputed, in  
 23 reality, the dispute turns on scientific computer  
 24 modeling by experts and potential results based upon  
 25 assumptions made."

1 Do you see that?  
 2 MR. GROTEN: I do.  
 3 MR. MCCREEDY: And then he talks a little  
 4 bit about what the experts assert. And then he goes to  
 5 the next page, and it's the paragraph that begins "The  
 6 only way."  
 7 It says, "The only way to determine which  
 8 expert is right would be to attempt to sort out various  
 9 predictions based on computer modeling and decide which  
 10 model is better."  
 11 And then he says, "I can't do that based on  
 12 the Garnet decision."  
 13 Do you see that?  
 14 MR. GROTEN: I do.  
 15 MR. MCCREEDY: That kind of crystalizes, if  
 16 you would, Mr. Groten, my concern that under some  
 17 theories, okay -- and, again, as a Board we have to  
 18 discuss this and study it in a little more detail, which  
 19 we'll do in executive session after you folks present  
 20 your arguments -- but under Ms. Malmen's theory, she  
 21 would say the hearing officer had the obligation to do  
 22 precisely that.  
 23 MR. GROTEN: I would certainly --  
 24 MR. MCCREEDY: He had the obligation to sort  
 25 through the computer models and that his reliance on

1 Garnet was misplaced.  
 2 MR. GROTEN: Well, I haven't actually heard  
 3 Ms. Malmen express it like that, but I understand --  
 4 MR. MCCREEDY: That's an inference from her  
 5 briefs.  
 6 MR. GROTEN: That's fair. And I would also  
 7 agree with your assessment that this is less than  
 8 careful language. But remember, when he was talking  
 9 about this in the context of, I believe, of --  
 10 MR. MCCREEDY: Well, he's talking about the  
 11 flares and he's talking about whether DEQ's permit  
 12 condition regarding the flares was irrational. And I  
 13 understand your position that there was no legal need to  
 14 impose any limits on the flares.  
 15 MR. GROTEN: That's right.  
 16 MR. MCCREEDY: Right?  
 17 MR. GROTEN: We'll start with that.  
 18 MR. MCCREEDY: But DEQ chose to impose  
 19 limits.  
 20 MR. GROTEN: No, it did not. You will not  
 21 look in the permit and find a numerical limit on flare  
 22 emissions. And that is -- that's sort of fundamental  
 23 here and why the --  
 24 MR. MCCREEDY: I thought DEQ imposed limits  
 25 based on the amount of time the flares could operate.

1 MR. GROTEN: Well, that part is true. But  
 2 that has nothing -- that has nothing to do with the  
 3 efficiency assumptions or the modeled impacts.  
 4 The modeled impacts are -- it's -- you know,  
 5 the ambient standard here for NOx is an annual standard.  
 6 And, you know, there's no dispute about the  
 7 enforceability or propriety of the powers of operation  
 8 limits.  
 9 The issue that Lamb Weston seems to  
 10 interject is whether the emissions that are occurring  
 11 during those hours of operation reflect -- are those  
 12 that result from 92 percent control of the inlet feed or  
 13 98 percent control of the inlet feed, and --  
 14 MR. MCCREEDY: So let me ask this just a  
 15 little more directly because I understand your argument  
 16 and I very much appreciate it.  
 17 Was the Hearing Officer obligated to do what  
 18 he said he was prohibited from doing? And that relating  
 19 to this computer modeling, did he have an obligation to  
 20 sort out the various predictions and decide which model  
 21 is better?  
 22 MR. GROTEN: No.  
 23 MR. MCCREEDY: Why not?  
 24 MR. GROTEN: Because there was substantial  
 25 evidence in the record to support the determinations

