



State of Idaho
DEPARTMENT OF ENVIRONMENTAL QUALITY
Board of Environmental Quality

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

Dirk Kempthorne, Governor
C. Stephen Allred, Director

IDAHO BOARD OF ENVIRONMENTAL QUALITY

MINUTES

October 16 & 17, 2002

The Board of Environmental Quality convened on October 16, 2002 at 8:30 a.m. at:

Idaho Department of Environmental Quality
1410 N. Hilton, Conference Rooms A & B
Boise, Idaho

ROLL CALL

BOARD MEMBERS PRESENT:

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

BOARD MEMBERS ABSENT:

None

DEPARTMENT OF ENVIRONMENTAL QUALITY STAFF PRESENT:

C. Stephen Allred, Director
Susan Burke, State Water Quality Program
Jess Byrne, Resource Officer
Barry Burnell, Life Sciences Discipline Lead, On-site Wastewater Program Coordinator
Debra Cline, Management Assistant to the Board
Doug Conde, Deputy Attorney General, DEQ
Keith Donahue, Deputy Attorney General, DEQ
Dean Ehlert, Solid Waste Program Coordinator
Paula Gradwohl, Administrative Rules Coordinator
Orville Green, Administrator, State Waste Management & Remediation Program
Rick Jarvis, Underground Storage Tank/Leaking Petroleum Storage Tank Program Coordinator
Jason Jedry, Administrative Services
Bill Jerrel, Loan Program Manager
Kate Kelly, Administrator, Air Quality Program
Tom John, Microbiology Rules Manager
Dave Mabe, Administrator, Water Quality Program
Chris Mebane, Water Quality Program

Diane Riley, Air Quality Analyst, Smoke Management
Jon Sandoval, Chief of Staff
Alan Stanford, Senior Water Quality Analyst
Steve West, Administrator, Boise Regional Office

OTHERS PRESENT:

Gayle Batt, Idaho Water Users Association
Jane Gorsuch, Intermountain Forest Association
Harriet Hensley, Deputy Attorney General, representing the Board of Environmental Quality
Dick Rush, Idaho Association of Commerce & Industry
Suzanne Schaefer, SBS Associates LLC
Travis Thompson, Barker Rosholt & Simpson; representing Idaho Power Co.

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

DELIBERATION IN THE MATTER OF SECTION 401 WATER QUALITY CERTIFICATION FOR RELICENSING OF THE C. J. STRIKE HYDROELECTRIC FACILITY, DOCKET NO. 0102-01-06

Chairman Paul Agidius stated Board members had received the draft decision prepared by Don Chisholm and Harriet Hensley, and asked for comments on the draft. Mr. Chisholm felt Idaho Rivers United and American Rivers had shown representational standing in the case and believed the matter should be returned to the hearing officer for further proceedings consistent with the opinion. He did not feel specific directions were needed. The hearing officer should have the full range of authority to proceed with the matter as she or the parties wish. Mr. Chisholm believed the Board should not deny Idaho Rivers United and American Rivers and the people they represent from raising these issues.

Dr. Joan Cloonan agreed with the direction of the draft and supported granting representational standing. Marti Calabretta was not satisfied standing existed on the issue of aesthetic and recreational uses. She believed there were presently recreational uses, and that it was not an issue of degradation, but restoration to a different perceived quality of aesthetic and recreational uses. Ms. Calabretta said she voted in support of standing at the last meeting because the group had participated appropriately from the beginning of the process.

Nick Purdy reluctantly agreed with the draft decision. He believed the groups did have standing in the case, but did not present it well in the petition. Marguerite McLaughlin also reluctantly agreed to support the draft decision. She was not convinced legal standing existed and felt the issue had been converted from what was first intended.

Dr. Randy MacMillan believed the groups did have standing in the case. He felt a key issue was the paragraph in the draft that stated the goals of the Clean Water Act include restoration and maintenance of fishable and swimmable waters. He asked if the draft order would become part of the record if the case were appealed to the courts, and if it was important that the order clearly and strongly identify the reasons for determining standing. Harriet Hensley responded that the final opinion would be part of the record on appeal, if it were appealed, and she envisioned doing considerable work on the draft before it is final.

Paul Agidius reluctantly supported the draft decision. He believed current Idaho law did not support standing, but federal law does; so it seems probable there will be a finding in state law in the near future that would support standing. He felt the finding of standing should be very narrow and should be based on the federal law. He stated his reluctance to be in the position of changing or interpreting the law, but felt it was the duty of the Board to make such decisions and enforce the Clean Water Act.

Marguerite McLaughlin asked if a Board decision granting standing would set a precedent that would be cited and used to make future decisions. Paul Agidius believed it would set a precedent and noted that the Board would be taking this step ahead of the Idaho Supreme Court. Marti Calabretta clarified that it had to do with aesthetic and recreational damage versus an economic damage.

Don Chisholm believed the people of the state wanted a strong Department of Environmental Quality that fulfilled its responsibilities under the Clean Water Act. If Idaho wants to have primacy of the programs under the CWA, we must establish that we have credibility and are willing to enforce federal law. He felt the Board should not ignore federal case law on the issue of standing under the CWA, just because the Idaho Supreme Court has not had a chance to act on it. To have credibility, the Board must not be afraid to stand up and address these issues. This case is somewhat unique because it deals with an existing facility with existing environmental problems. There will be cases in the future opposing applications for permits where the environmental damage has not yet occurred. This case deals with remediation or restoration, where certain parties do not believe DEQ's actions are adequately addressing the problem. The question is, who has the right to come forward and ask the Board to correct the problem when they feel the Department has not adequately addressed the issue in the 401 certification. Under this situation, he felt the Board should be open to addressing the issue and not require the public to go all the way to the Idaho Supreme Court or the federal courts to find a solution.

Harriet Hensley, Deputy Attorney General, advised that at this point the Board should take a vote on the matter and reach agreement on the general concepts that should be in the final opinion. She will then draft the final opinion for the Board using the draft opinion and other materials. Chairman Agidius stated he also wanted to have another vote on the final order to ensure that all members are comfortable with the language.

Marti Calabretta discussed her concern relating to the state goal of restoration of the beneficial uses as stated in the petition. She feared it was not realistic to expect restoration to a pristine condition. Dr. Joan Cloonan commented that this issue seemed beyond the scope of what the Board was supposed to consider in this matter. She believed the legal question before the Board was, who has the right to come forward and bring their concerns to the Board or challenge an action. Marti Calabretta questioned when the legal process would address the economic issues for those who would have a loss if the requested action were taken.

Randy MacMillan said the Clean Water Act has provisions (131.10(g)) that could recognize hydro-modification as a legitimate cause for not meeting water quality standards thus preventing removal of a dam for the purposes of meeting the Act. The pleadings do not suggest the dam should be removed, so that does not appear to be an issue.

Chairman Paul Agidius confirmed that the Board's responsibility at this point was to determine what parties could seek this forum, and not to discuss or determine the underlying issues of the case. The final order should address the standing issue, and not discuss the merits of the case. He asked the Board to focus on the standing issue and asked them to use caution in wording the decision because it will set a precedent for future cases.

Don Chisholm noted that one of the factors in determining standing is, "can the party requesting standing obtain redress if they are allowed to proceed?" He felt it was appropriate to discuss what relief they were seeking to determine if the Board or a court could redress the grievance. The Board can impose modifications on the 401 Certification or order DEQ to withdraw the 401 Certification if it deems that is the appropriate relief. There is a broad range of modifications that could be made to the certification. Mr. Chisholm did not believe anyone thought a practical solution was removing the dam, or that there was any way that would be the outcome of this case.

He felt it was unfair to limit standing only to those who suffer an economic loss, and that it would not be a valid process if you denied a voice to those with concerns about significant aesthetic and recreational issues. He thought the order should be expanded to show that there is information in the record to support aesthetic and recreational standing.

