



State of Idaho
DEPARTMENT OF ENVIRONMENTAL QUALITY
BOARD OF ENVIRONMENTAL QUALITY

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IDAHO BOARD OF ENVIRONMENTAL QUALITY

MINUTES

October 8 & 9, 2008

The Board of Environmental Quality convened on October 8, 2008, at 8:30 a.m.
at:

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

ROLL CALL

BOARD MEMBERS PRESENT

Craig Harlen, Chairman
Nick Purdy, Vice-chairman
Kermit Kiebert, Secretary
Donald J. Chisholm, Member
Dr. Joan Cloonan, Member
Dr. John R. "Randy" MacMillan, Member
Carol Mascareñas, Member

BOARD MEMBERS ABSENT

None

DEPARTMENT OF ENVIRONMENTAL QUALITY STAFF PRESENT

Toni Hardesty, Director
Curt Fransen, Deputy Director
John Brueck, Hazardous Waste Regulation & Policy Coordinator
Courtney Beebe, Deputy Attorney General, DEQ
Martin Bauer, Administrator, Air Quality Division
Barry Burnell, Administrator, Water Quality Division
Debra Cline, Management Assistant to the Board
Douglas Conde, Deputy Attorney General
Orville Green, Administrator, Waste Management & Remediation Division
Ed Hagan, Ground Water Program Manager
David Hatt, On-site Wastewater Specialist
Rick Jarvis, UST/LUST Program Coordinator
Tom John, Microbiology Rules Analyst
A J Maupin, Wastewater Engineer Program Lead

Tonia Mitchell, Aquifer Protection Supervisor
Bruce Schuld, Mine Project Coordinator
Michael Stambulis, Engineering Discipline Lead
Tim Wendland, Loan Program Manager
Bruce Wicherski, Voluntary Clean-up Program Manager
Paula Wilson, Rules Coordinator

OTHERS PRESENT:

Pat Barclay, Idaho Council on Industry and the Environment
Suzanne Budge, SBS Associates
Richard Carlson, Idaho Rural Council
Robbin Finch, Boise City Public Works
Senator Bob Geddes, President Pro Tem, Idaho State Senate
Justin Hayes, Idaho Conservation League
Marv Hoyt, Greater Yellowstone Coalition
Kent Lauer, Idaho Farm Bureau
Alex LaBeau, Idaho Association of Commerce & Industry
Jack Lyman, Idaho Mining Association
Mike McGowan, EPA
Brian Oakey, Idaho State Department of Agriculture (ISDA)
Marv Patten, ISDA
Jason Ronk, IACI
Lynn Tominaga, Idaho Ground Water Association
Jim Wertz, EPA
Donald Wind, Monsanto
Leigh Woodruff, EPA

- ❖ 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 Craig Harlen presented a certificate and token of appreciation to Dr. Joan Cloonan, past chairman, in recognition of her outstanding leadership of the Board of Environmental Quality.

PUBLIC COMMENT PERIOD

Chairman Harlen opened the floor to public comments on topics not specifically included on the agenda. No comments were received.

AGENDA ITEM NO. 1: ADOPTION OF BOARD MINUTES

a. March 12, 2008 meeting minutes

- **MOTION:** Dr. Cloonan moved the Board approve the March 12, 2008 minutes as presented.
SECOND: Dr. Randy MacMillan
VOICE VOTE: Motion carried by unanimous vote.

b. August 26, 2008 meeting minutes

➤ **MOTION:** Dr. Randy MacMillan moved the Board approve the August 26, 2008 minutes as presented.

SECOND: Nick Purdy

VOICE VOTE: Motion carried by unanimous vote.

c. Action Items

- 1) Ground Water Quality Plan – does it need to be updated; is it appropriate for the Board to take action?

Barry Burnell, Administrator, Water Quality Division, reported DEQ's efforts this year have been focused on a ground water quality rule. The division has an action item to review the Ground Water Quality Plan and has already started reviewing various policies. He will report to the Board as the review proceeds.