1 made as to what the emission rates would be at a 98  
 2 percent control. And because of that, the -- because  
 3 that -- that -- and there's no question that the  
 4 modeling that was done at those assumed emission rates  
 5 demonstrated compliance with applicable measures of  
 6 acceptable air quality both for NOx and for ammonia.  
 7 The dispute that the expert for Lamb Weston  
 8 seeks to interject and, again, that number should be --  
 9 the control number should be lower, the emission rate  
 10 higher, the impacts higher. But if the judge was -- if  
 11 the administrator or the hearing officer was satisfied  
 12 -- as he was -- that there was substantial evidence in  
 13 the record to support the initial assumptions about  
 14 control efficiency and emissions the -- just as it was  
 15 for DEQ's to go then chase down, okay, what if the  
 16 numbers were lower? "If the numbers were lower, would  
 17 the impacts still be acceptable" as the means of  
 18 providing public assurance and protection of air quality  
 19 that was done. But as a means of providing a  
 20 Recommended Order that demonstrated that the initial  
 21 assumptions that DEQ made about control efficiency were  
 22 -- survived the standard of review. Again, the need to  
 23 go into the modeling at all, either by DEQ or the  
 24 hearing officer, was an exercise in being overly  
 25 indulgent, if you will, to concerns expressed by the

1 petitioner.

2 MR. MCCREEDY: If the Board were to conclude  
3 that 67.5279 is the judicial standard of review, not the  
4 administrative standard of review, do we have to remand  
5 this case back?

6 MR. GROTEN: No. The -- I don't think  
7 there's really much question -- unless there's a  
8 wholesale departure from your precedential orders, Mr.  
9 Chairman, I don't think there's much question whether as  
10 a matter of law, the 67.157.20 -- I never get that  
11 number right.

12 MR. MCCREEDY: I know which one.

13 MR. GROTEN: Okay. 67 dash something. The  
14 -- even if, as a matter of law, that is the judicial  
15 standard of review, there is really almost no question  
16 in your precedential orders in, you know, the septic and  
17 Sunnyville, Sunnyvale, I think it is --

18 MS. HENSLEY: Sunnyside Farms.

19 MR. GROTEN: Sunnyside Farms. Thank you.  
20 The -- that the Board has accepted that as a useful  
21 model of decision-making. And, certainly, there is no  
22 evidence anywhere whatsoever in any precedential order  
23 that what this Board does or what the Hearing Officer on  
24 behalf of the Board does is a de novo review, which is  
25 effectively what Lamb Weston's asking you to do here.

1 MR. MCCREEDY: I had one more question. I  
2 apologize.

3 MR. GROTEN: Okay.

4 MR. MCCREEDY: Did the contested case rules  
5 for the State of Idaho identify an administrative  
6 standard of review?

7 MR. GROTEN: I don't believe that they do --

8 MR. MCCREEDY: Thank you.

9 MR. GROTEN: -- which is why you've had to  
10 provide, subsidize that, if you will, through a  
11 precedential order.

12 Mr. Lawrence may correct me if I'm wrong.

13 MR. LAWRENCE: No, I agree totally.

14 MR. MCCREEDY: Further questions?

15 Mr. Purdy.

16 MR. PURDY: Mr. Chairman.

17 I assume this is the Hearing Officer's  
18 language that you just read that "there was a great deal  
19 of discussion at the hearing regarding what facts were  
20 disputed and undisputed." And then he turns around and  
21 does a summary judgment because there weren't any  
22 disputed facts.

23 It doesn't seem logical to me first saying  
24 there are disputed facts and then making a decision  
25 based on no disputed facts. I still think we have

1 MR. MCCREEDY: We do not conduct a de novo  
2 review?

3 MR. GROTEN: You do not. At least if you  
4 do, this would be -- you have not articulated that in  
5 your years or decades of precedential orders.

6 MR. MCCREEDY: So even though 67.5279 is the  
7 judicial standard of review adopted by the Idaho  
8 legislature, you believe our own precedential orders  
9 that the Board has issued in the past adopt a similar  
10 deferential standard of review? Is that your argument?

