



State of Idaho  
DEPARTMENT OF ENVIRONMENTAL QUALITY  
BOARD OF ENVIRONMENTAL QUALITY

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**IDAHO BOARD OF ENVIRONMENTAL QUALITY**

**MINUTES**

**November 16 & 17, 2005**

The Board of Environmental Quality convened on November 16, 2005 at 8:30 a.m. at:

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

**ROLL CALL**

**BOARD MEMBERS PRESENT**

Dr. John R. "Randy" MacMillan, Chairman  
Dr. Joan Cloonan, Vice-chairman  
Craig Harlen, Secretary  
Marti Calabretta, Member  
Donald J. Chisholm, Member  
Marguerite McLaughlin, Member  
Nick Purdy, Member

**BOARD MEMBERS ABSENT**

**DEPARTMENT OF ENVIRONMENTAL QUALITY STAFF PRESENT**

Toni Hardesty, Director  
Jon Sandoval, Chief of Staff  
Barry Burnell, Administrator, Water Quality Division  
Orville Green, Administrator, Waste & Remediation Division  
Nancy Bowser, Senior Water Quality Analyst  
Jess Byrne, Interagency Affairs  
Debra Cline, Management Assistant to the Board  
Douglas Conde, Deputy Attorney General  
Stephanie Ebright, Deputy Attorney General  
Don Essig, Water Quality Standards Manager  
Patty Harrell, Air Quality Division  
Dave Hovland, Ground Water Program Manager  
Rick Huddleston, Wastewater Program Manager

**DEQ Staff Present (continued)**

Tom John, Microbiology Rules Manager, Water Quality Division  
Sharon Keene, Customer Resources Team Leader  
Beth Kittleman, Attorney General's Office  
Lisa Kronberg, Deputy Attorney General  
John Lawson, Mine Waste Program Scientist  
Mark Mason, Wastewater Engineer Program Lead  
Mike McGown, Administrator, Boise Regional Office  
Mike McIntyre, Surface Water Program Manager  
Bruce Schuld, Mine Project Coordinator  
Paula Wilson, Rules Coordinator

**OTHERS PRESENT:**

William Eddie, Advocates for the West  
Beth Elroy, Micron  
Roger Furner, private citizen  
Cyndi Grafe, U.S. Environmental Protection Agency (EPA)  
Justin Hayes, Idaho Conservation League (ICL)  
Jack Lyman, Idaho Mining Association (IMA)  
Jim Moyer, Southwest Basin Advisory Group member  
Don Munkers, Idaho Rural Water Association (IRWA)  
Alan Prouty, J. R. Simplot Co.  
Dick Rush, Idaho Association of Commerce & Industry (IACI)  
Lynne Sedlacek, City of Eagle Sewer Dept.  
Dennis Stevenson, Administrative Rules Coordinator, Department of Administration  
Sue Summers, Potlatch  
John Tensen, City Engineer, City of Boise and Association of Idaho Cities Public Works Professionals  
Steve West, Centra Consulting

- ❖ All attachments referenced in these minutes are permanent attachments to the minutes on file at the Idaho Department of Environmental Quality. To obtain a copy, contact the Board assistant at (208) 373-0465.

**PUBLIC COMMENT PERIOD**

No comments were received.

**AGENDA ITEM NO. 1:           ADOPTION OF BOARD MINUTES**

- a.     October 12, 2005 Meeting
- b.     Review of Action Items

Consideration of this agenda item was rescheduled to November 17.

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

Director Toni Hardesty updated the Board on a number of items including:

- Budget issues – DEQ continues to struggle with the increased workload due to growth in the state and decreasing federal dollars. The Department is considering using fees to help with expenses. A recent survey of all 50 states found the typical budget is made up of 17% general funds, 32% federal funds, and 51% fees. In comparison, Idaho’s budgets receive only 7% in fees. Any fees that are imposed or increased will go through negotiated rulemaking and will be brought before the Board.
- DEQ has requested approval from the Governor for several new positions to be funded by the general fund; two in Air Quality permitting and two in Water Quality permitting for plan and specification review. Additional funds were requested to fill vacant positions that were frozen due to the budget shortfall.
- DEQ is investigating a new process for notifying the public when rules are out for public comment. There is currently no formal process; staff attempt to notify all known interested parties. An electronic process is being considered that would allow individuals to sign up on the DEQ Web site and identify any areas of interest. They will then automatically receive notification when any rule in that category goes out for public comment.
- The Governor has appointed the members of the Treasure Valley Clean Air Council. The Council will develop an air quality plan for presentation in April 2006. DEQ will work closely with the Council.

Director Hardesty discussed a list of issues she has been tracking that the Board expressed interest in or requested training on including briefings on tribal law issues, natural background determinations, how significant degradation is determined, and the role of the Board and opportunities for involvement. Chairman MacMillan asked for a briefing on mercury toxicity and other issues involving the Clean Air Mercury Rule that will come before the Board. Marti Calabretta asked if the Board could also receive a briefing of how courts are considering the cumulative effects of problems and how that might be affecting DEQ. Don Chisholm asked if there was data on what other states are charging for fees compared to Idaho. Director Hardesty confirmed such information and comparisons were available. She will present the information to the Board at a future meeting.

Ms. Calabretta commended the Department for the “No Idle Zone” program of public outreach and education to reduce vehicle exhaust in school zones. She said the radio ads were well done and strongly supported DEQ’s involvement in such programs that educate the public and focus on young people.

**AGENDA ITEM NO. 3:**                    **RULES FOR ORE PROCESSING BY CYANIDATION, DOCKET NO. 58-0113-0501 (PENDING RULE) (RESPONSE TO SENATE BILL 1169)**

**AGENDA ITEM NO. 4:**                    **RULES FOR ORE PROCESSING BY CYANIDATION, DOCKET NO. 58-0113-0502 (PENDING RULE) (ICLS PETITION FOR RULEMAKING AND CLARIFICATION OF THE PERMITTING AND OPERATING PROCESS)**

Bruce Schuld, Mine Project Coordinator, stated Agenda Items 3 and 4 would be presented together because they tie in together both procedurally and historically. Docket No. 58-0113-0501 was initiated under direction of Senate Bill 1169, adopted by the 2005 Idaho Legislature to revise the Surface Mining Act with respect to bonding, closure plans, and time frames for

rejecting or approving permits for ore processing facilities using cyanide. The bill transferred the responsibility for bonding to the Idaho Department of Lands (IDL) and directed DEQ and IDL to promulgate temporary rules implementing the provisions of the legislation by August 1, 2005.

Docket No. 58-0113-0502 was initiated by DEQ for the purpose of making revisions to the Rules for Ore Processing by Cyanidation in response to the Idaho Conservation League's (ICL) Petition for Initiation of Rulemaking filed with the Board in February 2005. This docket addresses an increase in fees for the permitting process as well as some other changes deemed necessary to assure consistency with state and federal law and the efficient operation of a system for permitting ore processing by cyanidation.

DEQ conducted extensive public outreach for these rulemakings, holding 13 public meetings around the state to inform the public and elicit participation in the negotiated rulemaking. The negotiated rulemaking meetings were well attended by the mining community, environmental groups, the cities and counties, and a citizen at large. The IDL rule package was adopted by the Lands Board yesterday and it will go to the 2006 Idaho Legislature for approval.

Mr. Schuld explained the changes proposed in the rules in detail and reviewed the public comments received and changes made to the rules as a result of the comments.

Roger Furner, a private citizen who attended all the negotiated rulemaking meetings, testified regarding both dockets. Mr. Furner complimented DEQ and IDL staff on their efforts. He became interested in the rulemaking after reading a newspaper article on the process. During the meetings, he learned that cyanide itself is not a terribly dangerous element when used in the mining process, but it has to be treated with respect. He was more concerned about the potential of polluting the water and air from things such as arsenic and other chemicals. Mr. Furner stated, as a taxpayer, he was very concerned that large mining companies can come in and take great wealth from the public lands and pay a very negligible amount for that wealth. He felt the fees should be higher. He stated he understood DEQ's position in setting the fees as they did because the mining companies can go to the legislature and the legislature can come back and get down on DEQ. It is a circle, that as a citizen, he felt looked bad. He congratulated the Board for supporting DEQ staff.

➤ **MOTION:** Craig Harlen moved the Board adopt the Rules for Ore Processing by Cyanidation as presented in the final proposal under Docket No. 58-0113-0501.

**SECOND:** Dr. Joan Cloonan

**VOICE VOTE:** Motion carried by unanimous vote.

➤ **MOTION:** Dr. Joan Cloonan moved the Board adopt the Rules for Ore Processing by Cyanidation as presented in the final proposal under Docket No. 58-0113-0502.

**SECOND:** Marguerite McLaughlin

**VOICE VOTE:** Motion carried by unanimous vote.

**AGENDA ITEM NO. 5: WATER QUALITY STANDARDS AND WASTEWATER TREATMENT REQUIREMENTS, DOCKET NO. 58-0102-0503 (PENDING RULE) (UPDATE IDAHO TOXICS CRITERIA)**

Barry Burnell, Administrator, Water Quality Division, stated the purpose of this rulemaking was to bring Idaho's toxics criteria up to date with current science and recommendations of the EPA. The rule will revise the human health criteria in Section 210 to account for revised fish consumption rates and newer information on health effects, and to adopt an Idaho specific cadmium aquatic life criterion based on recalculation using additional, more recent toxicity data.

Don Essig, Water Quality Standards Manager, explained the proposed rule in detail and discussed the negotiated rulemaking process. An entire meeting was devoted to discussions about the proposed arsenic change. At the end of the meeting, it was decided to withdraw the proposed change to the arsenic criteria from the rule. DEQ will still need to address the issue.

Mr. Essig briefly discussed the three sets of comments received on the rule. The City of Boise and the Association of Idaho Cities were in favor of the rule and supported the decision to withdraw arsenic. The Idaho Conservation League (ICL) and the EPA commented in favor of the criteria being adopted in the rule; however they were critical of DEQ's decision to withdraw arsenic and the lack of action on the current cap on hardness for certain metals. A great deal of data was prepared by the USGS proposing an Idaho specific cadmium criteria. The data shows toxicity in cadmium extends below Idaho's current hardness cap. DEQ's response to this issue was to agree to take the matter up in a special rulemaking in the spring of 2006.

The revisions included in this proposed rule are not broader in scope, nor more stringent than federal regulations, and do not regulate an activity not regulated by the federal government.

Dr. Joan Cloonan asked for clarification that EPA would have final approval on the rule. Mr. Essig confirmed EPA would have to approve the rule before it would become effective for Clean Water Act purposes. Should they disapprove the rule, they would give DEQ 180 days to rectify the rule. If the rule is not rectified to their approval in that timeline, EPA would then promulgate a federal rule.

Chairman MacMillan asked if EPA was considering changing or expanding the way it looks at dioxins to a toxic equivalent basis. Mr. Essig was not aware of any change but said EPA's methodology for deriving human health criteria does talk about the concept of toxics equivalency factors and encourages their use.