Paul Agidius believed the petitioners were asking for a free flowing river and water quality changes. The TMDL process affects water quality, so there are things they are asking for that can be addressed. Since there is not a requirement to provide redress for all issues, he did not feel it was necessary to discuss the free flowing issue. The Board need only find that there are some issues that can be addressed through the TMDL process.

Marti Calabretta questioned why the Board was taking the step to broaden standing to aesthetic and recreational interests, based on federal standing doctrine, instead of waiting for the Idaho Legislature to act. Harriet Hensley stated the Idaho Supreme Court has not ruled on this issue, and has not made a definitive ruling that economic injury is required to establish standing. However, in the Fernan Lake case, the court indicated that something other than a pecuniary interest would be adequate for appeal. This is somewhat of a gray area. Dr. Joan Cloonan pointed out that the Idaho Supreme Court has not made a finding that aesthetic and recreational interests are not adequate to establish standing either.

Ms. Calabretta asked if there was anything in Idaho legislation that defined standing. Ms. Hensley explained that the Environmental Protection and Health Act (EPHA) provides "a right to appeal by any person aggrieved." A person aggrieved is further defined in the rules as "any person that has a legal standing."

Harriet Hensley clarified that while the Board would be setting a precedent with this order, it would be bound by the facts of the case. It is not really accurate to say that it will set a precedent for all 401 Certification cases. Don Chisholm pointed out that a case may come before the Idaho Supreme Court from a different agency that provides additional guidance on the issue of standing. The law of standing will constantly be in a state of development. Ms. Calabretta observed that presently by federal law the 401 Certification is a state process that is influenced by federal agencies, laws and regulations; so others feel it is appropriate for the Board to take this step.

Paul Agidius discussed his legal analysis of the standing issue. Because Idaho courts have not made a ruling, we must look to other guidance such as the Clean Water Act. He felt certain there would eventually be a finding of standing for aesthetic and recreational interests in the state courts. While he would be more comfortable letting the courts or the legislature establish the finding, he felt it was the duty of the Board to take that action in this case.

Marti Calabretta clarified her position that the petitioners participated appropriately from the first stages of the decisions made in issuing the 401 Certification. She believed this established the groups as having an interest in the issue, but was unclear about their grievance. They have a grievance with the present degraded condition, and appear to have a perception of a return to a pristine condition. She acknowledged that there could be partial redress.

Paul Agidius noted that he did not see anything in the petition that alleged that granting this 401 Certification would make the water quality worse. His perception was that the certification would maintain the status quo, while improving the water quality, but the petitioners felt the improvement was not enough.

Dr. Joan Cloonan felt many of the issues discussed in the confidential memo from Harriet Hensley should be put in the order. The current draft order is a good overview of the ideas discussed previously by the Board, but does not clearly cite the case law and reasons for granting standing. She felt a combination of the two documents with a little tightening of the concepts and expansion of the legal areas would produce a good result.

Board members discussed the process they would use to produce and approve the final order. Don Chisholm pointed out that an order denying a motion for summary judgment is generally not appealable; an order granting summary judgment is appealable. Marguerite McLaughlin stated she wanted the finding to be as narrow as possible. She emphasized her concern with the action of the Board in setting this precedent.

Doug Conde noted that Section 710 of the rules of procedure before the Board have a specific section that deals with the issue of whether the order would be appealable in district court if it doesn't dispose of all the issues raised in the contested case. It is in the Board's discretion to decide that this is a final appealable order, if it so chooses.

The Board directed Harriet Hensley to prepare another draft based on portions of the previous draft, her memorandum on the case, and their discussions. The basis of the finding should stress the petitioners' involvement in the FERC and 401 processes from the beginning. The purpose and goals of the CWA and the EPHA should also be included. The order should grant representational standing only, not organizational standing. The draft order will be distributed to Board members for review later today, and added to tomorrow's agenda for consideration.

WORKSESSION

RULES FOR THE CONTROL OF AIR POLLUTION IN IDAHO, DOCKET NO. 58-0101-0201 (PENDING RULE)

Kate Kelly, Administrator, Idaho Air Quality Program, explained the purpose of this rulemaking is to revise the open burning rule. The open burning rule is intended to set general

parameters under which open burning can and cannot occur in Idaho with a goal toward protecting human health and the environment from air pollutants in smoke. Ms. Kelly distributed a fact sheet that outlined the proposed revisions to the rule (Attachment 1) and briefly discussed each change. Most critically, the proposed changes will remedy inconsistencies with other local, state and federal rules, regulations and laws, and remove awkward or ambiguous phrasing. Also, burn periods for prescribed fires, additional prohibitions and reasonable precautions are proposed. The proposed rule adds reference to the Smoke Management and Crop Residue Disposal Act.

Diane Riley, Smoke Management Air Quality Analyst, discussed the reference to smoke management programs. Kate Kelly clarified they were not being incorporated or adopted by reference into the rule to make them an enforceable part of the rule; they are simply cross-referencing them. It does not carry the same weight. Language was also added to the rules to require that anyone who is not part of a smoke management program must abide by the DEQ prescribed burning restrictions on the toll-free hotline.

Marti Calabretta asked Ms. Kelly to characterize the difference between the Crop Residue Disposal Act and the Forest Practices Act. Kate Kelly explained the Department of Agriculture administers the Crop Residue Disposal program. It is a management program to manage that particular agricultural practice. The Department of Lands' Forest Practices Act is aimed more at safety practices. Neither act is an air quality protection statute; that authority expressly continues to rest with DEQ. Ms. Calabretta requested copies of the Crop Residue Disposal Act and the Forest Practices Act be provided for Board members to review prior to tomorrow's meeting.

Rules for Governing Fees for Environmental Operating Permits, Licenses and Inspection Services, Docket Nos. 58-0114-0201 and 16-0505-0201 (Pending Rule)

Barry Burnell, DEQ Technical Services Division, discussed these two dockets that are proposed to transfer sections regarding environmental fees from the Department of Health and Welfare to a new DEQ rule chapter. No comments were received from the public on this rulemaking. The rules will also allow local government and the health districts to adopt their own fees to cover their costs for providing environmental services. This will provide an environmental fee structure that is flexible, across the state, to reflect the costs of providing environmental services rather than using a flat fee.

Don Chisholm suggested a change to Section 110 to clarify the language in the second line to say, "the greater of \$10 per household or 250 gallons of flow." The change will be presented in tomorrow's meeting.

Solid Waste Management Rules and Standards, Docket Nos. 58-0106-0201 and 58-0106-0202 (Pending Rule/Amendments to Temporary Rule)

Dean Ehlert, DEQ Solid Waste Program Coordinator, explained the purpose of the rule is to address the proper management of non-municipal solid waste in Idaho and provide flexibility for the facilities that manage solid waste. These rules went through an extensive negotiated process. They were adopted as a temporary rule at the April 2002 Board meeting, and went out for public comment from June 5 – July 31, 2002. Some changes were made as a result of the comments received. Mr. Ehlert reviewed each of the changes.

Rules for Owners and Operators of Underground Storage Tanks and Leaking Petroleum Storage Tanks, Docket No. 58-0107-0201

Rick Jarvis, Underground Storage Tank Program Coordinator, reviewed the proposed rules for the regulation of underground storage tanks systems (USTs) and leaking petroleum storage tanks (PSTs). These rules will implement DEQ authority to regulate USTs and PSTs; and cover design, construction, installation, operation, release detection, closure and financial assurance requirements. The rule essentially uses the federal USTs rules with some minor changes. The changes were made with input from the Petroleum Storage Tank Advisory Committee. Negotiated rulemaking was conducted. No public comment was received on the rules. DEQ previously regulated USTs and PSTs through Sections 851 and 852 of the Water Quality Standards and Wastewater Treatment Requirements; those sections have been incorporated into these rules without modification.