11 MR. GROTEN: I do. Yes. With citations, at  
12 least the two that I've just mentioned.

13 MR. MCCREEDY: Right.

14 MR. GROTEN: And without, I guess, agreement  
15 from any of the parties in this case or the hearing  
16 officer.

17 MR. MCCREEDY: Okay. Thank you.

18 MR. GROTEN: And, again, even if it's a --  
19 it's a useful analogue if not made directly enforceable  
20 on its own terms and probably inappropriate here given  
21 that what you're dealing with is a department that's  
22 made a final decision that the legislature has --  
23 putting its bailiwick to the side and in your ear --  
24 just to make sure the department doesn't abuse its  
25 discretion, and it has not in this case.

1 problems.

2 MR. MCCREEDY: Well, we'll have that  
3 discussion during executive session.

4 But would you like the respond to Mr.  
5 Purdy's comment?

6 MR. GROTEN: I would. The -- he said there  
7 were disputes about what was disputed, just as you heard  
8 Ms. Malmen express this, but that doesn't mean that  
9 there actually were, that he found there the existence  
10 of any disputed facts. And you know in the -- this  
11 morning, I don't think we've really heard the -- as  
12 expressed in the standards of review -- or petition for  
13 summary judgment, the question is are there disputed  
14 issues of material fact? And I don't think the judge  
15 departed from that standard in his decision.

16 MR. MCCREEDY: Mr. Purdy.

17 MR. PURDY: Mr. Chairman, Mr. Groten. Well  
18 that's why I'm uncomfortable that these witnesses  
19 weren't able to be examined and cross-examined and  
20 rebutted in order to dig deeper into this.

21 MR. GROTEN: Mr. Purdy, I would submit that  
22 if that were the case, there would never be a case in  
23 which summary judgment were appropriate. And it's clear  
24 in this Board's decision making that summary judgment is  
25 the vehicle by which a vast majority of cases such as

1 this one get disposed of. There's always going to be  
 2 someone that wants to go to hearing. But I understand  
 3 that instinct. But to get the hearing you have to show  
 4 in your direct case that you have a disputed issue of  
 5 material fact, and it's the judge's decision here that  
 6 that was not presented.  
 7 MR. PURDY: Thank you.  
 8 MR. MCCREEDY: Further questions for Mr.  
 9 Groten?  
 10 Ms. Elroy.  
 11 MS. ELROY: Mr. Chairman, Mr. Groten. I  
 12 know that Ms. Malmen reserved time to respond back to  
 13 the two attorneys, and at what point will she be given  
 14 the opportunity, because I do have questions for her now  
 15 that we've had the opportunity --  
 16 MR. MCCREEDY: In about 30 seconds --  
 17 MS. ELROY: Excellent.  
 18 MR. MCCREEDY: -- is my best estimate.  
 19 MS. ELROY: Thank you.  
 20 MR. MCCREEDY: Is that --  
 21 MS. ELROY: That's my question.  
 22 MR. MCCREEDY: Further questions for Mr.  
 23 Groten?  
 24 DR. MACMILLAN: Not for Mr. Groten. But  
 25 would you entertain a short break for -- before we go to

1 rebuttal or --  
 2 MR. MCCREEDY: I'd be happy to. All right.  
 3 Do you want to be in executive session, or do we just  
 4 need a break?  
 5 DR. MACMILLAN: No, no. I just need a  
 6 break.  
 7 MR. MCCREEDY: That's a form of executive  
 8 session.  
 9 DR. MACMILLAN: No. I don't want the whole  
 10 group following me in.  
 11 MS. ELROY: Neither do I.  
 12 MR. MCCREEDY: We'll take a short break.  
 13 We'll be back at 11:10, please.  
 14 (Recess.)  
 15 MR. MCCREEDY: Okay. We're back on the  
 16 record.  
 17 Ms. Malmen, are you ready to proceed?  
 18 MS. MALMEN: Yes, Mr. Chairman. Thank you.  
 19 MR. MCCREEDY: I think you have about ten  
 20 minutes, give or take.  
 21 MS. MALMEN: Okay.  
 22 MR. MCCREEDY: But we're still a little on  
 23 the honor system depending on how many questions you  
 24 get.  
 25 MS. MALMEN: Great. Thank you.