Don Chisholm asked how the fish consumption rate was determined. Mr. Essig replied the rate was set by a Department of Agriculture nationwide survey. EPA encourages, and Idaho would like to have, state-specific information on fish consumption. It is well known there are sub-populations in Idaho that are at greater risk and greater exposure because they consume much more fish than the national rate. Mr. Chisholm asked if the tribes were working on this issue. Mr. Essig stated the Nez Perce Tribe has been involved in the matter through the Columbia River Intertribal Fish Council, which received an EPA grant to study the matter. The four tribes who are members of the Council surveyed their members and found fish tissue consumption rates much higher than the national average, upwards of 350 grams per day. This matter is also an

issue of concern in Oregon, where they also recently proposed new toxic criteria update. The Umatilla Tribe raised objections, and EPA and the Tribe are now trying to resolve the matter.

Marti Calabretta noted the tribes are not usually involved in rulemaking efforts in Idaho, and questioned whether there should be specific efforts to involve the tribes in the rulemaking early on to avoid such problems.

Marti Calabretta commented the USGS study was excellent and very helpful. She asked if the study was done for other states for cadmium, how the study was funded, and if there were plans to involve USGS in future efforts regarding the hardness or arsenic issues. Mr. Essig stated the study was funded with DEQ dollars. Normally, USGS will match funding dollars, but because they felt the nature of this work did not fit into their mission and the monies they had available, they did not contribute. DEQ would very much like to have USGS involved in the hardness discussions. Chris Mebane, USGS, is recognized as an expert in the toxicological affects, particularly of metals on aquatic life. USGS has not been involved in such studies in other states.

- **MOTION:** Don Chisholm moved the Board adopt the Water Quality Standards and Wastewater Treatment Requirements, as presented in the final proposal under Docket No. 58-0102-0503, with the temporary rules becoming effective December 7, 2005.  
**SECOND:** Craig Harlen  
**VOICE VOTE:** Motion carried by unanimous voice vote.

**AGENDA ITEM NO. 6:**            **WASTEWATER RULES, DOCKET NO. 58-0116-0501 (PENDING RULE) (NEW RULE CHAPTER, INCLUDES RESPONSE TO SENATE BILL 1220)**

Barry Burnell explained the 2005 Idaho Legislature enacted Senate Bill 1220 requiring DEQ to establish facility and design standards. This rulemaking creates a new rule chapter in response to SB1220. It also directed DEQ to create a panel of licensed professional engineers to assist DEQ in the development of facility and design standards. With the passage of SB1220 and the exclusion of extensions for public water systems and sanitary sewer from the design review responsibility of DEQ, it was important for DEQ to develop rules that address extension projects.

This rulemaking addresses the following:

- Certain wastewater treatment requirements and definitions have been copied from IDAPA 58.01.02, "Water Quality Standards and Wastewater Treatment Requirements," and revised as necessary.
- Creates standards for design of wastewater collection system line extensions.
- Extends wastewater land application operator compliance deadline by 12 months or until April 15, 2007 to allow sufficient time for land application operators to be come licensed.
- Clarifies operator licensure requirements for large soil absorption systems with multiple owners.
- Clarifies operator licensure requirements for Class A effluent distribution systems.
- Adds necessary definitions.
- Adds the standard rule sections necessary for conformance with IDAPA 44.01.01, "Rules of the Administrative Rules Coordinator."

Mark Mason, Wastewater Engineer Program Lead, presented five proposed changes to the final proposed rules that came about as a result of public comment. He outlined the negotiated rulemaking effort conducted by DEQ and the panel of licensed engineers. The effort was well publicized and well attended by the regulated community.

The additional changes in response to comments were:

- 1) Add the word “public” just preceding the word wastewater in Section 203 Public Wastewater System Operator Licensure Requirements, and 203.07 and 203.08
- 2) Section 400.b. delete the following from the first sentence: “Plans developed for routine maintenance or equipment or replacement activities or plans for sanitary sewer extensions, when such facilities will be owned and operated by a city, county, quasi-municipal corporation or regulated public utility, shall not require preconstruction approval by the Department, provided that such plans and specifications are reviewed and approved by a qualified Idaho licensed professional engineer, ~~who was not involved in the preparation of the plans and specifications being reviewed,~~ to verify compliance with the requirements of these rules prior to initiation of construction.”
- 3) Page 11, Section 410.01, line 5, to add the following sentence: Comprehensive facility plans are not required for minor or routine collection systems. Nick Purdy asked if “minor or routine collection systems” was defined. Mr. Mason stated the definition will be added along with some others, during phase two of the rulemaking.
- 4) Page 13, Section 430.02.k.iv. Materials. Wastewater pipelines entering or crossing surface water bodies shall be constructed of ductile iron pipe water transmission pressure rated pipe with restrained joints conforming to Section 400 of the Idaho Standards for Public Works Construction or other suitable pipe with restrained joints; ~~otherwise they shall be constructed so they will~~ capable of being installed to remain watertight and free from changes in alignment or grade. Material used to back-fill the trench shall be concrete slurry, stone, coarse aggregate, washed gravel, or other materials which will not readily erode, cause siltation, damage pipe during placement, or corrode the pipe.
- 5) Page 14, Section 493 Facility and Design standards for Wastewater Systems – Wastewater Lagoons. Strike the entire section. There have been a number of comments regarding this section. While DEQ believes it is appropriate this section be in the rules, they recognize the need to negotiate the section further. DEQ requested the section be stricken from the rule being presented, with the understanding the issue of wastewater lagoons will be added to the negotiated rulemaking discussions in phase two.

Don Chisholm was opposed to change 2) because the review process is a separate process from the design process. He believed the word “reviewed” in the statute implied that a separate person, and not the original drafter, would review and approve the documents. Barry Burnell agreed with Mr. Chisholm’s comment. He explained the issue driving the proposed change is a determination by the Professional Engineering Board of Idaho regarding conflict of interest. This has caused concern among the cities. Mr. Burnell believed it has also caused an interpretation of Senate Bill 1220 that is different from the spirit and intentions of the bill as it was negotiated. DEQ negotiated the bill with the concept that a second set of eyes, a qualified professional engineer, would be reviewing the projects instead of DEQ. DEQ is fully supportive of that concept. Mr. Burnell will request reconsideration from the Professional Engineering Board on November 18, 2005 on its determination of conflict of interest. There have been some discussions with the chairman of the P.E. Board, and he seems to be somewhat receptive to DEQ’s ideas of ways to avoid conflict of interest issues with the cities.

Mr. Burnell stated it is DEQ's intent to discuss this issue again in the second phase of the negotiated rulemaking for the facility design standards. He asked the Board to strike the issue from the rule being considered today with the understanding that DEQ will be negotiating this concept in the second phase of the negotiations. Director Hardesty pointed out that a decision will also be available at that time on the P.E. Board's reconsideration of the conflict of interest issue.

Don Chisholm stressed the Board's duty to protect the public health and questioned whether the P.E. Board should be directing the actions of the Board of Environmental Quality. He believed the Board had a duty to the public to provide a level of protection that was not based on the P.E. Board's view of conflict of interest, which might be affected by economic interest.

Mark Mason stated this is phase one, year one, of a two-phase rulemaking. DEQ intends to submit phase one to the upcoming legislative session, and phase two the following year. The phase two negotiated rulemaking will begin with the first meeting on December 15, 2005 at DEQ. A second meeting is scheduled for January 17. Barry Burnell stated the phase two negotiations would contain many aspects of treatment that are part of the Ten States Standards. The DEQ strategy for developing the facility and design standards was for phase one to set up the rule, put the structure in place, and include the extensions and aspects of extensions that are important for those currently doing extension reviews. Lagoons were originally included in phase one because of a policy of requiring seepage testing as part of the Wastewater Land Application Program. Due to the number of concerns expressed about that portion of the rule, DEQ is now asking to have this section struck from the current proposed rule so the issue can be negotiated further.

Craig Harlen asked if there was a definition of wastewater lagoon. Mark Mason responded the term was defined in the first paragraph of Section 493 as “. . . municipal and industrial lagoons, discharging and non-discharging lagoons, treatment lagoons, storage lagoons, tailings ponds, and any other lagoons that if leaking, have the potential to degrade waters of the state. These rules do not apply to single-family dwellings utilizing a single lagoon, two (2) cell infiltrative system, those animal waste lagoons excluded from review under Section 39-118, Idaho Code, or storm water ponds.” Mr. Harlen confirmed this would include evaporation ponds, slurry ponds, and tailings ponds involved in all processes in the state irregardless of whether it was wastewater treatment, sewage treatment—any wastewater that is capable of impacting the background water quality. Mr. Mason confirmed this understanding and pointed out the term wastewater is defined as other than just sewage.

Marti Calabretta asked if it would address the concerns to just omit tailings ponds and let the rest of the section go forward. She asked what concerns were expressed about seepage testing requirements and how they were expected to be addressed in future negotiations. Barry Burnell stated DEQ supports the section, but feels further discussion is needed with the stakeholders to gain support.

Paula Wilson pointed out two minor housekeeping corrections to Section 600.02

Mark Mason briefly discussed the stringency issue, noting the federal government does not regulate the items in these rules, but does have guidance on a number of the issues.

Nick Purdy asked how DEQ intended to respond to the concerns expressed in the written testimony submitted by Steve West, Centra Consulting (Attachment 1). Barry Burnell noted he had just received the written testimony, and had only briefly reviewed the document. He believed the question presented was whether or not Idaho Code § 39-118 has applicability to private industry. He thought the DEQ proposal to strike Section 493 would address the majority of concerns expressed in Mr. West's testimony. Section 39-118 has been applied to industry before. Procedurally, there are some questions raised on whether or not DEQ should have used legislative format (with underline and strikeout) in presentation of the rule. It is up to DEQ to choose whether or not to use that format; they are not required to by code. Since this is a new rule, DEQ chose not to use legislative format. There are some deletions that were brought over from the Water Quality Standards and Wastewater Treatment Requirements that primarily deal with the NPDES Program. They were deleted from this rule because DEQ does not yet have authority to implement the NPDES Program.

In response to Mr. West's allegation that the rule was prepared without input from the private industry sector, Mr. Burnell stated comments were received from Hecla and IACI. Negotiated rulemaking meetings were held and private engineering firms representing both cities and industry attended the meetings and were on the panel. Mr. Burnell reiterated DEQ's belief that the changes proposed in this meeting would address the concerns expressed in Mr. West's testimony.

Dennis Stevenson, Administrative Rules Coordinator, explained that legislative format cannot be used when new rule chapters are written. If DEQ had chosen to use legislative format, all of the text would have been underlined, and that simply would not make sense. Doug Conde said to help understand what was deleted from the portions of text that were moved over from the Water Quality Standards, you should look at those rules and it clearly shows what was struck. It was clearly explained in the public notice that you need to look at both dockets together. A working copy clearly showing what text was brought over from the Water Quality Standards and what text was deleted (with strikeout and underline) was distributed to stakeholders including IACI during the public comment period.