Chairman Harlen recalled that this action item was created to consider whether it was within the purview of the Board to do a thorough review of the Ground Water Quality Plan and recommend changes. He asked for input from the Board members on this question.

Dr. Randy MacMillan commented the public appears to be very concerned with the Ground Water Quality Plan. He believes it is appropriate for the Board to consider the matter after DEQ completes its review.

After discussion, the Board determined this item should be removed from the action items list. DEQ will update the Board when the review is completed.

- 2) Update on mercury fish tissue sampling and monitoring results

Director Toni Hardesty said DEQ will provide a presentation on mercury at the Board meeting Thursday. A number of people have also asked to testify or give presentations on the mercury issue. To provide adequate time for all parties to be heard and for other agenda items, the mercury issue will be extended to either the November or February Board meeting.

- 3) Report on testing for pharmaceuticals and personal care products in surface water and ground water

Barry Burnell reported as laboratories continue to refine their detection methods for pharmaceuticals and personal care products, more are being found in surface and ground water. The USGS completed a surface water study a few years ago to sample for personal care products in the Boise River and another river in northern Idaho. The Idaho Department of Water Resources has a statewide ground water monitoring program that collects ground water samples from 400 wells across the state. The program monitors for personal care products and issues reports periodically with its findings. DEQ assists IDWR with preparation of the report. Mr. Burnell will send Board members the most recent report from 2006.

Director Hardesty added that DEQ's Environmental Outreach and Assistance Group is working with pharmacies, retail groups, and hospitals to conduct workshops to explore the options for developing some kind of a pharmaceutical take-back program. One workshop has been held and another is planned for the end of October.

Nick Purdy asked if EPA was taking action towards regulating personal care products and pharmaceuticals in the surface and ground water. Mr. Burnell believes EPA is beginning to investigate the issue to learn what ecological effects these compounds in the environment have on human health. He was not aware of any definitive studies that have determined there should be any kind of regulatory level set for these compounds. The studies are still in their infancy. EPA's drinking water program has a process to study and prioritize contaminants of concern. Analytical work, toxicological, and ecological studies are then performed to develop the science needed to adopt a new maximum contaminant level for drinking water standards.

AGENDA ITEM NO. 2: DIRECTOR'S REPORT

Director Hardesty updated the Board on the following issues:

- Eric Neher was recently appointed as regional administrator of the DEQ Idaho Falls regional office. He was formally employed by CH2M Hill as a consultant at INL. He brings a wealth of experience and background in hydrogeology and management.
- Budget – all state agencies have been asked to give back one percent of their existing budget and hold an additional 1.5 percent in reserve in case additional holdbacks are necessary. DEQ has submitted a plan to Governor Otter identifying how it will meet the holdbacks. The DEQ plan includes cutbacks in travel, training, contracts, and special studies.
- EPA granted “treatment as a state” (TAS) status to the Shoshone-Bannock Tribe to allow them to develop their own water quality standards. The TAS status is a provision of the federal Clean Water Act, and the decision to grant TAS status is made by the EPA administrator. DEQ has signed a memorandum of understanding with the Tribe and EPA and will work with them to develop water quality standards. DEQ's intent is to help develop standards that are consistent with others in the state.
- The Stage One Vapor Recovery rules will be coming to the Board for consideration in February 2009. DEQ worked with the Idaho Transportation Department and the Transportation Board to use \$500,000 of their Congestion Mitigation Air Quality (CMAC) federal funding to provide a 50/50 match to help the petroleum industry in the Treasure Valley pay for the stage one vapor recovery controls. In order to qualify for the funding, the storage tank owners must come forward now and voluntarily install the vapor recovery controls instead of waiting until the regulation goes into effect next year. There are 300 storage tanks in the Treasure Valley, and it is hoped the funding will be adequate to provide matching funds for most or all of those tanks. Having these controls in effect before next summer should substantially reduce VOCs and help the Treasure Valley in its efforts to avoid an air quality nonattainment designation by EPA.