1 MS. HENSLEY: Excuse me, Mr. Chairman. Is  
 2 the recorder on?  
 3 MR. MCCREEDY: I have no idea.  
 4 MS. HENSLEY: I don't know either. We  
 5 should confirm that it's on.  
 6 MS. MALMEN: Thank you.  
 7 MS. HENSLEY: Rosie will be back in a  
 8 minute. She was going to get something from her office.  
 9 MR. MCCREEDY: Okay. So we'll hold for just  
 10 a few minutes.  
 11 MS. HENSLEY: I just wanted to make sure  
 12 that the recorder was on.  
 13 MR. MCCREEDY: Are we ready to proceed with  
 14 the recorder on? We are? Okay.  
 15 Please proceed.  
 16 MS. MALMEN: Thank you, Mr. Chairmen,  
 17 Members of the Board. I will try to be brief.  
 18 I was very appreciative of some of the  
 19 questions that were asked of DEQ and Magnida counsel. I  
 20 think it showed that the Board is very aware of what the  
 21 issues are that we're here about today.  
 22 I think it's clear there's no Modified  
 23 Summary Judgment Standard. The Recommended Order is an  
 24 error on that basis and must be reversed.  
 25 I think that there's a fundamental

1 misunderstanding in terms of the burdens that apply at  
 2 the summary judgment phase. I heard numerous references  
 3 from DEQ counsel and Magnida counsel that the burden is  
 4 on ConAgra to show that there are disputed facts. Not  
 5 true. Burden is on Magnida and DEQ to show the absence  
 6 of disputed facts.  
 7 Mr. Purdy's questioning with regard to the  
 8 order where it's indicated that we talked about disputed  
 9 facts in the summary judgment hearing was exactly  
 10 accurate. If the hearing officer were to have  
 11 determined after that discussion that the facts that we  
 12 dispute are not material, he had the option of saying so  
 13 in the order, and that's not what he did. He did not  
 14 apply that standard and did not make the required  
 15 findings.  
 16 I'm going to try to be brief and just go  
 17 through a couple of issues that Ms. Carlson raised in  
 18 her argument, some of which, you know, the beginning  
 19 arguments about the former permit for a different  
 20 facility, I just don't think are relevant to this case.  
 21 Different facility, different owner, lots of  
 22 differences.  
 23 Also, in terms -- I'm just going to go  
 24 straight to sort of what the issues are in terms of  
 25 what's in dispute now.

1 In terms of the extension, Magnida and DEQ  
 2 have tried to make the argument that there is no  
 3 dispute. The Hearing Officer wasn't able to find the  
 4 request for extension in the record. The so-called  
 5 request that the parties are referring to, it's  
 6 debatable whether it was even a request. They were  
 7 comments submitted in response to the draft permit. So  
 8 there's definitely disputes about whether there was a  
 9 request at all that satisfied the rule.

10 Secondly, there's dispute about whether the  
 11 request contained any evidence to support the request.  
 12 The Statement of Basis indicates that size and  
 13 complexity was the basis. I don't -- during the  
 14 depositions, we find out that that maybe wasn't the  
 15 basis for extension. We find out in deposition of DEQ  
 16 experts that it was financing. It was understood that  
 17 it was financing. So there's disputes of fact as to the  
 18 basis for the extension as well as whether there was an  
 19 extension -- the basis for it and what basis DEQ  
 20 actually granted the extension on. So there's some  
 21 facts in terms of the extension whether it was actually  
 22 supported by substantial evidence, regardless of, you  
 23 know -- setting aside the fact whether it existed in the  
 24 first place, the hearing officer did not locate one in  
 25 the record.

1 of factors. It would have been -- it's advisable to  
 2 have a hearing on that matter.

3 I have to just vehemently, vehemently object  
 4 to assertions made by opposing counsel that ConAgra had  
 5 an opportunity to present its case. It did not.  
 6 ConAgra submitted an affidavit in support of its Motion  
 7 For Summary Judgment. Motions for summary judgment are  
 8 to show whether or not there are disputed facts. The  
 9 burden's on DEQ to show there's not. DEQ didn't meet  
 10 that burden, nor did the summary -- nor did the hearing  
 11 officer actually apply the summary judgment standard.  
 12 He went on to apply the judicial review process of the  
 13 EPA which, frankly, may or may not be applied later in  
 14 the hearing but was inappropriate to apply at this stage  
 15 in the proceeding.