Craig Harlen cited language from Senate Bill 1220, “. . . to assist DEQ in establishing facility standards and design standards for new sewage systems, sewage treatment plants or systems, other waste treatment or disposal facilities, public water supply systems or public water systems.” Mr. Harlen questioned whether “new” applies just to new sewage systems, or to all of the items listed in the series. Doug Conde noted this language was from the preamble of the bill and pointed out Section 2 of the bill that directs DEQ to develop these standards says that, “DEQ is directed to adopt facility and design standards for all facilities regulated by § 39-118.” All facilities regulated by § 39-118 include both new and modified waste treatment disposal facilities. It is clear from the legislation as a whole that it includes both public drinking and wastewater systems and private industrial facilities. Whether it includes tailing impoundments is an issue DEQ is willing to discuss in the next phase of the rulemaking.

Nick Purdy stated he did not support the change to Section 400.01.b. that removed the requirement for the review and approval of another professional engineer, who was not involved in the preparation of the plans and specifications being reviewed. Barry Burnell noted the way the rule is structured, striking that section leaves the exact same language that is in statute. Mr. Burnell reiterated DEQ's belief that it is appropriate and the spirit of the negotiations of the statute, that “review and approval” means a separate set of eyes (not the drafting engineer) would

review and approve plans and specifications. DEQ will be discussing this issue in phase two of the rulemaking, which will take place after the P.E. Board has made a decision on the appeal of the conflict of interest finding.

Don Chisholm expressed concern that removing the requirement to have a “second set of eyes” review the plans and specifications would not provide adequate protection to the public health in situations with one-man engineering firms and small cities with a single engineer. Mr. Burnell stated DEQ has discussed such situations and believes there are ways to address any problems. Mr. Chisholm noted the disciplinary process can have a significant lag time and often problems are not discovered until years after a violation. He favored DEQ having authority to prevent a project from going forward until a set of plans are submitted that have been reviewed and approved by a second, independent professional engineer who was not involved in the design and preparation of the plans.

Doug Conde stated at DEQ’s request, he conducted a legal review of whether the language of § 39-118 requires a third-party review. His legal opinion was the use of the words “review and approval” and a “review to verify compliance” all seem to indicate a third-party review is intended. He discussed this finding with the legal counsel for the counties, Jerry Mason, who did not agree with the finding. Mr. Mason does not believe a third-party review is required; instead he believes a design engineer who prepares the plans can self-certify that the plans comply with requirements. Mr. Conde felt there was a credible debate over the issue and so DEQ is recommending leaving the language as it is in the statute for now, and bringing it up during the second phase of negotiations.

Craig Harlen stated after reading the text of SB1220, he still questioned whether the word “new” pertains to all of the items in the sentence separated by commas, or just to new sewage systems. He did not believe the language applied to existing structures. Mr. Conde clarified the language applies to only the expansion or modification of existing facilities. Mr. Harlen questioned why the rule goes beyond the scope of SB1220 and applies to existing ponds. Mr. Conde explained part of the rule clearly does go beyond the authority under in SB1220. There are significant provisions beyond just the § 39-118 authority that deal with DEQ’s general authority to regulate facilities to protect water quality.

Chairman MacMillan questioned the applicability of the new rule to the aquaculture industry. He noticed the new rule does not refer to the discretion of the Director in dealing with dairies, mining, and others. Doug Conde confirmed aquaculture is specifically excluded from the rule. The provision for the DEQ Director to make the determination that certain facilities or classes of facilities do not pose a threat to human health or the environment and need not be reviewed is under § 39-118. There is also an exclusion in Section 2 for the application of § 39-118 to dairy systems, storm water best management practices, routine maintenance or equipment or replacement activities. It is not DEQ’s intent to apply these rules to aquaculture because it is covered separately in statute.

Don Chisholm asked if Section two of the statute was intended to create guidance or rules. Mr. Brunell stated Section two is intended to develop facility standards and design standards. DEQ has the authority to adopt guidance to assist in implementation of rules. DEQ may develop guidance associated with design standards in the future

Dr. Joan Cloonan noted there are several places where the old rule applied only to publicly-owned treatment works, while the new rule appears to cover everyone. She questioned whether a professional engineer would have to inspect plans for small modifications or repairs for industrial facilities. Mark Mason said similar discussions and questions were raised during the land application guidance review. These discussions determined that DEQ does not exercise authority to review in-plant process engineering. DEQ does not review in-plant process engineering, nor does § 39-118 require the person who designs the in-plant process to be a licensed engineer. He noted this is specifically addressed in the last sentence of Section 400.01.b. which reads, "For industrial situations, the Department does not require review of industrial in-plant process, only those process that treat or distribute wastewater."

Dr. Cloonan asked if Section 400.02 which requires a professional engineer for alteration or expansion could be applied to industrial facilities. She felt this was an expansion from the original regulation and feared it could be applied to minor changes or repairs at industrial sites such as potato processing facilities. Mark Mason assured the new rule did not apply to waste treatment processes within the plant. The rule does address industrial waste treatment processes outside of the plant that is treated either for discharge to the river or land application. Doug Conde stated routine maintenance and equipment replacement activities are specifically excluded and do not require approval from DEQ.

Dr. Cloonan observed there are many changes in the new rule that were previously not noticed by industry. She cautioned the rule should not be looked at as a combination of old text carried over with some deleted items and some new items added by SB1220; it should be closely reviewed as a whole new rule. She added, for those who might be concerned about deleting the section on lagoons, the Land Application Guidance group has discussed this issue extensively with industry and other stakeholders. The section will be published in the guidance document in December 2005. She thought the issue should be quickly resolved in the second phase of the negotiated rulemaking.

Jack Lyman, Idaho Mining Association, was concerned the rule was being expanded beyond what was intended by SB1220 to include industrial facilities. In reviewing the legislative history, minutes, and materials he found no indication that DEQ requested the legislation expand the rule to include industrial facilities. That was not in practice before the passage of SB1220, and there is nothing in the legislation or the testimony that indicated they should go down this road. While DEQ may have the authority to enact these kinds of rules, he thought it was disingenuous to say SB1220 directed it. The mining industry was not contacted to take part in the negotiated rulemaking and was not told the rule would address tailings ponds. The IMA is very upset by the claim that the expansion is required by SB1220.

Mr. Lyman agreed the use of the legislative format for revisions was not practical in new legislation, but stressed the importance of providing the regulated community a clear understanding of what changes are being made. When sections are deleted in one rule and transferred to another, it isn't always in its entirety. In the past, they have provided a working copy, as was eventually done here, but that is not the way the original rule came out. He suggested the Board consider either an informal or formal policy that when there might be confusion, the department issues a working copy as a matter of course. It is not required under the APA, but when reviewing the rules, it makes it much easier to spot changes.

Mr. Lyman stated he appreciated DEQ eliminating Section 493 regarding lagoons to try to resolve the issue. He stressed the IMA does not believe there was a legislative directive to include lagoons in the rulemaking, and they do not believe it needs to be done. He suggested the rule be limited to the issues addressed in SB1220 -- the public wastewater facilities and sewage treatment plants. If DEQ intended otherwise, they should have indicated in the passage of the bill that it was their intent to comprehensively expand the regulatory reach of this rule to include industrial facilities. Mr. Lyman stated there was never an indication of that in any written or oral communication.

Marti Calabretta asked how many tailings ponds would be covered under the section related to lagoons. Mr. Lyman said he did not know the total number. He represents six members with approximately a dozen ponds. Smaller operators may or may not have tailings ponds. He stated the mining industry was already heavily regulated and did not see the value to industry or the citizens of state to create more hurdles for them to jump over. Ms. Calabretta acknowledged his concerns and questioned the specific problems the mining industry expected from the rules. She asked if mining could be excluded from the rule like other issues. Lagoons may potentially be an issue in other private interests and you need to look at the needs of the whole state.

Mr. Lyman said if he was aware this was intent, he would have sought an exemption for mining when the legislation was being developed. He disagreed with application of this rule to existing tailings ponds. Tailings ponds operate differently and it is unclear how they would leak test or judge compliance. If DEQ thinks there is problem with these nonmunicipal facilities, they should seek statutory amendment or appear before a legislative committee.

Director Hardesty reminded there was a precursor bill (HB143) to SB1220, and there was much discussion and testimony regarding industrial facilities. She has made that testimony available through a public information request from IACI. While it may not have been discussed in relation to SB1220, it was because it had already been discussed related to HB143.

Craig Harlen said he was personally aware of two larger industries in the southeast part of state that manage upwards of one to two dozen ponds each. The ponds are managed with totally different objectives, and it changes throughout the year depending on meteorological conditions. He estimated there might be hundreds of private industrial ponds that might now need to have a P.E. stamping their process changes throughout the year.

Director Hardesty pointed out the statute directs the department to form a group of facility engineers to establish facility standards and designs. There was significant discussion during the committee meetings with regards to the fact that engineers were asking for more clarity in DEQ rules. The consensus of the legislature was that the issues needed to be ironed out there needed to be more clarity with regards to the rules so there would be fewer opportunities for DEQ engineers and engineers from outside entities to disagree over what the facility standards were.

Jack Lyman discussed the statement of purpose for SB1220. He felt it clearly defined the intent of the bill was to focus on a very specific issue that had been brought to their attention -- the review of municipal wastewater facilities, and that is what the regulated community believed the impact of SB1220 would be when it went through the process.

The Board discussed possible solutions to address the concerns while still meeting the directives of the legislation.

Dick Rush, IACI, testified against the proposed rule. He had a number of concerns with the rule, some of which had already been discussed. He discussed his recollection of the history of HB143 and SB1220. He thought anyone who was involved would agree that the bill was not intended to increase the regulatory burden on industry; it was intended to reduce the regulatory red tape on municipalities and to speed up the review process.

Mr. Rush was concerned the requirements of Section 2 of the bill were not fully met. Section 2 requires DEQ to appoint a committee of professional engineers to assist with facility and design standards. IACI just recently learned this committee of four was appointed; two city engineers and two engineering firms doing business with cities. No one represented industry. Mr. Rush never heard or read any notification that the committee was going to meet or that it was being established. IACI was not notified, and no formal minutes were taken. Mr. Rush observed that the letters to the appointees said, "thank you for agreeing to help DEQ draft standards for wastewater collection line extensions." This was the direction DEQ gave to the committee.

Mr. Rush requested the Board not go forward with the rule at this time, and send the matter back to DEQ to negotiate and come back with a temporary rule to meet the statutory requirement to have the rules in place by the July 2006. He thought the suggested changes discussed by DEQ addressed most of IACI's concerns, but could not support the rule because there was no opportunity to fully consider the changes and discuss them with IACI members.