Dr. Randy MacMillan asked if the rules were more stringent than the federal rules. Mr. Jarvis responded that the rules could be interpreted as being more stringent because of some changes. For example, the federal rules had a provision that allowed the use of groundwater monitoring or vapor monitoring for leak detection. DEQ eliminated the provision from this rule because no one was using it and there is no solid standard to evaluate whether a leak is occurring. Those changes were properly identified and approved.

Dr. Joan Cloonan discussed the 30-day inspection requirement. She suggested the wording be changed to “at least once every month” to provide a more flexible timeframe. The change will be made to the final rule.

Water Quality Standards and Wastewater Treatment Requirements, Docket No. 58-0102-0203 (Temporary/Pending Rule)

Chris Mebane, Water Quality Standards Manager, briefed the Board on this rulemaking to adopt site-specific water quality criteria for portions of the Boise River for copper and lead for the City of Boise NPDES discharge. The only public comment received on the rule was from the U.S. Environmental Protection Agency in support of the rule. DEQ had some question whether the rule was necessary because they have the existing authority to apply these water-effect ratios for the City of Boise through the state certification of the federal discharge permit. It is presented as a rulemaking for documentation and to provide a public record. Also, discharge permits expire after five years, and this rule will be in the record and could be used again.

Water Quality Standards and Wastewater Treatment Requirements, Docket No. 58-0102-0204 (Pending Rule)

Chris Mebane explained this rule has two major components. The first is to make annual updates in designated beneficial uses for a number of different waters around the state. The standards are reviewed and public comment is taken. The second part is to publish applicable water quality standards for toxic chemicals directly in the state's rules. Presently, these standards are adopted by reference from the 1993 edition of the federal regulations' National Toxics Rule. This edition is difficult to find because it is out of print, and it is different from the current edition. There are no substantive changes in the actual values or how they would be implemented.

Two substantive comments were received on the rule; one was from EPA, the other was from the Nez Perce tribe. EPA supported the rule, and suggested two changes (regarding the equations for metals and cadmium). The changes were not made because they were beyond the scope of what was originally presented in the rule. The Nez Perce Tribe commented on the beneficial use designation for Butcher Creek. The tribe wanted Butcher Creek designated for salmonid spawning. They conducted a survey and submitted data to support the designation; therefore, DEQ supports the designation. Paul Agidius commented that when a designation is made on a section of a water body that may not be appropriate, it seems to be a major problem to down grade the designation. Mr. Mebane agreed that it is a difficult process to downgrade a designation. That is why care must be taken not to over designate in the first place.

Dr. Randy MacMillan asked if the Clearwater Basin Advisory Group (BAG) supported the change in beneficial use for Butcher Creek. David Mabe, Administrator of the Water Quality Program, discussed the matter with the Clearwater BAG. The BAG does not recommend any salmonid spawning designations because of concerns over temperature criteria. However, there are individuals within the BAG who are concerned that DEQ is not making enough salmonid spawning designations in the area. DEQ has attempted to reach a balance.

Paul Agidius has served on the Clearwater BAG and felt that the majority of the members would probably think it was appropriate to designate the lower reach of Butcher Creek for salmonid spawning, but would want a cutoff for the upper reach.

Dr. MacMillan served on the Upper Snake BAG, and in spite of tremendous effort, it was difficult to get the group to consider salmonid spawning designations. He wondered if it would cause a problem for the Board to approve the designation without first giving the BAG an opportunity to review the matter and make a recommendation. Dave Mabe said his discussions with the BAG resulted in a clear understanding that DEQ would not actively seek out and make salmonid spawning designations; but if the agency finds evidence or feels it needs to add salmonid spawning to a designation to legitimately reflect what is going on, the BAG will not endorse it, but they do recognize that it could occur through the process. The BAG has a general concern about salmonid spawning designations because of the temperatures that are required, and the ability to attain those temperatures on the ground in the Clearwater Basin. They are also concerned about the level of evidence that is acceptable to prove the need for a salmonid spawning designation.

Doug Conde added that the designation of Butcher Creek for salmonid spawning is consistent with the guidance DEQ developed for the identification of beneficial uses and designations. The guidance document used to make the designation has gone out for public comment and there have been extensive discussions on the process.

Chris Mebane noted that the rule also contains several other salmonid spawning designations in other areas, and they have not been controversial.

Idaho Rules for Public Drinking Water Systems, Docket No. 58-0108-0102

Tom John, Microbiology Rules Manager, presented an overview of the rulemaking to update engineering standards for public water systems. Engineering standards dealing with design, construction, and operation of public water systems have not been systematically

revisited since the 1980's. Advancing technologies and new national regulations have combined to make some portions of the rules increasingly dated and, in some instances, overly restrictive. This rulemaking is to update obsolete provisions, add flexibility where possible and appropriate, and clarify certain language that has been difficult to interpret. Some general housekeeping changes are also included. Mr. John reviewed the major changes to the rules. Negotiated rulemaking was conducted, and a hearing was held. No comments were received during the public comment period.

Director Steve Allred discussed security issues and the need to have language in the rules requiring an analysis of the security system for public drinking water systems during the construction phase. The systems need to be protected from intentional contamination by acts of terrorism or vandalism. Tom John questioned whether the analysis would be required for existing systems as well. Doug Conde noted that this could be considered a significant, new requirement that was not initially proposed in the rulemaking, and it is not in response to public comment. If the proposed change is not within the scope of the original rulemaking, it is not appropriate to add it at this stage. He suggested it might be better to address the matter in a separate rulemaking if it is not a logical outgrowth of the rule as it was originally proposed and presented to the public.

Don Chisholm suggested the security issue be addressed in a separate rulemaking to ensure the public and stakeholders have an opportunity to comment and participate fully.

Idaho Rules for Public Drinking Water Systems, Docket No. 58-0108-0201

Tom John explained the purpose of this rulemaking is to incorporate by reference the EPA Filter Backwash Recycling Rule and the Long Term 1 Enhanced Surface Water Treatment Rule. These are national primary drinking water regulations. Idaho must adopt these rules to maintain primacy for administering the Safe Drinking Water Act. Congress wanted EPA to adopt rules that would to enhance the protection of the public from pathogenic organisms. It was believed the national drinking water regulations were too focused on contaminants that are only dangerous to people when consumed over a long period of time, and ignoring organisms that can make people sick instantly. The problem was highlighted by the cryptosporidium outbreak in Milwaukee that killed 50 people and sickened over 100,000, and other outbreaks. Mr. John briefly discussed the two rules.

Wastewater and Drinking Water Loans and Grants, Docket Nos. 58-0104-020, 58-0112-0201, and 58-0120-0201

Bill Jerrel, Loan Program Manager, stated this rulemaking is needed to update and clarify the rules governing the review and approval of contracts for consulting engineers and determining eligible costs for grants and loans. Negotiated rulemaking was conducted with a broad group of representatives from large and small cities, engineers, and rural water associations. Mr. Jerrell briefly reviewed the changes.

Doug Conde commented that one of DEQ's main objectives in this rulemaking was to make it clear how the Department determines what costs are eligible for reimbursement under the grants and loans. There have been frequent misunderstandings in the past because it was not clear what costs were eligible and what process was used to make the determination. The confusion lead to lawsuits. This rule clearly states the types of contracts that will be allowed,

what costs contained in the contracts and other costs will be eligible, and how the contracts and costs are reviewed.

Nick Purdy discussed the need for communication and coordination between the DEQ loan programs and the Idaho Water Resource Board loan programs to ensure the best assistance to the public and particularly small water systems. He was concerned that the application process for the DEQ loan programs was too difficult and costly for small water systems. The Water Resource Board loans have a simpler, faster application process. Bill Jerrel acknowledged the limitations of the DEQ programs and explained that most of the money for the programs comes from the federal government. When federal dollars are used, there are requirements associated with the National Environmental Policy Act that must be addressed. He said staff will continue to work with Department of Water Resources staff to identify projects that might be a better fit for the Water Resource Board programs and refer them when appropriate. One advantage of the DEQ programs is that a technical, managerial, and financial capacity review is performed for each project. DEQ staff make recommendations on how improvements can be made to help systems comply with requirements.