16 In addition to the fact that the incorrect  
 17 standard was applied by the hearing officer, Magnida's  
 18 counsel's characterization of some minor quibbles with  
 19 the hearing officer's decision I don't think are  
 20 accurate. If you look at Magnida's response to  
 21 ConAgra's brief, there are two pages, essentially, of  
 22 errata and corrections that Magnida is asking the Board  
 23 to make on the order. So that, I think, tells us that  
 24 there are several issues that need to be revisited in  
 25 that order.

1 In terms of the primary reformer heater,  
 2 again, DEQ, Magnida tried to assert there's no disputed  
 3 issue of fact. Our expert submitted an affidavit in the  
 4 summary judgment hearing that their -- the DEQ did not  
 5 comply with BACT in that process. DEQ thinks it's the  
 6 right emission limit; our expert did not and explained  
 7 in the affidavit why he did not think it was the proper  
 8 limit.

9 In terms of the nitric acid plant, there  
 10 were some discussion from counsel about the NOx  
 11 emissions from nitric acid plants. There was some  
 12 discussion about the 5 parts per million limit. There  
 13 was, however, missing from that argument any discussion  
 14 about other permits that had lower limits in them.

15 In the BACT process -- and we may not always  
 16 like this process because it's a difficult process. But  
 17 in the determination of the Best Available Control  
 18 Technology, agencies are required to look at the permit  
 19 that's the most stringent. And then, generally  
 20 speaking, the agencies are bound to adopt that limit  
 21 unless they find good reason not to. That's a very  
 22 factually-driven process and depends on a variety of  
 23 sources. So it is not easy to say that -- you know,  
 24 just assert that something complies with BACT. It's a  
 25 pretty in-depth analysis, and it is based on a variety

1 I think I'm just going to go ahead and  
 2 conclude. I know some of the board members have some  
 3 questions, and I would like to have the opportunity to  
 4 address those. So with that, I would just request that  
 5 the Board not adopt the Recommended Order -- it's  
 6 flawed -- and remand the case back to the hearing  
 7 officer for further proceedings or take up the case on  
 8 its own accord. Thank you.

9 MR. MCCREEDY: Thank you.

10 Questions for Ms. Malmen?

11 MS. ELROY: Mr. Chairman.

12 MR. MCCREEDY: Ms. Elroy.

13 MS. ELROY: Ms. Malmen. So, specifically,  
 14 and I think the Chairman asked this earlier during your  
 15 initial testimony, what are ConAgra's disputed facts in  
 16 this case?

17 MS. MALMEN: Boy, that would be a very long  
 18 conversation that, honestly, I'm not qualified to do  
 19 right now. That's testimony stuff for our experts that  
 20 can talk about that. But I can give you some examples  
 21 and go through some of those if you would like. But I  
 22 would encourage you to read our Reply Brief and our  
 23 Exceptions Brief. That lays out most of them.

24 MS. ELROY: Is that the one--

25 Mr. Chairman.

1 Is that the one in Tab 55?  
 2 MR. MCCREEDY: Tab 58 is the Reply Brief, I  
 3 believe.  
 4 MS. ELROY: 58?  
 5 MR. MCCREEDY: Yes. That's the Exceptions.  
 6 It's the Reply Brief that Paula sent out that was filed  
 7 on November 7th.  
 8 MS. ELROY: Paula, do you know which tab  
 9 that's under?  
 10 MS. WILSON: It doesn't have a tab because  
 11 that was after your notebooks were sent to you.  
 12 MS. ELROY: Okay. Thank you.  
 13 MR. MCCREEDY: Ms. Malmen, I only have one  
 14 question, and that is -- without trying to put words in  
 15 counsel for DEQ's mouth -- but my understanding is that  
 16 DEQ is suggesting that this Modified Standard For  
 17 Summary Judgment, even if one exists and even if it was  
 18 applied, was essentially harmless error because there  
 19 are no genuine disputed issues of material fact and that  
 20 the Board doesn't need to get too hung up on the  
 21 Modified Standard of Summary Judgment because even if  
 22 you were to apply the correct standard or a different  
 23 standard, there are no genuine issues of material fact.  
 24 And so I have some of the same concerns that  
 25 I think Ms. Elroy does and that is the hearing officer