AGENDA ITEM NO. 3: RULES AND STANDARDS FOR HAZARDOUS WASTE, DOCKET NO. 58-0105-0801 (UPDATE OF FEDERAL REGULATIONS INCORPORATED BY REFERENCE)

Orville Green, Administrator, Waste Management and Remediation Division, presented this rule to adopt by reference the federal hazardous waste regulations that were promulgated from July 1, 2007 through June 30, 2008. This is a routine, annual procedure that DEQ performs to satisfy the consistency and stringency requirements of Idaho's Hazardous Waste Management Act. Adoption is required to maintain program primacy. He reviewed each of the four revisions to the rules.

- **MOTION:** Dr. Joan Cloonan moved the Board adopt the Rules and Standards for Hazardous Waste, as presented in the final proposal under Docket No. 58-0105-0801.
- SECOND:** Don Chisholm
- VOICE VOTE:** Motion carried by unanimous vote.

AGENDA ITEM NO. 4: STANDARDS AND PROCEDURES FOR APPLICATION OF RISK BASED CORRECTIVE ACTION AT PETROLEUM RELEASE SITES, DOCKET NO. 58-0124-0801 (PENDING RULE) (RULEMAKING TO ESTABLISH STANDARDS AND PROCEDURES FOR APPLICATION OF RISK BASED CORRECTIVE ACTION AT PETROLEUM RELEASE SITES)

Orville Green explained that DEQ is responsible for approving and overseeing appropriate response actions at petroleum release sites across the state. In June 2004, DEQ issued the Idaho Risk Evaluation Manual (REM). This manual describes an integrated risk evaluation process for managing chemical release sites that assists DEQ in determining the need for corrective action and, when necessary, the site-specific cleanup levels necessary to protect human health and the environment. Though the REM does not specify specific cleanup levels, it includes screening values which, though voluntary, have statewide applicability. Because it has the look and feel of a rule, DEQ decided to formalize the critical elements of the REM in rules.

This rule is the result of negotiated rulemaking and pertains mostly to the release of petroleum products; subsequent rulemaking will address non-petroleum issues. The rule is not broader in scope or more stringent than federal regulations and does not regulate an activity not regulated by the federal government. However, the rule does describe a process that is not specifically delineated or required by the federal government. For that reason, DEQ provided additional information required by Idaho Code § 39-107D regarding stringency.

Mr. Green responded to several questions from Board members to clarify specifics of the rule.

- **MOTION:** Dr. MacMillan moved the Board adopt the Standards and Procedures for Application of Risk Based Corrective Action at Petroleum Release Sites as presented in the final proposal under Docket No. 58-0124-0801.
- SECOND:** Dr. Joan Cloonan
- VOICE VOTE:** Motion carried by unanimous vote.

AGENDA ITEM NO. 5:

**RULES FOR ADMINISTRATION OF WATER POLLUTION CONTROL
LOANS, DOCKET NO. 58-0112-0801 (PENDING RULE)
(RULEMAKING TO PROVIDE FLEXIBILITY FOR USE OF LOAN FEES
AND TO MEET NONPOINT SOURCE NEEDS)**

Barry Burnell explained these rules are used to implement wastewater loans across the state. This rulemaking was initiated to provide flexibility to DEQ in its use of loan fees to meet statewide planning needs, to reduce administrative burden on a majority of wastewater loan recipients, and to achieve administrative efficiency.

Tim Wendland, Loan Program Manager, explained each of the changes in the rule packet.

Dr. MacMillan suggested wording be added to the rule indicating when documents are available on DEQ's Web site.

Don Chisholm suggested for-profit entities, such as a small ranching enterprise, be added to the qualifying entities who are able to participate in the loan program. He noted that it is sometimes just a matter of how an accountant or attorney advises a family that determines whether some of these entities are structured as corporations rather than doing business as individuals, partnerships, or otherwise. He believes it would create more flexibility and address nonpoint source needs better if for-profit entities were allowed to participate in the loan program if the principal officers guaranteed the debt or took some other action to provide adequate security of repayment.