Director Allred discussed the financial demands on the loan programs. DEQ may come to the Board in the future to request a bond issue.

Board members raised questions on several definitions. Staff will investigate and follow up with responses and changes if needed the following day.

The meeting adjourned at 3:15 p.m.

OCTOBER 17, 2002

The Board of Environmental Quality reconvened on October 17, 2002 and Chairman Paul Agidius called the meeting to order at 8:30 a.m. He announced an additional item would be added to the agenda. The deliberation of the C. J. Strike contested case will be carried over from the previous day's agenda.

ROLL CALL

BOARD MEMBERS PRESENT:

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

BOARD MEMBERS ABSENT:

None

DEPARTMENT OF ENVIRONMENTAL QUALITY STAFF PRESENT:

C. Stephen Allred, Director
Susan Burke, State Water Quality Program

Jess Byrne, Resource Officer
Barry Burnell, Life Sciences Discipline Lead
Debra Cline, Management Assistant to the Board
Doug Conde, Deputy Attorney General, DEQ
Keith Donahue, Deputy Attorney General, DEQ
Dean Ehlert, Remediation Program
Paula Gradwohl, Administrative Rules Coordinator
Orville Green, Administrator, State Waste Management & Remediation Program
Rick Jarvis, Underground Storage Tank/Leaking Petroleum Storage Tank Program Coordinator
Jason Jedry, Administrative Services
Bill Jerrel, Loan Program Manager
Kate Kelly, Administrator, Air Quality Program
Tom John, Drinking Water Program
Dave Mabe, Administrator, Water Quality Program
Chris Mebane, Water Quality Program
Diane Riley, Air Quality Analyst, Smoke Management
Jon Sandoval, Chief of Staff
Alan Stanford, Senior Water Quality Analyst
Steve West, Administrator, Boise Regional Office

OTHERS PRESENT:

Gayle Batt, Idaho Water Users Assoc.
Jane Gorsuch, Intermountain Forest Association
Dick Rush, Idaho Assoc. of Commerce & Industry
Suzanne Schaefer, SBS Associates LLC

PUBLIC COMMENT PERIOD – THE BOARD ALLOWS UP TO 30 MINUTES FOR THE PUBLIC TO ADDRESS THE BOARD ON ISSUES NOT SPECIFICALLY SHOWN AS AGENDA ITEMS.

Chairman Agidius opened the floor to public comments.

Dick Rush, IACI, said he would not be presenting testimony on any of the items on today's agenda, but distributed written comments on some air issues that will be presented at the next Board meeting. IACI will be working with DEQ over the next month on these issues regarding the proposed standard for hydrogen sulfide, the air program streamlining rules, and the Title V fee rule.

AGENDA ITEM NO. 1: ADOPTION OF AUGUST 6, 2002 MINUTES

➤ **MOTION:** Don Chisholm moved the Board adopt the minutes of the August 6, 2002 Board meeting as prepared and distributed.

SECOND: Dr. Randy MacMillan

VOICE VOTE: Motion passed unanimously

AGENDA ITEM NO. 2: DIRECTOR'S REPORT

Director Steve Allred briefly discussed issues affecting the Department including the latest budget holdback, the Coeur d'Alene Basin Commission, upcoming legislation, and the

Title V permitting program. The Department will meet its commitment to clear the backlog of Title V permits by the end of the year. He recognized the efforts and cooperation of industry to comply with the Air Quality Program. The Amalgamated Sugar Company and Monsanto have made significant commitments to improve the air quality.

Members discussed the affects of the budget cutbacks on the Department's monitoring efforts and ways of dealing with the loss of funding.

Director Allred discussed the long-range strategic plan and suggested he and the Board meet with the Governor and legislative leadership after the elections to discuss the plan. A meeting will be set up just before the Board's November meeting.

DELIBERATION IN THE MATTER OF SECTION 401 WATER QUALITY CERTIFICATION FOR RELICENSING OF THE C. J. STRIKE HYDROELECTRIC FACILITY, DOCKET NO. 0102-01-06

Harriet Hensley presented a revised draft order incorporating the Board's comments from the previous day. Chairman Agidius opened the floor to discussion.

Dr. Randy MacMillan thought the order was well done and said he would support it.

Board members suggested language be added to strengthen and clarify that the petitioners' participation in the FERC and 401 Certification processes from the beginning is material to the finding of representational standing, that petitioners were representing the interests of their members, that their members demonstrated palpable injury, and that the Board finds under these specific facts and circumstances there is representational standing. Don Chisholm recommended the final paragraph be changed to read: "The matter is remanded to the hearing officer for further proceedings consistent with this opinion." He also suggested the language on page 11, paragraph 2 be changed to read: ". . . aesthetic, recreational, as well as economic . . ." Minor clerical changes were also suggested. Harriet Hensley will make necessary formatting and clerical changes and changes to the conclusion to capture the overriding principles expressed by the Board. She will distribute the revised draft later in the meeting for the Board's consideration.

Don Chisholm felt the order should not be certified as an appealable order until someone requests it. It can be certified as a final order at a later date if it is requested. Harriet Hensley suggested it might be best to remand the case to the hearing officer for a decision on the substantive issues; then both the standing issue and the substantive issue will be ripe for appeal.

AGENDA ITEM NO. 3 APPROVAL OF HEARING OFFICER APPLICANTS

Paula Gradwohl presented a list of the applicants and resumes for the Board's approval. The list included Edward Lockwood, Coeur d'Alene; Kim Toryanski, Boise; and Mitchell Toryanski, Boise. Edward Lockwood has served as a hearing for the Department of Health and Welfare for many years. They have been very pleased with Mr. Lockwood's services.

➤ **MOTION:** Marti Calabretta moved the Board approve the addition Edward Lockwood, Kim Toryanski, and Mitchell Toryanski to the hearing officer list.

SECOND: Dr. Joan Cloonan

VOICE VOTE: Motion passed unanimously.

Paula Gradwhol commented that hearing officers are compensated at the rate of \$95 per hour. The fee is set to be consistent with what other state agencies pay. It is set out in a standard contract and is not negotiated on a per case basis. Doug Conde noted that the Board's rules require the hearing officer to issue a decision within 180 days, and billable time is defined in the contract.

AGENDA ITEM NO. 4

**RULES FOR THE CONTROL OF AIR POLLUTION IN IDAHO,
DOCKET NO. 58-0101-0201 (PENDING RULE)**

Kate Kelly presented this amendment to the general open burning rules. The rules are submitted to EPA as part of the state implementation program and are required by EPA as basic controls and restrictions on general burning in Idaho. Ms. Kelly briefly reviewed the rules. Education is a major component. The rules have not been comprehensively updated for over 15 years. This update provides needed clarification and guidance. She distributed changes that were made as a result of Board comments.

Marguerite McLaughlin questioned Section 614 regarding Prescribed Burning in Accordance with Smoke Management Program. She questioned whether the language gave DEQ new authority and oversight over the Department of Lands' Forest Practices Act. Kate Kelly explained the Forest Practices Act was cited in the rules simply because it similarly applies to this activity, not because it supplants DEQ's authority. It is just to note that the Forest Practices Act is there, and is something that people are complying with as well.