1 posthaste and in a very clear, concise, and prompt  
 2 fashion.  
 3 MS. MALMEN: Thank you, Mr. Chairman. We're  
 4 happy to provide supplemental briefing or entertain any  
 5 questions that the Board may have going forward. I  
 6 think all the parties, frankly, are anxious to have  
 7 these issues resolved, and I don't think any of us are  
 8 wanting a long protracted trial. So to the extent that  
 9 we can narrow and focus the issues, I don't think any  
 10 party in this case is going to object to that.  
 11 MR. MCCREEDY: Okay. And that's assuming we  
 12 find a problem. Again, we may not.  
 13 MS. MALMEN: Understood, Chairman.  
 14 MR. MCCREEDY: Further questions for Ms.  
 15 Malmen?  
 16 Board Members, do you have any questions for  
 17 any of the counsel who've been up before us today?  
 18 Okay.  
 19 So, Ms. Hensley, I think we now can go into  
 20 executive session and excuse everyone?  
 21 MS. HENSLEY: You can. You'll need a  
 22 motion, a second, and a roll call vote, and you'll need  
 23 to read from the statutory language.  
 24 DR. MACMILLAN: Mr. Chairman, do the other  
 25 attorneys need to provide rebuttal, or they already did

1 did quite a good job of sorting through all the facts,  
 2 the record. I think the record demonstrates that he  
 3 gave ConAgra and Lamb Weston ample opportunity to plead,  
 4 supplement, plead some more, supplement some more. And  
 5 here we are down the road quite a ways, and what I need  
 6 to know is on what specific issues do you need a trial  
 7 on where you think cross-examination is going to change  
 8 the result?  
 9 And I think that may be a little bit of what  
 10 some of the board members may be struggling with and  
 11 that is having you -- I don't expect you to do it  
 12 verbally today, okay? We'll have to talk about this in  
 13 executive session. But if we're going to burden the  
 14 parties with additional delay and cost and expense of a  
 15 trial, what are the issues they need to focus on?  
 16 Because I doubt we're going to want to start this case  
 17 anew.  
 18 So I encourage you to think about that a  
 19 little bit and help us articulate exactly what it is.  
 20 Now that's assuming we find a problem with his order.  
 21 We may not. Again, we'll talk about that in executive  
 22 session. But if there is, I'm very reluctant to keep  
 23 this open ended for a long period of time. Certainly,  
 24 the board members are going to have to weigh in on their  
 25 thoughts. But it needs to be finished up kind of

1 that?  
 2 MR. MCCREEDY: No, I think --  
 3 DR. MACMILLAN: Okay.  
 4 MR. MCCREEDY: I think they've had their  
 5 opportunity.  
 6 If there's any board members who have any  
 7 questions, you're certainly entitled to bring them back  
 8 up.  
 9 Okay. So someone other than the chair, I  
 10 guess, must read that motion.  
 11 MR. BOLING: Pursuant to 67-2345(1f), I move  
 12 that we proceed to executive session to communicate with  
 13 legal counsel to discuss the ramifications of and legal  
 14 options for pending litigation.  
 15 DR. MACMILLAN: Second.  
 16 MR. MCCREEDY: It's been moved and seconded  
 17 that we move into executive session, pursuant to Idaho  
 18 Code 67-2345(1f).  
 19 Any discussion?  
 20 All those in favor?  
 21 MS. HENSLEY: We need a roll call.  
 22 MR. MCCREEDY: We need a roll call.  
 23 MS. HENSLEY: Sorry, Mr. Chairman.  
 24 MR. MCCREEDY: That's okay. Thank you.  
 25 MS. ALONZO: Chairman John McCreedy.