Mr. Burnell explained the loan program was initially designed to be used for municipal wastewater treatment systems, sewer districts, or special service districts; however, under the existing rules, private entities can receive funding from this program for certain kinds of nonpoint source projects that are allowed under § 319 of the federal Water Pollution Control Act.

Doug Conde, Deputy Attorney General, pointed out that the legislation that provides authority for this loan program to make grants and loans for sewage treatment works is specifically limited to municipalities, which is defined as counties, cities, special sewer districts, non-profit corporations. That limitation does not explicitly appear in the authorizing legislation to provide loans for implementation of best management practices under § 319.

Mr. Chisholm questioned that if the goal is to reduce nonpoint source pollution to a stream, why should a for-profit corporation, such as a 100-year old family ranch, be excluded from receiving funding from the loan program just because of the for-profit status of the ranch. Mr. Burnell said that DEQ usually refers such situations to the § 319 grant program.

Chairman Harlen asked if there was concern that allowing for-profit companies to access the loan program would flood the program with applications or deplete funds available for municipalities. Mr. Burnell said municipalities had expressed that concern because they want to make sure the funds are available for public projects. During the rulemaking discussions, DEQ described the need for individuals with subsurface sewage system to access low-interest loan money to make repairs to their systems. Municipalities did find the changes in the proposed rule acceptable. This rule represents DEQ's first step at modifying the language in the rule to open up the loan program to some degree to certain types of projects.

Nick Purdy said he agreed with Mr. Chisholm's suggestion. He felt it did not make sense to allow an individual developer to access the loan program, but not a corporate developer. Mr. Burnell explained that neither individuals nor corporate developers that are starting out with new projects would be able to get enough points to qualify for a loan through the program. There would not be a public health emergency associated with their projects and they wouldn't have the priority ranking points necessary. The loan program is intended for those with failing systems that are impacting the environment and public health.

Dr. Cloonan pointed out that if the for-profit entities were unable to get the ranking points needed to get a loan, then opening the loan program up should not have a major impact on the funds available to municipalities; each project would proceed on its own merit.

Doug Conde suggested that rather than trying to make changes now, it might be more appropriate to send the matter back to negotiated rulemaking for further discussion of this issue. This would also allow time to carefully review any proposed changes to make sure they do not conflict with other restrictions.

Chairman Harlen asked if there were any time constraints that would cause a problem with sending the rule back for further negotiations. Mr. Burnell said he knew of no time constraint, but would like to have the rule come back before the Board in November 2008. He thinks the cities will be very interested in the suggested change and should be involved in the discussions.

Kermit Kiebert said he did not understand the logic behind the rule as it is currently proposed and believes the issue warrants further discussion.

Barry Burnell pointed out it would be a substantial change in the administration of the loan program to go to a for-profit approach that allows corporations to be eligible for loan dollars. He thinks the cities and existing qualifying entities would oppose the change. He said the step in the proposed rule that would allow individuals with failed systems to access the loan program to repair their systems has been negotiated and approved by the rulemaking committee. No public comments were received on this rule package.

Mr. Burnell suggested if the Board feels strongly about allowing for-profit corporations to be eligible for the loan program, it should direct DEQ to undertake a separate negotiated rulemaking to bring to the Board at a later date. He urged the Board to approve the rulemaking as presented with directions to DEQ to undertake additional investigation for for-profit corporations as qualifying entities.

Don Chisholm suggested as a compromise, language be added to the rule that individual owners of for-profit corporations may participate in the program on behalf of their corporations. This would keep big corporations from using the loan program. He assumed that individuals as well as partnerships would be allowed to access the program (for example, a ranch owned by two brothers). He believes the municipalities would still have priority access to the funding due to the point system.

➤ **MOTION:** Don Chisholm moved the Board refer the Rules for Administration of Water Pollution Control Loans, Docket No. 58-0112-0801, back to DEQ with the request that it

create language that would allow individual owners of corporations or partnerships to access the program on behalf of their business entities just as individuals would be allowed to do, and that the rule be brought back to the Board at its November 2008 meeting with the suggested language.