Marti Calabretta suggested a definition for household be added to Section 611 on domestic household waste. She questioned why Section 614 regarding prescribed burning was needed and if there was a specific area where a health threat existed that prompted this rule. Kate Kelly explained the provision is needed to protect public health. Prescribed burning is defined as a planned event to manage wild land fuels. There is a small subset of people who conduct prescribed burning, including the Forest Service and Bureau of Land Management (BLM), who are members of the Montana Idaho Airshed Group. It is a voluntary group that requires the payment of fees and regular meetings. They have hired a full-time meteorologist who evaluates the atmospheric conditions and makes a daily call on whether or not burning can occur. The members of the Group comply with those calls. There is another subset of people who are not members of this voluntary group who also conduct prescribed burning. The proposed rule does not require these people to become members of a group; it simply requires them to call the DEQ hotline to find out if it is a burn or no burn day, and comply with the call. If they burn on a day when atmospheric conditions are not conducive, it can cause an unhealthful condition.

Marti Calabretta felt it was not a small subset that would be affected by this rule in the counties in Northern Idaho. She asked if it was the responsibility of the property owner or the contractor to comply with the rule. Ms. Kelly noted that the rule says, "any person who may conduct or allow prescribed burning . . ." It could be interpreted as being the contractor, but there are rules of law that could impose it on the landowner as well. Marti Calabretta asked how this provision would be implemented and what the cost would be to DEQ. Ms. Kelly indicated there would be very limited costs. DEQ already coordinates closely with the local authorities, the Department of Lands, and the federal land management agencies. The Forest Practices Act requires individuals to contact the Department of Lands for burn permits. The permits require

compliance with DEQ air quality rules. DEQ will coordinate with Lands and distribute pamphlets to educate the public about the program.

Nick Purdy said prescribed burning is used quite a bit in agriculture for private rangeland in cooperation with the BLM. He asked how enforcement would be handled and what the penalty would be for a violation if someone were not aware of the requirement. Kate Kelly explained the enforcement authority is in the EPHA. The notice of violation (NOV) process will be used. DEQ uses discretion when dealing with violations of a new rule. Ms. Kelly thought it would be very unlikely that any enforcement action would take place against a first offense; education would be the focus. Director Allred clarified this rule would not affect cases where prescribed burning is coordinated with the BLM. The BLM is part of the Oregon Idaho Smoke Management Program.

Marti Calabretta felt it was still unclear why the rule was needed and how problematic it would be for individuals to comply.

Marguerite McLaughlin asked what changes would be made to the Department of Lands permitting process as a result of this rule. Kate Kelly did not foresee any changes to the way the Department of Lands conducts its operation. DEQ works very closely with Lands to coordinate activities. Lands' burn permits specifically references DEQ's air quality rules and the need to comply with the rules. Part of the education component of this rule will be to supply pamphlets to the Department of Lands so they can make anyone applying for a burn permit (for a prescribed burn) aware of this additional requirement to call the hotline. Ms. McLaughlin reiterated her concern that the rule would change the jurisdiction of the Department of Lands. Ms. Kelly noted it was not uncommon for more than one agency to regulate such an activity. The Department of Lands acknowledges that DEQ has jurisdiction over the air quality issue. The burn permits issued by Lands are good for ten days and do not address air quality issues such as atmospheric conditions, smoke dispersion, and smoke management.

Jane Gorsuch, Intermountain Forest Association (IFA), submitted written comments (Attachment 2) and expressed concern about the actual applicability and implementation of the proposed rules. Ms. Gorsuch thanked DEQ for the opportunity to take part in the negotiated rulemaking and for making some changes in response to the last set of comments the IFA submitted. The IFA questions the need for the rule when the majority of the forest land in Idaho is already covered by the Montana Idaho voluntary smoke management program, which is more stringent than this rule. She asserted there was not a real problem for air quality due to forestland activities. There are over 55,000 individual forestland owners who will be impacted by this rule. The IFA does not represent these individuals. Ms. Gorsuch felt educating these individuals would be a huge effort that could go on for years. She felt the issue could result in lawsuits between neighbors. The IFA is concerned that this rule is an additional layer of regulation. The Forest Practices Act, the rules, and the best management practices address concerns about the impacts of smoke on human health and the environment.

Don Chisholm asked if the information on the DEQ hotline could be incorporated into existing hotlines that must be called to determine the fire danger rating, to eliminate the additional call. Diane Riley explained there are numerous different levels of government and agencies that operate other hotlines, and they are often seasonal.

Chairman Agidius asked if the alternative language proposed by the IFA in its October 16 letter (Attachment 2) was intended to provide an exemption from the emergency episode rule. Ms. Gorsuch indicated that was not the intent; however, it appears to do that as it is now written.

Dr. Joan Cloonan commented that the Forest Practices Act regulations clearly state that it is the purpose of the rules to establish a management system for smoke from prescribed fires that will protect air quality and public health. She discussed language proposed by the IFA to provide an exemption from the rules if prescribed burning is conducted in accordance with the Forest Practices Act or an approved smoke management plan. She suggested the word exempt be replaced with “presumed to be in compliance with . . .” This would remove the exemption from the emergency episode rule. Ms. Gorsuch agreed with the proposed change in language.

Kate Kelly objected to the use of the word “or” in the proposed language. The fact that prescribed burners would have to comply with the Forest Practices Act or a smoke management plan defeats the purpose that prescribed burning be conducted only on days when there is good dispersion for the smoke.

Marguerite McLaughlin felt there was a definite overlay of authority with the proposed rule and questioned whether this was something the Board wanted in this rule.

Nick Purdy was in favor of adopting the rule, but felt Section 614 should be left as it is in the existing rule until DEQ develops an education plan and cost estimate. He feared that without an extensive education program people would unknowingly be at risk of lawsuits from neighbors. Since the majority of potential burners are already regulated under the Forest Practices Act or smoke management plans, he felt the value of the rule did not justify the risk it had for causing problems for many people.

Director Allred clarified the intention was not to create an overlay with another program. If burners are complying with another program, this rule does not require them to do both. He felt the language suggested by Dr. Cloonan (if you comply with the Forest Practices Act and an approved smoke management plan, you are deemed to comply with this rule) addressed this concern. The intent of Section 614 is to recognize the Forest Practices Act.

Kate Kelly pointed out that DEQ intends to put the educational component in place before the burning season occurs next spring. She invited Mr. Purdy to take part in the process to see how it is implemented. She noted that DEQ recognizes the importance of maintaining particulate matter levels in Idaho below the National Ambient Air Quality Standards. The minimal cost of implementing this rule is a worthwhile investment. Recent events in the Treasure Valley have highlighted the importance and need to maintain these levels. The implications of not complying with the standards are very severe. She strongly supported the minimal investment of resources this rule would require to protect the air quality. The rule is simply an extension of efforts the Department is already making to ensure that the atmospheric conditions needed to disperse smoke exist before burning takes place. It does not change the Forest Practices Act or the smoke management plans.

Jane Gorsuch did not disagree with the concerns for the Treasure Valley, but pointed out that her members operate in the woods and areas where particulate matter is not a problem. The IFA is not questioning the budget element, but is concerned with how the educational element will reach all of the individuals in the remote areas of Idaho who will be affected by this rule.

Some of the remote areas where slash burning is required by law may not have phone service to comply with this rule.

Don Chisholm noted that it would not trigger a violation if you did not call the hotline; only if you burned on a no burn day when atmospheric conditions do not allow smoke dispersion. Most people who work the land tend to know when there is an inversion or other situation that will cause a problem. Mr. Chisholm felt the general goal was good air quality, and believed the concerns about the rule were overstated. The rules should be written to be uniform in application throughout the state. He felt confident DEQ could handle the combination of education and rolling out the enforcement.

Marguerite McLaughlin commented the forest industry is not trying to avoid management. They are concerned about air quality, but want common sense rules. She noted that the inversions in Northern Idaho are entirely different than in the Magic Valley. There are areas that are very remote and may have little or no outside contact. The Forest Practices Act is familiar with the issues and is better prepared to regulate these areas. Ms. McLaughlin supported portions of the rule, but wanted to ensure the forest industry was able to perform necessary work without conflict or confusion between the Forest Practices Act and this rule.