1 MR. MCCREEDY: Aye.  
 2 MS. ALONZO: Mr. Kevin Boling.  
 3 MR. BOLING: Aye.  
 4 MS. ALONZO: Ms. Beth Elroy.  
 5 MS. ELROY: Aye.  
 6 MS. ALONZO: Ms. Carol Mascarenas.  
 7 MS. MASCARENAS: Aye.  
 8 MS. ALONZO: Mr. Nick Purdy.  
 9 MR. PURDY: Aye.  
 10 MR. PURDY: Dr. Randy MacMillan.  
 11 DR. MACMILLAN: Aye.  
 12 MS. ALONZO: Mr. Kermit Kiebert.  
 13 MR. KIEBERT: Aye.  
 14 MR. MCCREEDY: Motion carries.  
 15 Thank you for your excellent presentations.  
 16 Very much appreciate it.  
 17 (Executive session.)  
 18 (Hearing resumed.)  
 19 MR. MCCREEDY: Hello. Who's on the phone,  
 20 please?  
 21 MS. MALMEN: Hi. Erika Malmen, counsel for  
 22 ConAgra Lamb Weston.  
 23 MR. MCCREEDY: Okay.  
 24 MR. MENDIOLE: Mark Mendiola. Green Market.  
 25 MR. MCCREEDY: Do we have a representative

1 least a week or two.  
 2 MS. ELROY: Mr. Chairman.  
 3 MR. MCCREEDY: Ms. Elroy.  
 4 MS. ELROY: As the board member representing  
 5 air issues, and as an individual that's had experience  
 6 with PSD permits, BACT analysis, these types of issues,  
 7 I need more time as well to fully understand the details  
 8 associated with this case.  
 9 MR. MCCREEDY: Any further comments from  
 10 board members?  
 11 MR. PURDY: Mr. Chairman, Nick Purdy. I  
 12 agree with the other board members.  
 13 MR. MCCREEDY: Thank you, Mr. Purdy.  
 14 MS. MASCARENAS: Mr. Chairman, I concur as  
 15 well.  
 16 MR. MCCREEDY: All right. Thank you, Ms.  
 17 Mascarenas.  
 18 Chair would entertain a motion if there is  
 19 one.  
 20 MS. ELROY: Chairman.  
 21 MR. MCCREEDY: Ms. Elroy.  
 22 MS. ELROY: Pursuant to 67-5244(2c), I move  
 23 that given the complexity of this case, the Board extend  
 24 oral argument to December 4th, 2014 at 1:00 p.m. to  
 25 allow time for comprehensive review of the record and

1 from Magnida on the phone?  
 2 MR. SORBO: This is Ric Sorbo with Magnida.  
 3 MR. MCCREEDY: Okay.  
 4 MR. HOLCOMB: Yeah, this is Taylor Holcomb  
 5 with V&Es. Eric Groten's one of my colleagues. He  
 6 asked me to pass on that he'd be back in just a few  
 7 minutes.  
 8 MR. MCCREEDY: Okay. Well, I just wanted to  
 9 make sure that someone from Magnida and someone from  
 10 ConAgra Foods Lamb Weston was on the line because we are  
 11 now back out of executive session having received some  
 12 legal advice.  
 13 I can tell you that, at least from this  
 14 board member's perspective, the legal and the factual  
 15 issues are a little complex, and I personally want a  
 16 little more time to examine them before the board  
 17 renders a decision.  
 18 Any other board members wish to comment?  
 19 DR. MACMILLAN: Mr. Chairman, this is Randy,  
 20 and I echo that concern. There's a lot of nuances  
 21 associated with this particular case that I need time --  
 22 additional time to digest and then, in particular, to  
 23 look at the -- as best a biologist can do -- look at  
 24 some of the legal issues there. So I would hope we are  
 25 able to delay rendering any type of decision for at