Don Chisholm asked Mr. Rush whether he thought Section two of SB1220 was intended to promulgate rules or promote the writing of guidance. Mr. Rush stated IACI did not participate and he did not testify on SB1220. It was passed at the end of the session after the initial HB143 was derailed. He reiterated his belief that the bill was not intended to affect industry.

Chairman MacMillan asked Mr. Rush if he could support the rule with the changes proposed by DEQ earlier in the meeting. Mr. Rush replied that while he felt better about the rule with the proposed changes, he could not support the rule without having an opportunity to fully review the suggested changes and discuss them with IACI members. He noted the most important issue to IACI was the change to delay Section 493 regarding lagoons. IACI does support that change.

Sue Sommers, Environmental Manager for Potlatch in Lewiston, Idaho, testified against the rule. She discussed the extensive regulation already in place at the facility. It has been analyzed and regulated for many years by a whole series of engineers. The NPDES permit has a general duty clause that requires the system to be designed and operated in accordance with good engineering practice. The facility has a very large wastewater system with six lagoons, one which is over 100 acres. She stressed the facility is already very heavily regulated by several layers of regulation. They make frequent modifications to the system to optimize the performance of the system. They have professional engineers on-site to oversee the modifications, but they are not necessarily documented and approved. The system is very specialized, and she was concerned about requirements to have modifications submitted for review and approval. She stated Potlatch did not support this rule, even with the changes, because it is another layer of regulation on top of many others.

Doug Conde pointed out the existing rules and the existing statute require the alteration or expansion of any wastewater treatment or disposal facility must submit plans and specifications to DEQ. This is not a new requirement DEQ is trying to put in place to set more specific

standards for the review process. DEQ is not suddenly expanding this rule to other than sewage treatment plants. This has always been in the rules and the reference to the Ten State Standards has always been in the rules. DEQ is simply calling out part of the Ten State Standards as part of the rule. He emphasized the idea that DEQ is suddenly now regulating industrial facilities where they have not in the past, is just not right.

John Tensen, Boise City Engineer, testified on behalf of Boise City and the Association of Idaho Cities Public Works Professionals. He served on the initial committee to draft SB1220 and submitted written comments (Attachment 2) expressing concerns and requesting specific revisions to the rule. He stated the modifications proposed by DEQ addressed the majority of his concerns and urged the Board's support of those modifications.

Mr. Tensen focused his comments on the plan review issue and the requirement for a second engineer review in Section 400.01.b. He discussed the history and concerns leading to the two pieces of legislation. SB1220 was a compromise that was not everything the parties wanted, but felt was an improvement over Idaho Code § 39-118 as it previously existed and over what was proposed by HB143. The cities do not support or see a mandate to require a second review. While it is good standard engineering practice and something the larger cities and firms do internally, it concerns them that SB1220 is being interpreted as requiring a second review. The conflict of interest finding that would prevent the second review from being an internal review, essentially guts anything they gained by the passage of SB1220. If the cities have to hire a consulting engineer or send the plans to DEQ for review, it will add additional time and steps that can threaten the public health during emergencies such as septic tank failures. Mr. Tensen stated he was unaware of any evidence that any plans that were inspected by a licensed professional city engineer caused any problems. He questioned the value of the requirement to have a second engineer inspect the plans if DEQ has never discovered any problems.

Mr. Tensen noted the smaller cities do still want DEQ involvement. Most do not have professional engineers on staff; and if they do, they do not want to have to pay a consulting engineer to review their plans. They appreciate having DEQ review their plans and having a second set of eyes to make sure whatever is being built in their city is being done correctly. From a cities perspective, they are not sure that a second review should absolutely be mandated. In his opinion, it was not the intent of SB1220.

Don Chisholm said it was his understanding that SB1220 was created because it was taking too long for cities to get their plan and specification reviews approved by DEQ, and the cities wanted the option to have a professional engineer sign off on the plans instead. It now appears there are other issues being raised. He asked Mr. Tensen if he could clarify the matter. Mr. Tensen responded the delay was one major problem. With the growth in the valley, there were sometimes four to eight week review times. There was also concern that DEQ was having non-professional engineers review professional engineer's work. In order to get plans approved, plans would have to be changed to comply with requirements set by a non-professional engineer. There was also a need for more clear design standards.

Barry Burnell clarified during the negotiations of SB1220, the concept was the second review does not necessarily have to be done by DEQ, but could be done by the cities. He pointed out Idaho Code § 39-118 did require review by DEQ of all plans. With SB1220, it now allows those reviews to be done by cities, counties, quasi-municipal agencies or regulated public utilities. This substitutes DEQ's role with the cities' role. A great deal of work has been done to make

sure this process works. The conflict of interest issue has raised a problem they hope to resolve with the appeal to the P.E. Board.

Mr. Burnell responded to the concern about non-professional engineers reviewing the work of P.E.s. DEQ does hire engineers-in-training (E.I.Ts.) when they lose staff and are unable to hire P.E.s. They operate under the direction of a licensed P.E. Anytime a DEQ E.I.T. corresponds with a P.E., they are doing so under the direction of a licensed P.E.

John Tensen stated the rule, with the changes proposed by staff, would meet their concerns. He thanked Director Hardesty for recognizing their concerns and supporting them all the way through this process.

Steve West, Centra Consulting, testified against the proposed rule. He summarized the five concerns listed in the written comments he submitted (Attachment 1).

- 1) The proposed rule goes far beyond the intended scope of SB1220. Based on his reading of the bill and discussions with drafters, sponsors, and co-sponsors, Mr. West believed the legislation was intended to apply only to publicly owned facilities and not be extended to industrial facilities; and certainly not to the extent of trying through expanded definitions to increase the regulatory scope and to place added burdens of testing, monitoring, and review on the private sector of the regulated community.
- 2) The proposed rule will result in significant costs and adverse economic impacts to the regulated community. The descriptive summary understates this. The reference to \$2,000 – 13,000 for leach testing does not give a good picture of the costs from the preparation, submittal, and follow-up for reports and efforts to ensure requirements are met. It would also increase costs to DEQ to perform the additional oversight to ensure compliance.
- 3) There are continuing procedural questions pursuant to requirements of the APA with respect to how the proposed rule has been presented resulting in a great deal of confusion. There continues to be at least confusion about how closely the spirit of the intent of the APA was followed. This kind of confusion precludes the kind of clear, concise, and robust discussion that is needed for a healthy and valid rulemaking.
- 4) The “Rulemaking and Public Comment Summary” is inaccurate. Mr. West asserted the summary was inaccurate regarding the cost impact, fiscal impact statement, and the legal authority for the rule.
- 5) The proposed rule was prepared without input from the private industry sector of the regulated community and as such violates the spirit and intent of the negotiated rulemaking process. Mr. West stressed the importance of conducting a negotiated rulemaking where issues have been thoroughly aired and discussed over a period of time by those impacted by the changes. Though not required by the APA, it is certainly encouraged and is the intent and spirit of the APA to conduct negotiated rulemaking. DEQ has a long history of very successful negotiated rulemaking that has resulted in the trouble free adoption of rules. He observed that no one on the committee appointed by DEQ to assist with establishing facility and design standards represented the private sector of the regulated community. These entities will be significantly impacted by this rule if it is allowed to go forward. While consulting engineers play a vital role in environmental compliance, they also stand to gain the most from additional stringencies and requirements. Mr. West believed a conflict of interest exists if only DEQ and consulting engineers are allowed to offer comments on the development of the rule. He

felt the fact that substantial changes were being proposed to the rule at the last moment was indicative of the fact that a healthy negotiated rulemaking was not conducted.

Mr. West believed it was not a good way to conduct rulemaking to make a lot of last minute changes in an attempt to get something passed, and then have to immediately go back into rulemaking for a lot of unresolved issues. He suggested instead that DEQ go back and work diligently with all stakeholders to get all the issues and concerns resolved to the extent possible and bring a rule back to the Board that has the support they are hoping for in the next rulemaking.

Mr. West added he agreed with Don Chisholm's concerns about an engineer self-certifying plans and specifications.

Board members discussed the options and possible revisions. Don Chisholm favored revising the rule to address only SB1220 by allowing plan approval by a P.E. rather than DEQ, and sending all other issues back to negotiated rulemaking. Dr. Cloonan was concerned how the revisions would affect industry and whether the revised rule would fulfill the needs of the cities. She questioned whether a statement could be added that would allow a judgment decision so the standards could apply to everyone as appropriate. Nick Purdy was not comfortable making such substantial changes to the rule at this stage. He favored tabling the rule and sending it back into negotiated rulemaking, and possibly adopting it as a temporary rule as soon as possible. Craig Harlen was also concerned how the rule would affect industry and believed the rule was far too broad and could result in a huge amount of regulation that was not intended.

Barry Burnell suggested staff rework the language in Sections 400 and 402 to address the concerns expressed by industry. The proposed changes could be presented later in the meeting.

Marti Calabretta stated she was ready to support the rule with the amendments proposed by DEQ earlier in the meeting. The main question seemed to be whether it was the intent of the Legislature to have this rule apply not just to public wastewater, but also to private wastewater. The Legislature sometimes passes a bill that has unintended ramifications. Issues that are already in the law may be amplified by the legislation. Ms. Calabretta feared tabling the rule or revising it to address only one issue would remove the motivation for future negotiations, and provide no clarification from the Legislature. If the rule is adopted, industry can then seek guidance from the Legislature if they choose.

Dr. Cloonan favored having staff bring a revised draft, as suggested by Mr. Burnell, to the meeting the next day. She felt some minor changes could be made to address some of the concerns, and the phase two rulemaking could go into more detail in separating out the things that are specifically for municipalities.

Don Chisholm favored bringing the rule in line with the statute and sending the other issues back to negotiated rulemaking so the regulated community could be fully included in the negotiations.

Nick Purdy reiterated his concern that the proposed changes were too extensive, and asked for legal guidance on the matter. Doug Conde replied it was a valid concern because making substantive changes at this stage could give the appearance of being outside the scope of the original notice of rulemaking. He said he would need to review the final draft rule to ensure it was in compliance with the requirements that changes be a logical outgrowth of what was

originally advertised, and are within the scope of the initial notice of rulemaking. Dr. Cloonan felt the most substantive change was the elimination of part of the rule, which would not be proposing something new, but simply splitting off part of the rule for consideration at a later time.

The Board deliberated the rule and proposed changes and discussed possible alternatives to address issues of concern. Chairman MacMillan determined, and the Board concurred, the Wastewater Rules, Docket No. 58-0116-0501 and the Water Quality Standards and Wastewater Treatment Requirements, Docket No. 58-0102-0504 (Agenda Items 6 and 7) would be tabled until November 17, 2005, following the Air Quality rules. He directed DEQ staff to prepare a clean draft with their recommended revisions for the Board's consideration. Board members concurred with the action.