SECOND: Nick Purdy

DISCUSSION: Dr. MacMillan asked if there might be a legal problem with the proposed language. Mr. Chisholm believes if individuals can access the program (as is proposed in the existing language) that the suggested language should also be legal. Dr. MacMillan asked that language also be included to indicate when applications and reference documents are available on the Web site.

Carol Mascareñas pointed out another change that needed to be made on page 88 to correct a typographical error.

VOICE VOTE: Motion carried by unanimous voice vote.

AGENDA ITEM NO. 6: RULES FOR PUBLIC DRINKING WATER SYSTEMS, DOCKET NO. 58-0108-0802 (PENDING RULE) (INCORPORATION BY REFERENCE OF FEDERAL GROUND WATER RULE)

Barry Burnell explained this rule is a national primary drinking water regulation. To retain primacy for administering the Safe Drinking Water Act, Idaho must adopt this rule within two years of promulgation by EPA. This rule was adopted by EPA in November 2006. EPA allows states to develop a guidance document for the Drinking Water Program with respect to the Ground Water Rule, which allows a certain amount of flexibility. DEQ has done that with the portion of the rule that addresses significant deficiencies in sanitary surveys that DEQ performs during the evaluation of public water systems.

Mr. Burnell said negotiated rulemaking was conducted and noted that the rule is not more stringent than the federal rule.

Tom John, Microbial Rules Manager, reviewed the changes included in the rules. The Ground Water Rule is expected to provide greater protection against microbial pathogens in public water systems that use ground water. It attempts to target the subset of ground water systems that are at higher risk of fecal contamination by requiring regular sanitary surveys, establishing a flexible program for identifying higher risk systems through existing bacterial monitoring and state determinations, and providing for ground water source monitoring in systems that do not provide demonstrated virus inactivation through disinfection. The rule requires that deficiencies detected during sanitary surveys be corrected on a reasonable schedule. Negotiated rulemaking was conducted and there were no contentious issues.

Dr. MacMillan asked if in the future, as rulemaking is conducted, it could be stated in the rule whenever a guidance document or reference manual is available and provide the Web site if they are available on the Internet. Mr. Burnell said this rule has a number of Web citations associated with the guidance documents; for those that don't typically have a fee associated with them, an address is provided where the document can be purchased.

Director Hardesty asked if there was a main location in the rules where DEQ's Web site could be located so that it would not have to be repeated throughout the rules. Paula Wilson, Rules

Coordinator, said it could be added in the beginning of the rules with DEQ's physical address and office hours. Staff will try to make sure the Web addresses are kept current.

➤ **MOTION:** Dr. MacMillan moved the Board adopt the Idaho Rules for Public Drinking Water Systems, as presented in the final proposal in Docket No. 58-0108-0802.

SECOND: Dr. Joan Cloonan

VOICE VOTE: Motion carried by unanimous voice vote.

AGENDA ITEM NO. 7: RULES FOR PUBLIC DRINKING WATER SYSTEMS, DOCKET NO. 58-0108-0801 (PENDING RULE) (REVISION AND CLARIFICATION OF FACILITY AND DESIGN STANDARDS)

Barry Burnell said this rulemaking is Phase III of the Facility and Design Standards Rulemaking, which resulted from Senate Bill 1220 passed in 2005. It was a negotiated rulemaking, and the objective of the rule is to modify the Public Drinking Water Systems rule so the engineering community can approve simple water main extensions without having to develop facility plans as a preliminary step in these simple projects. Definitions have been added and several sections of the rules clarified to make these changes. Public comments were received, and the rules were amended based on those comments.

Michael Stambulis, Engineering Discipline Lead, Technical Services Division, explained the revisions to the rules and responded to questions from the Board. There was strong participation from the regulated community in the rulemaking process. DEQ does not anticipate any cost increase to the regulated community as a result of this rulemaking and is unaware of any contentious issues.