Chairman Agidius commented his concerns would be addressed with the change in language providing that compliance with the Forest Practices Act and a smoke management plan would be presumed to be compliance with this rule. Doug Conde cautioned against using the word presumed because it is unclear and might be hard to enforce. The language should clearly state that if you follow the Forest Practices Act and a smoke management program, you are in compliance with these rules. It should also be clear what is being complied with.

Kate Kelly added that DEQ worked with the Department of Lands to develop this rule. The Department of Lands helped write the language, particularly in Section 614, and they support the rule.

Chairman Agidius suggested the language state, "Prescribed burning is an allowable form of burning if done in compliance with the Forest Practices Act and an approved smoke management plan."

Dr. Cloonan suggested that for now, Section 02. Other Prescribed Burning, (that requires persons not meeting all conditions of a smoke management plan must adhere to the time periods for burning set by the Department and made available on the hotline) be revised so that it is recommended, instead of mandatory. This change would address the concerns expressed about liability from violations and lawsuits from neighbors. The section could later be changed so that it is mandatory. This would allow a roll out of the education and enforcement elements without risk. Jane Gorsuch felt this would be a useful way of dealing with the concerns.

Nick Purdy stated he could support Section 614 with the changes recommended by Dr. Cloonan. He mentioned that it would be very helpful to the public if these issues could be addressed consistently throughout the state under one agency, instead of having to deal with numerous different state, county, and local entities.

Don Chisholm recommended the Board ask staff to amend Section 614 and bring the rule back at the November Board meeting. There were substantial changes discussed and he felt care

should be taken not to rush into adopting a rule with hastily prepared revisions that have not been fully reviewed.

Kate Kelly asked for clarification of exactly what changes the Board was requesting to Section 614. She stressed that making the provisions of subsection 02. voluntary instead of mandatory would in essence gut Section 614.

- **MOTION:** Don Chisholm moved the Board direct staff to redraft Section 614 to say that prescribed burning will not be exempted from the emergency episode rules, that it will be allowed for individuals who comply with the Forest Practices Act and an approved smoke management plan, and people who are not part of an approved smoke management plan will be required to call the Department to determine whether they will be allowed to burn on a particular day.

SECOND: Motion failed for lack of second.

- **MOTION:** Nick Purdy moved the Board direct staff to redraft Section 614 to say that prescribed burning will not be exempted from the emergency episode rules, that it will be allowed for individuals who comply with the Forest Practices Act and an approved smoke management plan, and people who are not part of an approved smoke management plan should call the Department to determine whether they will be allowed to burn on a particular day, and that compliance for those who are not part of a smoke management plan will be voluntary until DEQ has an educational program in place.

SECOND: Dr. Randy MacMillan

DISCUSSION: Dr. Randy MacMillan understood the need for a strong education effort, but felt there should be no doubt about moving forward with a rule that was needed to protect the public health. If the Board chooses to make compliance voluntary for those who are not in a smoke management program, there should be a clear understanding and direction to DEQ to transition the compliance from voluntary to mandatory within a reasonable amount of time. Nick Purdy agreed with the suggested direction. Dr. MacMillan commented that in Twin Falls County they periodically have problems with burning that takes place at obviously inappropriate times. It is a real public health concern for the community. Paul Agidius voiced two concerns; the motion changes nothing for the group of people who are unregulated and they can continue to burn whenever they want to, and he felt the rule should have a time certain indicating when compliance becomes mandatory so the rule will not have to come before the Board again. Don Chisholm agreed and suggested language be added to make compliance mandatory after April 1, 2004. Dr. Joan Cloonan agreed that setting a time certain for the transition was a good approach.

AMENDMENT: Nick Purdy moved the motion be amended to include language in the redraft of Section 614 providing that after April 1, 2004 people who are not part of an approved smoke management plan will be required to call the Department to determine whether they will be allowed to burn on a particular day. During this transition period the Department will conduct a strong education program.

SECOND ON AMENDMENT: Dr. Randy MacMillan

DISCUSSION: Don Chisholm asked if the requested revisions could be made and brought back to the Board later in the meeting. Kate Kelly agreed to bring the redrafted rule back to the Board later in the day. She will update the Board periodically on the status of the education and outreach plan.

MOTION WITHDRAWN: Nick Purdy withdrew the motion so action could be taken on the matter later in the meeting.

AGENDA ITEM NO. 5

RULES GOVERNING FEES FOR ENVIRONMENTAL OPERATING PERMITS, LICENSES AND INSPECTION SERVICES, DOCKET NOS. 58-0114-0201 AND 16-0505-0201 (PENDING RULE)

Barry Burnell, DEQ Technical Services Division, noted this rule was adopted by the Board as a temporary rule in June 2002, and has been in effect since July 1, 2002. The public comment period was held during August, and DEQ received no comments. This rulemaking shifts the fee authority from the Department of Health and Welfare to DEQ for programs DEQ has delegated to the health districts. The regulated community includes property owners, septic tank pumpers and installers, and land developers.

The rule was amended at Section 110.02. regarding Multiple Households or Buildings that use a common subsurface sewage disposal system. The revised language will read:

“For individual and subsurface sewage disposal systems serving more than one (1) household or building in any combination, the fee shall be ninety dollars (\$90) plus ten dollars (\$10) per each household or **per** each two hundred fifty (250) gallons of flow **from buildings.**”

➤ **MOTION:** Don Chisholm moved the Board adopt the Rules Governing Fees for Environmental Operating Permits, Licenses, and Inspection Services as presented in the final proposal under Docket No. 58-0114-0201 with the amendment presented today.

SECOND: Dr. Joan Cloonan

VOICE VOTE: Motion passed unanimously.

➤ **MOTION:** Don Chisholm moved the Board adopt the Rules Governing Fees for Health Operating Permits, Licenses, and Inspection Services as presented in the final proposal under Docket No. 16-0505-0201.

SECOND: Marguerite McLaughlin

VOICE VOTE: Motion passed unanimously.

AGENDA ITEM NO. 6

SOLID WASTE MANAGEMENT RULES AND STANDARDS, DOCKET NOS. 58-0106-0201 AND 58-0106-0202 (PENDING/AMENDMENTS TO TEMPORARY RULE)

Dean Ehlert, Solid Waste Program Coordinator, stated these rules governing the management of non-municipal solid waste were adopted by the Board in April 2002 as temporary and went through a public comment period during June and July. Some changes were made as a result of comments DEQ received. Most of the changes were to provide clarification. Substantive changes included a change to provide that open burning be conducted pursuant to conditions set by DEQ or the local fire authority; a parks, scenic or natural use siting restriction including but not limited to wild and scenic areas, national monuments, wilderness areas, historical sites, recreational areas, preserves and scenic trails; and notification to local government that an application has been filed.

- **MOTION:** Dr. Joan Cloonan moved that the Board repeal the Solid Waste Management Rules and Standards as presented in the final proposal under Docket No. 58-0106-0202.
SECOND: Dr. Randy MacMillan
VOICE VOTE: Motion passed unanimously.

- **MOTION:** Dr. Joan Cloonan moved that the Board adopt the Solid Waste Management Rules as presented in the final proposal under Docket No. 58-0106-0201, and further moved that the Board adopt the revisions included in the final proposal as amendments to the previously adopted temporary rules, with the amendments becoming effective October 18, 2002 and that the additional changes discussed by Dean Ehlert in this meeting are included in this motion.
SECOND: Don Chisholm
VOICE VOTE: Motion passed unanimously.

AGENDA ITEM NO. 4 **RULES FOR THE CONTROL OF AIR POLLUTION IN IDAHO, DOCKET NO. 58-0101-0201 (PENDING RULE)**

Chairman Paul Agidius reopened this agenda item to review and consider the redrafted Section 614 per discussion earlier in the meeting.

Kate Kelly distributed the redrafted Section 614 containing the revisions requested by Board members earlier in the meeting (Attachment 3). She noted that Section 606 as shown on the attachment is already in the rule and is not before the Board for change. It was included on the attachment to clarify that revisions are not needed to provide that prescribed burning is not exempt from the emergency episode rule.