**AGENDA ITEM NO. 8: IDAHO RULES FOR PUBLIC DRINKING WATER SYSTEMS, DOCKET NO. 58-0108-0501 ( PENDING RULE) (RESPONSE TO SENATE BILL 1220)**

Barry Burnell stated this rule docket will address the facility and design standards for public drinking water systems that were required by SB1220. He introduced Tom John, DEQ Microbiology Rules Manager, who took part in the committee to develop the standards.

Tom John presented the rule and explained the changes in detail. A panel of licensed engineers assisted DEQ in developing a preliminary draft, which was then taken through negotiated rulemaking. The negotiated rulemaking was well attended by a diverse group of stakeholders. DEQ does not anticipate any increased cost to the regulated community as a result of this rule.

One point of confusion with the rule has been the inclusion of two parts of the recommended standards for waterworks, or what is referred to as the "Ten State Standards." The Ten State Standards have always been part of the rules, but in the past were incorporated by reference. The only change is that they are now printed in the rule instead of just incorporated by reference. The two parts were printed in the rule so all the language would be in one document instead of two.

EPA submitted a letter of comment expressing concern about the potential for erosion of DEQ's ability to ensure that public water systems are designed and constructed in a manner that makes them capable of achieving compliance with the Safe Drinking Water Act, which is a condition of the primacy agreement with EPA. However, EPA reserved judgment and advised DEQ watch how it is implemented and what the actual on-the-ground effects are before they can fully evaluate whether their concerns are warranted.

In regards to the stringency issue (Idaho Code § 39-107D), this rule will regulate an area not regulated by the federal government. The standards used in the design and construction of public water systems are based on nationally accepted criteria such as the standards of the American Waterworks Association and the Ten States Standards.

The changes in this rule include:

- Modify the plan and specification review language to provide for construction approval of plans for water main extensions by licensed, qualified professional engineers representing the cities, counties, and water districts.

- Added definitions to bracket the project types eligible for review by a P.E., and to clarify the use of guidance
- Moved language from the Ten States Standards, Part 1 regarding plan and specification review and Part 8 which deals with distribution systems with pipelines, into the rule instead of incorporating them by reference.

Dr. Joan Cloonan asked if the language regarding the review and approval by a P.E. who was not involved in the preparation of the plans and specifications raised the same concerns as it did in the Wastewater Rule. Tom John responded that in order to be consistent with the Wastewater Rule, the language should probably be stricken and reserved for the phase two negotiated rulemaking until the conflict of interest issue is resolved by the Board of Professional Engineers.

Don Chisholm objected to striking the language and restated his concerns that plans and specifications should be reviewed by a second set of eyes to protect the public health and environment, and such decisions should not be delegated to the Board of Professional Engineers.

Barry Burnell explained how the rule would impact a small public water system. The rule excludes from DEQ review, projects owned and operated by a city, county, quasi-municipal entity, or a regulated public utility. The rule provides the consulting engineer one source to refer to for standards.

- **MOTION:** Craig Harlen moved the Board adopt the Idaho Rules for Public Drinking Water Systems as presented in the final proposal under Docket No. 58-0108-0501 with the following amendment: On Page 383, Section 551.04.a. Review of Plans and Specifications, strike the following words; “. . .who was not involved in the preparation of the plans and specifications being reviewed . . .”

**SECOND:** Dr. Joan Cloonan

- **SUBSTITUTE MOTION:** Marti Calabretta moved a substitute motion to adopt the Idaho Rules for Public Drinking Water Systems as presented in the final proposal under Docket No. 58-0108-0501.

**SECOND:** Don Chisholm

**DISCUSSION:** Ms. Calabretta said clearly the intent of Section 551.04.a. was a trade-off for the public. It removes the oversight of a public agency, who will protect by law and mission, the public health and drinking water; and allows the substitute of the professional engineer – a person who is not first in place or have any other connection in terms of conflict of interest. She felt the Board must assure for the public in Idaho that this will be appropriately done. She stressed this in no way denigrates the ability or trust of professional engineers; it is simply being clear and above-board relating to the issue of the protection of the public.

Don Chisholm agreed with Ms. Calabretta’s comments and reaffirmed his belief that the Idaho Legislature intended an independent review of plans and specifications and not a self-certification.

Craig Harlen commented his motion simply suggested exactly what DEQ has changed in its recommendations on the Wastewater Rule, and that is to wait until there is a ruling on the conflict of interest question from the Board of Professional Engineers. It would merely conform the drinking water change to the wastewater change.

Ms. Calabretta pointed out the change in the wastewater rules has not been approved. She believed the issue was whether any group, having its professional standards within its group

dealing with conflict of interest, is sufficient in protection of the people of the state and their water.

**ROLL CALL VOTE ON SUBSTITUTE MOTION:** Motion carried. 5 ayes (Ms. Calabretta, Mr. Chisholm, Dr. Cloonan, Ms. McLaughlin, Dr. MacMillan), 1 Nay (Craig Harlen), 1 abstain (Nick Purdy).

**AGENDA ITEM NO. 9: IDAHO RULES FOR PUBLIC DRINKING WATER SYSTEMS, DOCKET NO. 58-0108-0601, (TEMPORARY RULE) (POINT OF USE TREATMENT DEVICES)**

Barry Burnell explained this temporary rule will provide DEQ greater flexibility in the use of point of use treatment technology for drinking water systems. Point of use treatment units are used to treat some chemical contaminants such as arsenic.

Lance Nielsen, Drinking Water Program Manager, explained the details of the rule. A point of use treatment device is a relatively simple pre-engineered, self-contained unit. It is typically installed under the kitchen sink to treat a single tap. It can replace a centralized treatment plant that treats all of the water going through the entire distribution system. Only 1%-3% of the water going into a distribution system is actually ingested; most is used for irrigation and other domestic purposes. In certain cases, point of use treatment devices are very good alternatives. The rule is being presented as a temporary rule to ensure this technology is available to water systems before the new federal arsenic standard becomes effective January 23, 2006.

The Idaho Rural Water Association submitted written comments in support of the rule (Attachment 3).

Regarding the stringency requirements of Idaho Code § 39-107D, there is no comparable code of federal regulations to adopt by reference; however there is a federal statute that lifted the ban on point of use devices, made them available, but does not define specifically what is required. This rule is not broader in scope nor more stringent.

Board members discussed the details of the rule and challenges of maintaining the units. Ms. Calabretta asked to be updated on how the rule works once it is put in practice.

➤ **MOTION:** Marguerite McLaughlin moved the Board adopt, as temporary rules, the Idaho Rules for Public Drinking Water Systems, as presented under Docket No. 58-0108-0601 with an effective date of November 17, 2005.

**SECOND:** Don Chisholm

**VOICE VOTE:** Motion carried by unanimous voice vote.

**AGENDA ITEM NO. 10: RULES FOR ADMINISTRATION OF WATER POLLUTION CONTROL LOANS, DOCKET NO. 58-0112-0501, (TEMPORARY RULE) (STATE REVOLVING FUND PROGRAM LOAN FEE)**

Barry Burnell stated the State Revolving Fund is one of the programs experiencing a reduction in federal funding. The program is running out of funding to administer the loan program and this rule will establish a fee in the form of a percentage of each loan. The fee will be up to 1% of the loan, but will be offset in a reduced interest rate for the loan, so there is no financial impact to the community.

Bill Jerrel, Loan Program Manager, provided a brief history of the State Revolving Fund program and explained the details of the rule. The federal grant for the program has been steadily declining from \$6.2 million in 2004, to \$5.2 million in 2005, to \$3.1 in 2006, and possibly zero in fiscal year 2007. Congress has already appropriated the FY2006 money, but likely will be rescinding about 30% of it to cover the cost of hurricanes Katrina and Rita. There are 39 other states that use a fee to fund their loan programs.

Lynne Sedlacek, City of Eagle Sewer Department and member of the Eagle City Council, testified in support of the rule. The city of Eagle has used the State Revolving Loan Fund in the past to help a subdivision change its failing septic systems to central sewer, and has applied for some upgrades to its water system. They support the program and feel it is very important to their community. Ms. Sedlacek said most of the people moving into this area are accustomed to such fees. She believed these user fees were the most equitable and widely accepted. She expressed her appreciation for the help the city of Eagle has received from the program and DEQ staff and again stated her full support for the program and the proposed rule. As a fourth generation Idahoan, she expressed her appreciation for all that DEQ does for the state. After serving 17 years with the sewer department and two terms on the city council, she observed it is always cheaper to protect the environment than to go back and try to clean it up.

➤ **MOTION:** Dr. Joan Cloonan moved the Board adopt, as temporary rules. The Rules for Administration of Water Pollution Control Loans, as presented under Docket No. 58-0112-0501, with as effective date of January 4, 2006.

**SECOND:** Craig Harlen

**VOICE VOTE:** Motion carried unanimously.

**AGENDA ITEM NO. 17:            CONTESTED CASE AND RULE DOCKET STATUS REPORT**

Doug Conde reviewed the contested case report, noting a new case has been filed by Pristine Springs challenging the TMDL for the aquaculture facilities on the Mid-Snake River. A number of other facilities have filed to intervene in the case.

Paula Wilson reported negotiated rulemaking is continuing on the dairy permitting rule. It may come before the Board in February 2006 as a temporary rule. A new water quality rulemaking will start soon on a rule to codify existing policy on use of frequency of exceedance of numeric criteria in evaluating certain water quality parameters.

**AGENDA ITEM NO. 18:            LOCAL REPORTS AND ITEMS BOARD MEMBERS MAY WISH TO PRESENT**

The following meeting schedule for 2006 was presented for discussion:

February 23	Boise
June 21 & 22	Coeur d'Alene
October 11 & 12	Boise
November 15 & 16	Boise

Board members discussed meeting locations. The Board may want to reschedule the February meeting to April, depending on how the rulemaking process proceeds on the dairy rule. A

conference call meeting may be added in April to provide a legislative wrap-up report, if the February meeting is not rescheduled. A training session on tribal law will be on the agenda for the February or June meeting.

DEQ staff will notify the Board when its budget and rules are before the legislature.

➤ **MOTION:** Don Chisholm moved the proposed schedule be adopted subject to the provision the Chairman and the Executive Committee, with input from the Director, can propose changes depending on rulemaking and other needs that may arise.

**SECOND:** Nick Purdy

**VOICE VOTE:** Motion carried unanimously.

Marti Calabretta discussed a recent public television program regarding the Silver Valley myths resolved. It is available on the Idaho Public Television Website. The program discusses a number of issues regarding economic development, recreation, and recovery of the area.

Ms. Calabretta briefly discussed concerns from a constituent, Randall Contracting, regarding how contracts for the Coeur d'Alene Basin Commission are handled. Director Hardesty responded to several questions regarding this contractual dispute. Marguerite McLaughlin commented she had heard concerns that the contract be kept inside the state of Idaho. Director Hardesty stated DEQ is very sensitive to that concern, and will follow the appropriate procurement process.