1 arguments presented today. At the December 4th, 2014  
 2 hearing, the Board may have additional questions for the  
 3 parties and will deliberate towards a decision at that  
 4 time.  
 5 MR. MCCREEDY: Thank you, Ms. Elroy.  
 6 MS. MASCARENAS: I second.  
 7 MR. MCCREEDY: Seconded by Ms. Mascarenas.  
 8 Any further discussion?  
 9 Do we need a roll call vote?  
 10 Roll call vote, please.  
 11 MS. ALONZO: Chairman John McCreedy.  
 12 MR. MCCREEDY: Yes.  
 13 MS. ALONZO: Mr. Kevin Boling.  
 14 MR. BOLING: Yes.  
 15 MS. ALONZO: Ms. Beth Elroy.  
 16 MS. ELROY: Yes.  
 17 MS. ALONZO: Mr. Nick Purdy.  
 18 MR. PURDY: Yes.  
 19 MS. ALONZO: Dr. Randy MacMillan.  
 20 DR. MACMILLAN: Aye.  
 21 MS. ALONZO: Ms. Carol Mascarenas.  
 22 MS. MASCARENAS: Yes.  
 23 MS. ALONZO: Mr. Kermit Kiebert.  
 24 MR. KIEBERT: Aye.  
 25 MR. MCCREEDY: Motion carried.

1 So before we finish or release the parties,  
 2 are there any other questions or comments first from  
 3 board members?  
 4 Mr. Purdy.  
 5 MR. PURDY: Were we going to give them a  
 6 list of some of the -- some of the items we might have  
 7 questions on in two weeks or --  
 8 MR. MCCREEDY: We're going to potentially  
 9 have that list ready in two weeks, yes.  
 10 MR. PURDY: In two weeks.  
 11 MR. MCCREEDY: Yeah.  
 12 MR. PURDY: Okay.  
 13 MR. MCCREEDY: Any further questions?  
 14 Any questions from anyone on the phone?  
 15 Okay.  
 16 Should we entertain a motion to adjourn?  
 17 DR. MACMILLAN: So move.  
 18 MR. BOLING: Second.  
 19 MR. KIEBERT: Second.  
 20 MR. PURDY: Second.  
 21 MS. MASCARENAS: Second.  
 22 MR. MCCREEDY: We've got a motion and four  
 23 seconds. So we stand adjourned. Motion carries. Thank  
 24 you.  
 25 (Adjourned.)

1  
 2  
 3 REPORTER'S CERTIFICATE  
 4  
 5  
 6  
 7 I, Rachelle Cahoon, Court Reporter, do hereby certify:  
 8 That I am the reporter who took the proceedings had in  
 9 the above-entitled hearing in machine shorthand and  
 10 thereafter the same was reduced into typewriting under  
 11 my direct supervision; and  
 12 That the foregoing transcript contains a full, true, and  
 13 accurate record of the proceedings had in the above and  
 14 foregoing cause, which was heard at Boise, Idaho.  
 15 IN WITNESS WHEREOF, I have hereunto set my hand  
 16 December 1, 2014.  
 17  
 18  
 19  
 20  
 21 Rachelle Cahoon, Court Reporter  
 22 SRT No. 2026  
 23  
 24  
 25

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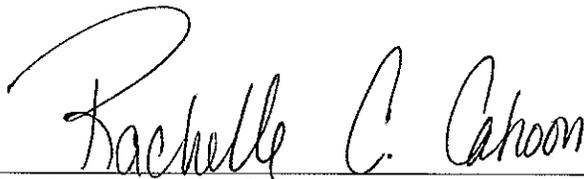
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I, Rachelle C. Cahoon, Court Reporter, a Notary Public, do hereby certify:

That I am the reporter who took the proceedings had in the above-entitled action in machine shorthand and thereafter the same was reduced into typewriting under my direct supervision; and

That the foregoing transcript contains a full, true, and accurate record of the proceedings had in the above and foregoing cause, which was heard at

IN WITNESS WHEREOF, I have hereunto set my hand this 1<sup>st</sup> day of December, 2014.



Rachelle C. Cahoon, Court Reporter  
SRT No. 1026