- **MOTION:** Don Chisholm moved the Board adopt the Rules for the Control of Air Pollution in Idaho, as presented in the final proposal under Docket No. 58-0101-0201 incorporating the amendments to Section 611 and 614 as distributed today.
SECOND: Dr. Randy MacMillan
DISCUSSION: Marti Calabretta requested clarification on whether a smoke management plan and a smoke management program were the same thing. Kate Kelly stated the definitions set out in the rules broadly define a smoke management program and would include an approved plan. Ms. Calabretta asked if all smoke management plans or programs were currently approved by DEQ and what was required to get approval. Kate Kelly responded all smoke management plans or programs she was aware of had been approved by DEQ. Ms. Calabretta explained that she would vote against the motion because she believed compliance should be voluntary for those individuals who are not part of a smoke management plan or program and are not currently regulated. She hoped that the education and outreach program would be effective so it does not create a hardship.
VOICE VOTE: Motion passed. 6 ayes; 1 nays (Calabretta); 0 absent.

AGENDA ITEM NO. 7: **RULES FOR OWNERS AND OPERATORS OF UNDERGROUND STORAGE TANKS AND LEAKING PETROLEUM STORAGE TANKS, DOCKET NO. 58-0107-0201, AND WATER QUALITY STANDARDS AND WASTEWATER TREATMENT REQUIREMENTS, DOCKET NO. 58-0102-0202 (PENDING RULE)**

Rick Jarvis presented the Rules for Owners and Operators of Underground Storage Tanks and Leaking Petroleum Storage Tanks and a docket to repeal Sections 851 and 852 of the Water Quality Standards and Wastewater Treatment Requirements. Sections 851 and 852 currently regulate leaking petroleum storage tanks. These sections will be adopted as part of the proposed Rules for Owners and Operators of Underground Storage Tanks and Leaking Petroleum Storage Tanks. They are being transferred, without modification, for ease of use, so the requirements for UST systems and PST systems will be located in the same rules.

Negotiated rulemaking was conducted and the rules were reviewed during the last year by the Petroleum Storage Tank Advisory Committee. No public comment was received on the rule. The proposed rule implements DEQ authority to regulate UST systems at the state level. The rule in most part adopts the federal underground storage tank regulations.

Mr. Jarvis reviewed the changes made to the federal rule (Attachment 4) which address issues that were identified over the last ten years as needing clarification. There is also a change to Section 023.03. to change the 30 day inspection requirement to a monthly inspection.

If the rules are not adopted, the U.S. EPA will enforce the federal UST rules through its Seattle and Washington D.C. offices.

- **MOTION:** Dr. Randy MacMillan moved the Board adopt the Rules for Owners and Operators of Underground Storage Tanks and Leaking Petroleum Storage Tanks as presented in the final proposal under Docket No. 58-0107-0201 as amended (Sec. 023.03).
SECOND: Marti Calabretta
VOICE VOTE: Motion passed unanimously.

- **MOTION:** Dr. Randy MacMillan moved the Board adopt the Water Quality Standards and Wastewater Treatment Requirements as presented in the final proposal under Docket No. 58-0102-0202.
SECOND: Dr. Joan Cloonan
VOICE VOTE: Motion passed unanimously.

Dr. Joan Cloonan questioned how the stringency issue was handled in the rule making process. This rule has some changes from the federal law that could be construed as being more stringent. Paula Gradwohl, Administrative Rules Coordinator, responded that the Notice of Pending Rule, authorities section, included the stringency language required to meet the statute.

AGENDA ITEM NO. 8 **WATER QUALITY STANDARDS AND WASTEWATER TREATMENT REQUIREMENTS, DOCKET NO. 58-0102-0203 (TEMPORARY/PENDING RULE)**

Chris Mebane explained these standards address water quality criteria for the Boise River for copper and lead. Testing commissioned by the City of Boise supported raising the water quality criteria for copper and lead by 2.5 and 2 times, respectively.

Although DEQ has the authority to adopt this change through the state certification of the federal discharge permit, they are recommending adoption of this rule to provide clarity and to establish a public record. Putting the change in the rule will also make it easier to address the issue in the future.

- **MOTION:** Dr. Randy MacMillan moved the Board adopt as temporary rules and pending rules, the Water Quality Standards and Wastewater Treatment Requirements as presented under Docket No. 58-0102-0203 with the temporary rules becoming effective October 18, 2002.
- SECOND:** Don Chisholm
- VOICE VOTE:** Motion passed unanimously.

AGENDA ITEM NO. 9 **WATER QUALITY STANDARDS AND WASTEWATER TREATMENT REQUIREMENTS, DOCKET NO. 58-0102-0204**

Chris Mebane briefly reviewed the purpose of the rulemaking. The substantive change in the rule is the annual update in designated beneficial uses for a number of different waters around the state. There are about 200 such amendments. The only one that received specific public comment was on Butcher Creek, which is a tributary to the South Fork of the Clearwater River. The Nez Perce Tribe and the EPA believe it should be protected for salmonid spawning, which imposes a colder temperature requirement. Initially, DEQ did not make the designation because they did not have data supporting the salmonid spawning designation. The Nez Perce Tribe surveyed the creek and presented data to support the designation, so DEQ designated Butcher Creek for salmonid spawning.

Discussions questioned whether it was appropriate to designate the entire 19 miles of Butcher Creek for salmonid spawning, if the only evidence (juvenile rainbow trout) was found in the lower part of the creek. The upper part of the creek in on the Camas Prairie and the lower part is forested. DEQ prepared alternative language for the Board's consideration that would split the designation so only the lower portion of Butcher Creek would be designated for salmonid spawning.

- **MOTION:** Nick Purdy moved the Board adopt the Water Quality Standards and Wastewater Treatment Requirements as presented in the initial proposal under Docket No. 58-0102-0204 with the following amendment. The use designation for Butcher Creek, at section 120.07, unit C-11, is amended to include salmonid spawning on the lower, forested, canyon segment of the stream, to be designated by distance later.
- SECOND:** Dr. Randy MacMillan
- DISCUSSION:** Dr. Joan Cloonan asked if the amendment was specific enough for the purposes of the regulation. Chris Mebane stated generally a mapping database is used to provide the detailed latitude and longitude and legal description. DEQ will work with its Grangeville office to provide the specifics.
- VOICE VOTE:** Motion passed unanimously.

DELIBERATION IN THE MATTER OF SECTION 401 WATER QUALITY CERTIFICATION FOR RELICENSING OF THE C. J. STRIKE HYDROELECTRIC FACILITY, DOCKET NO. 0102-01-06

Harriet Hensley stated in her opinion, the affidavit submitted by American Rivers does not support a finding of representational standing. After closely reviewing the affidavit of Rob Masonis, Ms. Hensley felt it did not allege a distinct, palpable injury related to water quality. The affidavits submitted by Idaho Rivers United do support a finding of representational standing. She recommended the opinion be revised to reflect that only the affidavits submitted

by Idaho Rivers United meet the standard for distinct, palpable injury; and American Rivers did not submit adequate affidavits to meet the standard for representational standing.

Nick Purdy believed American Rivers had established representational standing because they filed a petition and fully participated in the FERC and 401 Certification processes. Dr. Joan Cloonan and Paul Agidius believed that both participation and injury were necessary to meet the legal requirement for standing.

The Board agreed the conclusion and order should be revised to provide that Idaho Rivers United has standing to bring the contested case based on its participation in the FERC and 401 Certification process and the establishment of individualized and palpable injuries to its members, that American Rivers did not submit adequate affidavits to meet the standard for representational standing, that neither Idaho Rivers United nor American Rivers established organizational standing, and that the hearing officer's order be rejected as to Idaho Rivers United's claim of standing, that the matter be remanded to the hearing officer for a determination on the substantive claims raised by Idaho Rivers United., and accepting the hearing officer's recommended order regarding American Rivers.