Chairman MacMillan commented he had heard about a possible temperature TMDL for the Mid-Snake River and asked how one would be instituted. Director Hardesty responded temperature is an important issue in the state with a number of water bodies. Temperature has also been raised as an issue in DEQ's Triennial Review with EPA. This is another topic that should probably be added to the list of issues to provide educational briefings for the Board. They are discussing whether use attainability analysis (UAA) might be appropriate for temperature in some of the water bodies. DEQ is reviewing the UAA process to improve success with EPA approval.

The meeting adjourned at 4:30 p.m.

## **November 17, 2005**

The Board of Environmental Quality convened on November 17, 2005 at 8:30 a.m. at the DEQ Conference Center.

### **ROLL CALL**

#### **BOARD MEMBERS PRESENT**

Dr. John R. "Randy" MacMillan, Chairman

Dr. Joan Cloonan, Vice-chairman

Craig Harlen, Secretary

Marti Calabretta, Member

Donald J. Chisholm, Member

Marguerite McLaughlin, Member

Nick Purdy, Member

**BOARD MEMBERS ABSENT**

None

**DEPARTMENT OF ENVIRONMENTAL QUALITY STAFF PRESENT**

Toni Hardesty, Director  
Jon Sandoval, Chief of Staff  
Barry Burnell, Administrator, Water Quality Division  
Orville Green, Administrator, Waste & Remediation Division  
Nancy Bowser, Senior Water Quality Analyst  
Jess Byrne, Interagency Affairs  
Debra Cline, Management Assistant to the Board  
Douglas Conde, Deputy Attorney General  
Stephanie Ebright, Deputy Attorney General  
Mike Edwards, SIP & Maintenance Plan Coordinator, Air Quality Division  
Patty Harrell, Air Quality Division  
Dave Hovland, Ground Water Program Manager  
Rick Huddleston, Wastewater Program Manager  
Tom John, Microbiology Rules Manager, Water Quality Division  
Sharon Keene, Customer Resources Team Leader  
Beth Kittleman, Attorney General's Office  
Lisa Kronberg, Deputy Attorney General  
Mark Mason, Wastewater Engineer Program Lead  
Mike McGown, Administrator, Boise Regional Office  
Chris Ramsdell, Monitoring and Emission Inventory Analyst, Air Quality Division  
Mike Simon, Stationary Source Program Manager  
Paula Wilson, Rules Coordinator

**OTHERS PRESENT:**

Beth Baird, Boise City  
William Eddie, Advocates for the West  
Beth Elroy, Micron  
Representative R. J. "Dick" Harwood, Idaho State Representative, District 2  
Dustin Holloway, Micron  
Jack Lyman, Idaho Mining Association (IMA)  
Krista McIntyre, Stoel Rives  
Ken Miller, Northwest Energy Coalition  
Alan Prouty, J. R. Simplot Co.  
Dick Rush, Idaho Association of Commerce & Industry (IACI)  
Sue Summers, Potlatch

- ❖ All attachments referenced in these minutes are permanent attachments to the minutes on file at the Idaho Department of Environmental Quality. To obtain a copy, contact the Board assistant at (208) 373-0465.

Chairman MacMillan announced the unfinished business from yesterday, agenda items 6 and 7 would be addressed following deliberation of the Air Quality Rules.

**AGENDA ITEM NO. 1:            ADOPTION OF BOARD MINUTES**

- c.     October 12, 2005 Meeting
- d.     Review of Action Items

➤ **MOTION:** Don Chisholm moved the Board approve the minutes of the October 12, 2005 Board meeting as presented with the correction of a typographical error on Page 9.

**SECOND:** Dr. Joan Cloonan

**VOICE VOTE:** Motion carried by unanimous voice vote.

**AGENDA ITEM NO. 11:        RULES FOR THE CONTROL OF AIR POLLUTION IN IDAHO, DOCKET NO. 58-0101-0503, (PENDING RULE) (RESPONSE TO HOUSE BILL 230 AND SENATE BILL 1228: REGULATED AIR POLLUTANTS)**

Martin Bauer, Administrator of the DEQ Air Quality Division, stated this rulemaking is in response to House Bill 230 and Senate Bill 1228 that require DEQ to adopt rules that define the term “regulated air pollutant” as it applies to various Clean Air Act (CAA) permit to construct and operating permit programs. It also will clarify certain rule sections and permit requirements to ensure consistency with federal CAA requirements.

This rule was presented to the Board for consideration at its October 2005 meeting and was tabled pending a legal opinion from the Attorney General on whether the proper federal procedures were followed concerning public comment when HB230 and SB1228 were passed by the Idaho Legislature. The opinion was received (Attachment 4) and finds this is somewhat of a grey area. As a result, DEQ decided to ensure the public hearing provision is satisfied by conducting a public hearing on December 5, 2005. Following the guidance of the legal opinion, if there are any comments at the hearing that would drive changes to the statute, DEQ will go back to the Legislature and request a change to the statute and the rulemaking process will start over. If no comments are received that would change the rule, the statute will stand and the rule will be valid.

William Eddie, Attorney for the Idaho Conservation League (ICL), stated the ICL believes the changes in the law that were reflected in these rules were adopted and fixed when the Governor signed the bills in April 2005. The federal public notice and comment requirements that are part of the CAA for State Implementation Plan (SIP) approval and for SIP change submissions to EPA were not met prior to adoption of those statutes. The federal requirements are requirements upon the entire state as manager of the CAA program in Idaho, and not simply on DEQ. The ICL appreciates DEQ’s efforts and intent to hold a public hearing; however, DEQ does not have the authority to change the statute. Mr. Eddie felt the best he and his client could hope for was that DEQ recommends to the Legislature that the statutes be amended or changed, or that the Legislature itself hold a public hearing on the changes in law that have already been adopted and fixed.

Mr. Eddie appealed to the Board, as a guardian of fair and open process, to direct DEQ not to submit the rule to EPA as a change to the SIP unless it is absolutely clear that the federal requirements have been complied with from the state’s perspective. The approval of EPA would give these rules federal enforceability. Mr. Eddie believed this is why the requirement for public

notice and comment is more rigorous; because it is not just a matter of typical changes in state law—it is a matter of opening the door to enforcement at a federal level in federal court.

Don Chisholm questioned whether it might be more appropriate to wait until after the public hearing to adopt the rule. Lisa Kronberg, Deputy Attorney General, prepared the legal opinion and investigated this question. She stated the Board could take action now or wait until after the hearing. She stated she was comfortable with the statute as written. It has been discussed with EPA, and DEQ made the revisions EPA suggested. She did not believe there would be a problem, but there is no way to know for certain until it is submitted to EPA.

Marti Calabretta discussed the role of the Board in this issue. She thought the Board should discourage placing a regulation or rule in code that has not had an open public comment process. She thought the question was not whether the Board should follow a Legislative directive, but whether the Board wanted to have a system where it automatically rubber stamped something that undermines all of its rule promulgations. It is not the role of the Board to tell the Legislature how to make policy, and the Board cannot change what the Legislature did. The Board can only look at its role in this process. She did not think it was appropriate for the Board to approve the rule at this time, knowing there possibly could be comments or information from the public that would drive changes to the statute. She believed it would make it more difficult to respond to public comment.

Dick Rush, IACI, was in support of the rule and agreed with Lisa Kronberg's comments. He discussed the history of the legislation and the lawsuit that led to this rule. He pointed out EPA commented during the legislative process and during the rulemaking process, and there were changes as a result of their comments. He thought the matter was vetted extremely well in the Legislature.

Nick Purdy asked if Mr. Rush would oppose the Board tabling the rule until after the December 5, 2005 hearing. Mr. Rush stated IACI members felt strongly about the legislation, and they did everything they could to make sure it did not do anything more than bring the state back to what it had always done. He wanted to make sure the matter was resolved and the rules were passed, but it was not a major issue whether it was done today or after the hearing. Mr. Rush did feel the Legislature would be disappointed if the rules were not adopted at some point in time. He encouraged the Board to adopt the rules today if possible, or this year.

Dr. Joan Cloonan asked what the effect of the rule would be on the state and the regulated community prior to SIP approval by EPA. Lisa Kronberg stated once the rule is approved by the Legislature, it will have an effective date and will become state law on the effective date. It will not be federal law under the SIP and will not be federally enforceable, so the regulated community will be subject two different laws. DEQ believes it will not be a difficult or lengthy process for EPA to propose a SIP approval because of their level of input and involvement with the statute and the rule.

Don Chisholm asked about the SIP approval process and potential consequences of nonapproval. Martin Bauer explained the worst case scenario could be EPA pulling delegation of authority for the program, but that is highly unlikely. The more likely worst case scenario would be EPA sending the SIP back to DEQ for revisions and a new rulemaking.

Mr. Chisholm said he did not like to see the state violating the policies for public participation, but thought it might be a case of “no harm, no foul.” He was very sensitive to the concerns expressed by ICL and Mr. Eddie regarding bypassing the public input process. He also wanted to handle the issue in an efficient manner without having an unnecessary meeting if possible.

Krista McIntyre, Stoel Rives, stated she was an environmental attorney representing a number of clients who use this rule. The discussions have involved a lot of procedural issues and the dynamics between the Legislature, EPA, and the Board. She was confident the right things had been done procedurally, and pointed out ICL’s comments had all been on process, not on the substance of the rule. From her client’s perspective, failure to adopt the rule and put into state law consistency in the approach to permitting in state law as it relates to the approach to permitting in federal law, perpetuates the ongoing confusion that is inherent in the air rules. Failing to clarify when fugitive emissions are counted, and failing to clarify what pollutants are subject to regulation in what permitting program today, and putting it off potentially for a couple of months, only makes it harder for the users of the rules to navigate through them. Ms. McIntyre asserted that adopting the rule today, which DEQ has confirmed procedurally has met all the requirements of public process, public participation, and rulemaking development; will make it easier for the users of the rule to “true up” what is covered in a permit process both with respect to state and federal law.

Nick Purdy asked when the rule would become effective if adopted today. Paula Wilson replied the rule would become effective at the close of the 2006 Legislative session, possibly late March or April. If not adopted today, but shortly after the December 5, 2005 hearing at a special Board meeting by conference call, it could still be approved by the Legislature and become effective at the close of the 2006 Legislative session.

Don Chisholm asked if the Board could take corrective action through a temporary rule to address any concerns that might be raised at the December 5 hearing and have it adopted at the February 2006 Board meeting. Doug Conde advised it would be procedurally possible to take such action.

Dr. Cloonan felt the issue was becoming unnecessarily complicated. She did not believe the Board could make changes that would correct problems with the legislation. The rule has gone through the appropriate comment process. She thought the Board should be aware there may be changes needed in the future, but did not support trying to do a last minute fix.

- **MOTION:** Dr. Joan Cloonan moved the Board adopt the Rules for the Control of Air Pollution in Idaho as presented in the final proposal under Docket No. 58-0101-0503.
- SECOND:** Marguerite McLaughlin
- VOICE VOTE:** Motion carried. 6 ayes (Calabretta, Chisholm, Cloonan, Harlen, McLaughlin, MacMillan); 1 nay (Purdy); 0 absent.