➤ **MOTION:** Dr. MacMillan moved the Board adopt the Idaho Rules for Public Drinking Water Systems, as presented in the final proposal in Docket No. 58-0108-0801.

SECOND: Dr. Joan Cloonan

VOICE VOTE: Motion carried by unanimous voice vote.

AGENDA ITEM NO. 8: WASTEWATER RULES, DOCKET NO. 58-0116-0801 (PENDING RULE) (REVISION AND CLARIFICATION OF FACILITY AND DESIGN STANDARDS)

Barry Burnell said this rulemaking is Phase III of the Facility and Design Standards Rulemaking, which resulted from Senate Bill 1220 passed in 2005. It was negotiated at the same time as the rulemaking presented under Agenda Item No. 7 and is a revision and clarification of facility and design standards. The objective of this rulemaking is to modify the recently updated Wastewater Rules so that the engineering community can approve simple sewer main extensions as intended by Senate Bill 1220 (Idaho Code § 39-118).

Mr. Stambulis reviewed the rule changes. There is no cost increase to the regulated community as a result of this rulemaking, and there were no contentious issues.

Don Chisholm discussed Section 68, Page 303, which reads:

Reasonably Accessible. The following criteria shall be used to determine whether a project proposing a new private municipal wastewater treatment plant, or an existing

private municipal wastewater treatment plant, is reasonably accessible to a public municipal wastewater collection system.

Mr. Chisholm believes there must be some missing language, such as “modification of an existing” or “increase of” because it appears this section could be imposed retroactively on an existing system that may have a public transmission line moved in. He thinks the intent is that the criteria will apply if a new project is proposed that would modify an existing system.

Barry Burnell said in order for the provision in Section 68 to apply, a set of plans and specifications showing a modification would need to be submitted to DEQ. He agreed that a change would need to occur with an existing private municipal wastewater treatment plant in order for this section to apply.

Mr. Chisholm suggested the words “or modification of” be inserted into the paragraph to make that intent clear.

Mike Stambulis said he was not sure that was the intent when the rule was created. He noted that Section 68.a. clearly states that, “For an existing private municipal wastewater treatment plant, reasonably accessible means the public municipal wastewater collection becomes located within a minimum of 1,000 feet of any portion of the discharge piping of a private municipal wastewater treatment plant, and the owner of the public municipal wastewater collection system will provide a “will serve” letter.”

Doug Conde agreed with Barry Burnell, saying that the intent of these rules is to help implement Idaho Code § 39-118, which requires submission and approval of plans and specifications for construction of new waste treatment or disposal facilities or for material modifications or expansions to existing systems. If an existing system is not going through a material modification or expansion, there would be no obligation to give DEQ plans and specifications requiring DEQ to apply these wastewater rules. Mr. Conde said he did not believe it would fit the intent of Idaho Code § 39-118 to apply this to an existing system that isn’t being modified or expanded.

Mr. Chisholm suggested the words, material modifications be added after the word or in the first sentence of Section 68 for clarification. He also feels it is important to carefully consider antitrust issues when setting regulations that tell developers they must deal with one entity. He thinks there may be a need for PUC intervention or some other action to ensure things are done with equity and fairness when municipalities issue “will serve” letters so they do not create a situation where there are so many conditions and changes that a property cannot be developed.

Doug Conde pointed out that a Supreme Court decision applies to this situation and supports the reasonable accessibility provision in the existing subsurface sewage rules.

Members discussed the matter and noted a potential for conflict and a need for flexibility in the language to allow DEQ to look at total circumstances in each case.

Mr. Chisholm said he was inclined to move to adopt the rule, but recognizing that this issue does need to be addressed further. He commented that after hearing the contested case on this matter next month, the Board may have more insight and may decide there is a need for another rule to address the more complex issues.

➤ **MOTION:** Don Chisholm moved the Board adopt the Wastewater Rules, as presented in the final proposal in Docket No. 58-0116-0801.

SECOND: Dr. Randy MacMillan

VOICE VOTE: Motion carried by unanimous voice vote.