- **MOTION:** Dr. Joan Cloonan moved that the Board in Docket No. 0102-01-06 adopt the Conclusion and Final Order with the language of the conclusion as agreed upon during discussion of the order, and that the Board return the draft Order to Harriet Hensley for final editorial changes consistent with the discussions on October 16 and 17, 2002.
- SECOND:** Nick Purdy
- DISCUSSION:** Don Chisholm clarified that the Board was adopting the conclusion as discussed, and it is not subject to further revision.
- VOICE VOTE:** Motion passed unanimously.

Harriet Hensley will send the final draft to the Board members for review within one or two weeks.

AGENDA ITEM NO. 10 **IDAHO RULES FOR PUBLIC DRINKING WATER SYSTEMS, DOCKET NO. 58-0108-0102 (PENDING RULE)**

Tom John, Microbiology Rules Manager, DEQ Drinking Water Program, presented this docket to update engineering standards dealing with design, construction, and operation of public water systems. He briefly reviewed some of the changes.

- **MOTION:** Marguerite McLaughlin moved the Board adopt the Idaho Rules for Public Drinking Water Systems, as presented in the final proposal under Docket No. 58-0108-0102.
- SECOND:** Dr. Joan Cloonan
- VOICE VOTE:** Motion passed. 6 Ayes; 1 Absent (Marti Calabretta)

AGENDA ITEM NO. 11 **IDAHO RULES FOR PUBLIC DRINKING WATER SYSTEMS, DOCKET NO. 58-0108-0201 (PENDING RULE)**

Tom John presented this docket to incorporate by reference new federal drinking water regulations regarding the filter backwash recycling rule and the long-term 1 enhanced surface water treatment rule.

- **MOTION:** Dr. Randy MacMillan moved the Board adopt the Idaho Rules for Public Drinking Water Systems, as presented in the final proposal, for Docket No. 58-0108-0201.
SECOND: Dr. Joan Cloonan
VOICE VOTE: Motion passe unanimously.

AGENDA ITEM NO. 12 **WASTEWATER AND DRINKING WATER LOANS AND GRANTS, DOCKET NOS. 58-0104-0201, 58-0112-0201, 58-0120-0201, AND 58-0122-0201 (PENDING RULE)**

Bill Jerrel, Loan Program Manager, stated these dockets address the review and approval of contracts for consulting engineers, how eligible costs are determined for grants and loans, and more clearly state what types of contracts are eligible. All four dockets were addressed simultaneously through negotiated rulemaking. No public comment was received.

Doug Conde discussed a suggested change in the definition of municipality. He explained the definition used in the rule came directly from the Idaho Code, and recommended it be left as is. There was also a question about the definition of contaminate. The definition was taken directly from the Drinking Water Rules and should not be changed.

- **MOTION:** Don Chisholm moved the Board adopt the Rules for Administration of Wastewater Treatment Facility Grants as presented in the final proposal under Docket No. 58-0104-0201.
SECOND: Dr. Joan Cloonan
VOICE VOTE: Motion passed unanimously.
- **MOTION:** Nick Purdy moved the Board adopt the rules for Administration of Water Pollution Control Loans as presented in the final proposal under Docket No. 58-0112-0201.
SECOND: Dr. Joan Cloonan
VOICE VOTE: Motion passed unanimously.
- **MOTION:** Dr. Joan Cloonan moved the Board adopt the Rules for the Administration for Drinking Water Loan Program as presented in the final proposal under Docket No. 58-0120-0201.
SECOND: Dr. Randy MacMillan
VOICE VOTE: Motion passed unanimously.
- **MOTION:** Marguerite McLaughlin moved the Board adopt the Rules for the Administration of Planning Grants for Public Drinking Water Facilities as presented under the final proposal under Docket No. 58-0122-0201.
SECOND: Dr. Randy MacMillan
VOICE VOTE: Motion passed unanimously.

AGENDA ITEM NO. 12 **LOCAL REPORTS AND ITEMS BOARD MEMBERS MAY WISH TO PRESENT**

Marti Calabretta discussed the summary of the blood lead sampling data distributed earlier in the meeting (Attachment 5). She noted that the information beginning on page 7 is for the Coeur d'Alene River Basin area. The information on pages 1-6 represents testing in the

“box” in the Bunker Hill area. Once again, the testing shows continuing improvement in blood levels. She questioned the continuing expenditure of state and federal dollars for removal of soil to meet EPA’s level of 1,000 ppm, rather than focusing efforts on the health issue with children. She felt this was misdirected activity and a waste of state and federal resources.

Director Allred discussed soil remediation issues and the risk evaluation used by EPA for risk assessment at Superfund sites.

AGENDA ITEM NO. 13 CONTESTED CASE AND RULE DOCKET STATUS REPORT

Paula Gradwohl briefly reviewed the contested case and rulemaking activities. Doug Conde noted the Glanbia Foods matter was not shown as a contested case at this time, but should be added to the November agenda for board review. DEQ is meeting with the parties to try to negotiate a solution.

Dr. Joan Cloonan commented she has heard concerns expressed by some IACI members that the stringency statements DEQ is using for rulemaking are not adequate to fulfill the requirements of the law. The statements simply say that the rule may or may not be more stringent or broader in scope than the federal law, without any details as to where or how it is more stringent or broader in scope. There appears to be an expectation among some people that there would be more detail.

Paul Agidius asked how the statements are developed. Doug Conde responded that when there is a question whether certain provisions are more stringent, DEQ identifies each section they feel might be considered more stringent or broader in scope. There is detailed information in the binders given to the Board and in the legal notice that accompanies the rule when it is published. The underground storage tank rules, for example, included this information. Dr. Cloonan suggested that the detailed information be included in the package that goes to the legislature.

Doug Conde noted that it is not always easy to tell when someone might perceive that something is more stringent or broader in scope. For example there are often federal programs that address a certain area, but anticipate some state action. In these instances, the state is not really being broader in scope, but some people may perceive it that way. DEQ has tried to be conservative by stating that such issues may be interpreted as being broader in scope. If there has been a deficiency, it may be in not always providing the detailed information to the legislature. Chairman Agidius thought the best solution would be for DEQ to always provide the legislature with the detailed information up front, unless there is a good reason not to.

Marti Calabretta stated there was a long struggle regarding stringency beginning in 1984. She felt the legislature was essentially giving DEQ more latitude now by allowing the rules to move into areas that are either not covered by federal law or for whatever reasons are more stringent than federal law. To respect this development, she felt the department should fully identify such matters for the legislature.

Don Chisholm believed there was never any time when DEQ did not try to comply with the law. There may be times when these issues are hard to identify and are subject to argument, but the department should try to disclose the information fully so the legislature can understand the situation.

Director Allred stated DEQ is very willing to supply the legislature with such detailed information on stringency issues. The information is available, but publishing it in the Administrative Rules Bulletin would be very costly. He pointed out that the Attorney Generals office prepares the stringency statements for DEQ and Legislative Services reviews them.

The meeting adjourned at 3:00 p.m.

Paul C. Agidius, Chairman

Marti Calabretta, Secretary

Debra L. Cline, Management Assistant and Recorder

Attachments

	Page
Attachment 1 - Factsheet on Proposed Revisions to the Open Burning Rule	6
Attachment 2 - IFA Comments on the Open Burning Rule.....	4
Attachment 3 - Revisions to the Open Burning Rule	19
Attachment 4 - Changes to the Federal Rules for Underground Storage Tanks.....	20
Attachment 5 - 2002 Bunker Hill (Box) and Coeur d'Alene River Basin Blood Lead Levels.....	24

- ❖ All attachments referenced in these minutes are permanent attachments to the minutes on file at the Idaho Department of Environmental Quality. A copy can be obtained from the assistant to the Board of Environmental Quality.