**AGENDA ITEM NO. 12:            RULES FOR THE CONTROL OF AIR POLLUTION IN IDAHO,  
DOCKET NO. 58-0101-0504, (PENDING/TEMPORARY RULE)  
(EMISSIONS REPORTING)**

Chris Ramsdell, Monitoring and Emission Inventory Analyst, explained this rule proposes to make revisions to the emission registration requirements for the Title V sources of air pollution. The rule change will consolidate two processes, emissions registration and emission inventory projects, to save time and eliminate confusion between the projects. It will also automate the process and put it on a Web application. Negotiated rulemaking was conducted, and a public hearing was held in Boise, Idaho. No cost impact is expected to DEQ or the regulated community. The rule does not regulate an activity not regulated by the federal government, nor is it broader in scope or more stringent than federal regulations.

- **MOTION:** Craig Harlen moved the Board adopt, as temporary and pending rules, the Rules for the Control of Air Pollution in Idaho as presented in the final proposal under Docket No. 58-0101-0504, with the temporary rules becoming effective January 4, 2006.

**SECOND:** Dr. Joan Cloonan

**DISCUSSION:** Don Chisholm asked if it was mandatory for industry to file their information on the Web site. Mr. Ramsdell stated it was not mandatory, but is in their best interest. If the reports are not received through the Web site, they are turned over to EPA for processing because DEQ does not have the resources to process different spreadsheet programs. EPA would make a very conservative estimate of the facility's emissions. The rule was written to be open-ended to allow for change if better technology is developed in the future.

Nick Purdy questioned how industry felt about being compelled to use the Web application. Krista McIntyre believed giving facilities an option is fine, although DEQ's inability to review different kinds of spreadsheets is something that concerns the regulated community. She had not seen the final version of the application, but felt after the system was refined it would be more convenient for the regulated community to use.

**VOICE VOTE:** Motion carried unanimously.

**AGENDA ITEM NO. 13:            RULES FOR THE CONTROL OF AIR POLLUTION IN IDAHO,  
DOCKET NO. 58-0101-0505, (PENDING RULE) (ANNUAL UPDATE  
OF FEDERAL REGULATIONS INCORPORATED BY REFERENCE)**

Chairman MacMillan announced the federal Clean Air Mercury Rule (CAMR) section of this rule has been removed pending reconsideration of the rule by the EPA. It will be brought back before the Board at some point in the future.

Martin Bauer said this rule is an annual update needed to incorporate by reference updates of federal rules. The update will ensure consistency with the federal rules and is necessary for the state to maintain delegation of the program. Negotiated rulemaking was not conducted, but public comment was taken and a hearing was held. DEQ received 600 comments opposing the CAMR rule. EPA then issued a notice they were reconsidering seven sections of the rule. DEQ felt it was not prudent to adopt a rule that EPA was reconsidering and could potentially change, so the CAMR rule was removed from this rulemaking. When EPA makes a final decision on the CAMR rule, DEQ will handle it as a new rulemaking and conduct negotiated rulemaking.

This rule does not regulate an activity not regulated by the federal government, nor is it broader in scope or more stringent than federal regulations.

- **MOTION:** Dr. Joan Cloonan moved the Board adopt the Rules for the Control of Air Pollution in Idaho as presented in the final proposal under Docket No. 58-0101-0505.  
**SECOND:** Craig Harlen  
**VOICE VOTE:** Motion carried by unanimous voice vote.

Mr. Bauer explained the issues being reconsidered by EPA in the CAMR rule. There are two main reconsiderations; one is a process or legal consideration on how the rule was passed, and the other pertains to how the caps on mercury were developed. He briefly discussed the cap and trade program.

**AGENDA ITEM NO. 14:**        **RULES FOR THE CONTROL OF AIR POLLUTION IN IDAHO,**  
**DOCKET NO. 58-0101-0507, (PENDING RULE) (PERMIT**  
**CLARIFICATION: EXEMPTIONS)**

Martin Bauer reminded this rule is one of three rulemakings DEQ initiated last year to streamline the permitting process. The revisions proposed in this rule are for certain currently-listed sources that are exempt from obtaining an air quality permit to construct. The changes propose to:

- specifically list three exemptions to the air permitting exemption criteria;
- to clarify two other current exemptions;
- increases the number of operating hours allowed for stationary internal combustion engines used for emergency purposes; and
- to delete the Director's discretionary exemption.

The facility types affected are certain size crematoriums, certain petroleum remediation sources, and dry cleaning facilities that are not major sources.

Negotiated rulemaking was conducted and a public hearing was held in Boise. The meetings were well attended by stakeholders including industry, small business advocates, environmental groups, attorneys, and consultants. There should be a long-term decrease in costs due to these rule changes. There were no controversial issues in the rulemaking. The rule does not regulate an activity not regulated by the federal government, nor is it broader in scope nor more stringent than federal requirements.

Mr. Bauer explained the Director's discretionary exemption is no longer needed because it has been replaced with specific exemptions in the rule and other flexible options for dealing with the kind of situations it was previously used to address.

- **MOTION:** Nick Purdy moved the Board adopt the Rules for the Control of Air Pollution in Idaho as presented in the final proposal under Docket No. 58-0101-0507.  
**SECOND:** Dr. Joan Cloonan  
**VOICE VOTE:** Motion carried by unanimous voice vote.

**AGENDA ITEM NO. 15:**        **RULES FOR THE CONTROL OF AIR POLLUTION IN IDAHO,**  
**DOCKET NO. 58-0101-0508, (PENDING RULE) (FACILITY**  
**EMISSION CAPS)**

Martin Bauer stated this is the third and final rule of the three rules initiated to streamline the permitting process.

Mike Simon, Stationary Source Program Manager, provided a brief overview of the facility emission caps rule. The rule establishes new procedures for minor air quality facilities. It is a voluntary program that establishes facility-wide emission limits (caps) in either the Permit to Construct Program or the Tier II Operating Permits Program. The goal of the rule is provide an efficient permitting process that allows facilities operational flexibility and reduces the administrative burden on permitting modifications for both industry and DEQ, while still maintaining air quality standards. Mr. Simon explained the changes in detail.

There is some increase in costs to DEQ and the regulated community, but it should be a trade-off for savings in other areas and should not be substantive.

Negotiated rulemaking was conducted over the last year and was well attended by stakeholders. A public hearing and comment period were held. The rule does not regulate an activity not regulated by the federal government, nor is it broader in scope or more stringent than federal regulations.

Chairman MacMillan commended DEQ and industry on the innovative and logical changes brought about by their efforts to streamline the permitting process.

Marti Calabretta asked for further clarification of the five-year renewal process. Mr. Simon explained the process is used to respond to growth and changes at the facility and in the airshed.

Dick Rush, IACI, testified in support of the rule and complimented DEQ on a very successful rulemaking process. Numerous representatives and members of IACI took part in the negotiated rulemaking. The parties stayed with the rulemaking until everyone was very comfortable.

➤ **MOTION:** Dr. Joan Cloonan moved the Board adopt the Rules for the Control of Air Pollution in Idaho as presented in the final proposal under Docket No. 58-0101-0508.

**SECOND:** Marti Calabretta

**VOICE VOTE:** Motion carried unanimously.

**AGENDA ITEM NO. 16:**        **PRESENTATION ON FEDERAL REGIONAL HAZE REGULATIONS AND BRIEFING ON UPCOMING DEQ RULEMAKING ON REGIONAL HAZE**

Mike Edwards, State Implementation Plan Coordinator, presented a PowerPoint presentation (Attachment 5) and discussion of federal regional haze regulations and briefed the Board on a rule DEQ plans to initiate next year. The federal regional haze rule applies to 156 Class I areas of national parks and has been in existence since 1977. In Idaho, the rule applies to the Sawtooth, Craters of the Moon, Yellowstone, Hells Canyon, and the Selway Bitterroot.

Chairman MacMillan announced the Board would hear the two items, Agenda Item No. 6 and Agenda Item No. 7, which were tabled yesterday.

Barry Burnell distributed a revised rule incorporating the guidance and suggested changes the Board made at yesterday's meeting (Attachment 6). Mr. Burnell reviewed each of the revisions shown in legislative underline/strikeout format and highlight.

- Page 1, 004. Incorporation by Reference. – Add citation for Section 401 of Idaho Standards for Public Works Construction.
- Page 2, 007. Referenced Material. – Delete Section 01. Idaho Guidance for Wastewater Facilities. No such document exists at this time. It is anticipated in the future and will be added back at that time.
- Page 3, 010. Definitions. – 18. Facility Standards and Design Standards. Delete Section 493 regarding lagoons.
- Page 6, 010.61. Treatment System. Delete ~~system~~ and change term to Treatment Facility.
- Page 9, 203. Public Wastewater System Operator Licensure Requirements. 07. and 08. – Add the word “public” in front of wastewater.
- Page 9, 400. Review of Plans for Municipal Waste water Treatment or Disposal Facilities. Add the words “municipal” and “water” to section title. Revise text to clarify the entire Section 400 applies only to municipal wastewater treatment or disposal facilities.
- Page 10, 400.01 Plan and Specification Review. b. – Delete “~~, who was not involved in the preparation of the plans and specifications being reviewed,~~” Move last sentence, “For industrial situations, the Department does not require review of industrial in-plant processes, only those process that treat or distribute wastewater.” Strike from this section because it now applies only to municipal, and move it to Section 401.
- Page 11, 401. Review of Plans for Nonmunicipal and Waste water Treatment or Disposal Facilities. Mr. Burnell noted Section 401 is entirely new to this rule and has been copied from the current Water Quality Standards and Wastewater Treatment Requirements and minor changes are made to text. 01. Plan and Specification Approval Required. – A sentence is added (moved from Section 400), “The Department does not require review of industrial in-plant processes.” ~~02. Professional Engineer.~~ – Strike this section. 03. As constructed Record Plans and Specifications. Strike “~~As constructed~~” and replace with “Record.” Term changed for consistency with Senate Bill 1220 language.
- Page 11, 410. Facility and Design Standards for Municipal Wastewater Systems Treatment or Disposal Facilities. Add sentence, “Comprehensive Facility Plans are not required for minor or routine collection systems.” Sentence added for clarification at the request of Boise City.
- Page 12, 420. Facility and Design Standards for Municipal Wastewater Systems Treatment or Disposal Facilities – Submission of Plans and Support Documents. – Revise title and text to add municipal and treatment or disposal facilities.
- Page 12, 430. Facility and Design Standards for Municipal Wastewater Systems Treatment or Disposal Facilities – Design and Construction of Wastewater Pipelines. – Revise title and text to add municipal and treatment or disposal facilities.
- Page 13, 430.02.k.iv. Materials. – Revise language: Wastewater pipelines entering or crossing surface water bodies shall be constructed of ductile iron pipe water transmission pressure rated pipe with restrained joints conforming to Section 401 of the “Idaho

Standards for Public Works Construction” or other suitable pipe with restrained joints; ~~otherwise they shall be constructed so they will~~ capable of being installed to remain watertight . . . Material used to back-fill the trench shall be concrete slurry, stone, coarse aggregate, . . . The revisions were made as a result of comments from Boise City.

- Page 15, 493. ~~Facility and Design Standards for Wastewater Systems—Wastewater Lagoons~~. Section 493 is stricken in its entirety. The section will be renegotiated as part of phase two of this rulemaking.
- Page 16. 600.02 Applied Waters Restricted to Premises. Clerical correction to add back the word “site.”

Mr. Burnell said the rest of the text remains as previously presented. DEQ believes the proposed changes provide the focus and limited application of the rules to the municipal facilities. He noted Section 401 was added in to preserve the existing authorities DEQ has in the Water Quality Standards and Wastewater Treatment Requirements. It also helps cleanup and remove the Wastewater Treatment Requirements out of the Water Quality Standards.

Chairman MacMillan asked if the phase two negotiated rulemaking would address industrial facilities. Mr. Burnell stated phase two would continue with the municipal issues and would not address industrial facilities. DEQ may address industrial issues in a future rulemaking, but it is not planned at this time. Chairman MacMillan commented the proposed revisions appeared to be very responsive and thanked DEQ for their efforts.

Don Chisholm suggested that rather than strike 007.01. Idaho Guidance for Wastewater Facilities, they simply strike the words “referenced in these rules” from the first line of Section 008. Use of Guidance in Design and Review. This would eliminate the need for an additional rulemaking to put Section 007.01 back into the rules when the document is completed. The matter was discussed and the suggested change was made.

Mr. Chisholm asked why the language in Section 400.01.b. Plan and Specification Review requiring independent review or a “second set of eyes” approve the plans was stricken. The issue was discussed in the Drinking Water Rules and the Board decided to leave that requirement in the rule. Mr. Burnell stated the matter was simply left for the Board’s discussion.

Nick Purdy asked Doug Conde if he was comfortable that all the proposed revisions were within the requirements of the Administrative Procedures Act and were a logical outgrowth of the rule as originally published. Doug Conde stated he had reviewed the matter and believed the revisions met the APA provisions in that they were clearly a logical outgrowth and fell within the scope of the original notice.

Mr. Chisholm suggested a change to Section 400.01.b. to delete the following language: “Plans developed for ~~routine maintenance or equipment replacement activities or plans~~ for sanitary sewer extensions, . . .” He further suggested the language that is currently proposed to be stricken: “, who was not involved in the preparation of the plans and specifications being reviewed,” be added back in the rule. These proposed changes would allow for independent review of plans for sewer extensions and clarify that plans developed for routine maintenance or equipment replacement activities do not have to be reviewed. The matter was discussed and Board members deliberated the proposal.

Craig Harlen discussed the challenges faced by municipalities in dealing with growth, development, and emergencies and the need to respond in a quick manner. He explained the strict construction codes and professional engineering guidelines used by municipalities.

Representative Dick Harwood provided a brief history of House Bill 143, which was later replaced by Senate Bill 1220. The legislation was developed in response to complaints from cities about the delay in getting DEQ approval of plans and specifications. Representative Harwood commented he heard no discussions of lagoons, tailings ponds, or industry when the legislation was being developed. The focus was on helping municipalities. He did not favor leaving issues open to interpretation, and felt it would be better to take the issue back to the Legislature for clarification if needed. He was also concerned that the people who testified in this matter yesterday said they had no voice in the process. He believed it was very important to have open, public hearings that allow people to provide input. He reminded the Board of the importance of protecting the citizens of Idaho in addition to protecting the environment and the public health. Representative Harwood believed protecting the citizens of Idaho was perhaps the most important part of the job of being a legislator or serving on a board.

Dick Rush stated IACI supported the proposed revisions with one minor addition to Section 010.18 Definitions. Facility Standards and Design Standards. He requested the word “municipal” be added to read: Facility and design standards found in Sections 410, 420, and 430 of these rules must be followed in the planning, design, construction, and review of municipal wastewater facilities. Mr. Rush stated he agreed with Mr. Conde’s finding that the proposed revisions were in compliance with the APA and were a logical outgrowth of the original Notice of Rulemaking.

Chairman MacMillan asked if Mr. Rush had any comments on the change proposed by Don Chisholm to Section 400.01.b. to add back the language to require independent review of plans. Mr. Rush stated IACI did not have a position on the matter.

John Tenson, City Engineer for the City of Boise and also representing the Association of Idaho Cities’ Public Works Professionals, testified in support of leaving the language the same as SB1220 regarding Section 400.01.b. The city of Boise and other large cities that have P.E.s on staff are very concerned about the conflict of interest issue (the ruling that it would be a conflict of interest for someone within the city to design the plans and another P.E. within the city to review them). The concern may be resolved by the appeal to the Board of Professional Engineers; but if it is not, the proposed change would cause a problem with many of the routine projects the cities perform constantly such as 8” two block extensions. The cities will either have to hire a consultant to perform the independent review or take the project to DEQ for review. The cities are concerned about the additional costs and delays this would cause. Mr. Tenson stated he has not seen any evidence there is any benefit to the larger cities by the requirement. If the language is left out, the rule is open to interpretation as to whether a “second set of eyes” is required or if the designing engineer can provide the review and certify that it meets the standards. If there is a problem, it will be the P.E. and ultimately the city that will be responsible.

Don Chisholm felt the larger cities could work around the issue by doing more comprehensive planning. The rules need to address small and large cities and the independent review is important for the protection of the citizens of Idaho. Mr. Tenson stated they do have a master plan, but need to have specific plans to implement the master plan.

Mark Mason believed the City of Boise's concerns would be addressed if the Board of Engineers decides in favor of the appeal. He thought the independent review was necessary in order to protect the smaller cities that do not have the professional staff.

Barry Burnell felt confident the appeal to the Board of Professional Engineers would be granted. DEQ is working on a delegated city policy that will provide even greater plan and spec review authority to those cities that show demonstrated capabilities.

Mr. Burnell asked that one additional change be made to Section 401.01 Plan and Specification Approval Required. The revised text would read: ". . . submitted to and approved by the Department, ~~except~~. Deviations may be allowed as provided in Subsection 401.02. Board members concurred with the change."

Don Chisholm asked if DEQ supported his proposed change to Section 400.01.b to add back the language to require independent review of plans. Mr. Burnell stated DEQ's position during the negotiations of SB1220 was that review and approval should be done by a different individual than the one who created the design. It was a fundamental element of DEQ's understanding of how the bill was being crafted, and they support having the language in the rule.

John Tensen asked for a legal opinion from DEQ staff regarding how the language "who was not involved in the preparation of plans and specifications being reviewed" would be applied. As city engineer, he sees virtually every project that is designed by people under his supervision. If one of his engineers consults with him on a project, and they discuss an issue and make a decision, does that make him ineligible to provide the review and approval of the project? Doug Conde replied DEQ anticipated this language would exclude the person who put their engineering stamp on the design of the plans being removed from the review to assure compliance with facility standards. Mr. Conde did not believe a discussion about a project with someone who was under his general supervision would exclude Mr. Tensen. The real intent is to ensure that the person who did the actual design work could not then turn around and review his own work and certify that it complies with facility standards.

Mr. Tenson stated he preferred the language not be included, but suggested instead of "who was not involved in the preparation of plans and specifications"; the words, "the specifications are reviewed and approved by another qualified licensed professional engineer" be added.

➤ **MOTION:** Don Chisholm moved the Board adopt the Wastewater Rules as presented in the final proposal under Docket No. 58-0116-0501 with the following changes: **Section 010.18 Facility Standards and Design Standards.** – Insert the word "municipal" in front of wastewater facilities. In **Section 008. Use of Guidance in Design and Review.** Delete the words "~~referenced in these rules~~" from the first sentence. In **Section 400.01.b. Plan and Specification Review.** In the first line, delete the words, "~~routine maintenance or equipment replacement activities or plans for~~" and in line four, the word "another" be substituted for "a" to read: ". . . specifications are reviewed and approved by another qualified Idaho licensed professional engineer." In **Section 401.01. Plan and Specification Approval Required.** Insert a period after the word "Department," in line three, delete the word ~~except~~, and add the words, "Deviation may be allowed" and retain the last sentence, "The Department does not require review of industrial in-plant processes."

**SECOND:** Marti Calabretta

**DISCUSSION:** Marti Calabretta stated while she appreciated the work done on the revisions, she felt a need to consider voting no on the motion because the nonmunicipal entities were so easily removed from the rules. She was concerned there were some small businesses, such as RV parks, who could present a problem. Mark Mason explained such entities were included in the definition of municipal wastewater.

Dr. Cloonan commented the rule, as proposed in the motion, very closely adheres to the Notice of Proposed Rulemaking. She thought it was appropriate to leave the issue of lagoons for a future rulemaking, and noted they were covered in other rules.

**ROLL CALL VOTE:** Motion carried. 6 ayes (Chisholm, Cloonan, Harlen, McLaughlin, Purdy, MacMillan); 0 nays; 0 absent; 1 Abstain (Calabretta)

**AGENDA ITEM NO. 7:**            **WATER QUALITY STANDARDS AND WASTEWATER TREATMENT REQUIREMENTS, DOCKET NO. 58-0102-0504 (PENDING RULE)**  
**(REMOVE WASTEWATER PROVISIONS: CHANGE TITLE OF RULE CHAPTER)**

Barry Burnell explained this docket is a companion rule to the previous docket and deletes sections from the Water Quality Standards that are now incorporated in the new Wastewater Rule Docket No. 58-0116-0501.

➤ **MOTION:** Craig Harlen moved the Board adopt the Water Quality Standards and Wastewater Treatment Requirements as presented in the final proposal under Docket No. 58-0102-0504.

**SECOND:** Dr. Joan Cloonan

**VOICE VOTE:** Motion carried unanimously.

The meeting adjourned at 2:25 p.m.

/s/

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Dr. John R. MacMillan, Chairman

/s/

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Craig Harlen, Secretary

/s/

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Debra L. Cline, Management Assistant and Recorder

## ACTION ITEMS

1. Update on the actions of the ECSC Servicing Communities: Planning for the Future Subcommittee and Land Use Planning Act issues. (Jon Sandoval)

2. Update on the CAMR rule and mercury toxicity issues
3. Regional Haze Update
4. Report on the Results of December 5, 2005 hearing on House Bill 230 and Senate Bill 1228 (Air rule No. 58-0101-0503 Regulated Air Pollutants)
5. Comparison of DEQ fees to other state's fees
6. Review of water temperature issues
7. Report on how the new Drinking Water Point of Use Treatment Device Rule is working.