AGENDA ITEM NO. 9: **INDIVIDUAL/SUBSURFACE SEWAGE DISPOSAL RULES, DOCKET NO. 58-0103-0801 (PENDING RULE) (RULEMAKING TO PROVIDE FOR A REVISED METHOD TO ESTIMATE WASTEWATER FLOW FROM SINGLE-FAMILY DWELLINGS)**

Barry Burnell presented this rulemaking to provide a revised method to estimate wastewater flow from single family dwellings that is more consistent with domestic water usage statewide. The proposed revisions would provide for a more refined soil classification system, which will allow more precise sizing of drainfields. The rule would also provide a definition of “bedroom” and “module” to assist in the understanding and applicability of the rule within the regulated community.

Mr. Burnell gave a brief history of the rule. In 2007 the Panhandle District Health Department (District) had a rule before the Idaho Legislature, and a portion of that rule was stricken by concurrent resolution. The legislative direction at that time was for the District to revise the rule and bring it back to the legislature. During 2007, the District developed a rule addressing wastewater flow. It was adopted by the District’s board in December 2007, but this action occurred too late to go before the 2008 legislature.

During DEQ’s rule presentations at the 2008 legislature, senators requested that DEQ develop a statewide rule to address wastewater flow rather than the issue being addressed on a district-by-district basis. The public health district directors also requested that DEQ undertake a rulemaking for estimating wastewater flow from single family dwellings. This rulemaking is a result of those requests.

The health districts have been collecting and developing wastewater flow-specific information for Idaho. The current method of estimating wastewater flow was developed on the basis of nationwide estimates published by EPA in the 1970s. DEQ felt in order to make a change regarding wastewater flow, it would need a substantial data set to evaluate Idaho wastewater flow. The health districts collected 2800 records of wastewater flow from across the state and generated flow information for individual family dwellings on the basis of the number of bedrooms approach.

AJ Maupin, Wastewater Engineer Program Lead, explained the technical aspect of the rules. He said the rule is needed because current wastewater flows established in the Idaho rules do not accurately reflecting existing wastewater flows, as supported by current data collected by the seven health districts. Drainfields that are sized based on wastewater flow levels that are too low have a much shorter service life than the industry standard of 20 – 30 years.

Mr. Maupin discussed the changes to the proposed rule including:

- 1) adding a definition for the terms “bedroom” and Module”
- 2) revising the wastewater flow rates for single family dwellings

- 3) refining the soil classification system from three to six soil types (transferring the more refined soil classification system from the technical guidance manual into the rules), and
- 4) revising the maximum total square feet of trench (In order to be in balance with increased wastewater flow rates, it is necessary to increase the maximum allowable size for a standard drainfield.)

Negotiated rulemaking was conducted and seven sites with video conference access were provided statewide to allow wide participation. Three eight-hour rulemaking sessions were conducted, and minutes of the meetings were distributed to over 70 email recipients. The meetings were well attended by the stakeholders including the Building Contractors Association, all seven health districts, numerous engineering consulting firms, system installers, planning and building departments from Nez Perce County, and the Bonneville County Commissioner.

A controversial issue in the rulemaking is the concern expressed by realtors, the Building Contractors Association, and developers that the rule will have a negative impact on building lots that have already been platted within subdivisions but have not yet been issued an onsite wastewater disposal installation permit and, consequently, a building permit. They believe that currently platted lots should be regulated under the current rule for estimated wastewater flows and drainfield sizing. However, the proposed rules would require already platted lots to use the new, more accurate wastewater flow estimates that are based on actual Idaho data so that the size of the drainfields would be right-sized and able to handle the actual flows.

Mr. Maupin said DEQ believes that with the flexibility in the rules regarding drainfield configurations, the new rule will not make the lots unsuitable for building. It may increase the cost of the system in some cases, but methods described in the rules and the technical guidance manual can be used to minimize costs. For example, an extra drain rock trench or an absorption bed can reduce the footprint of the proposed new sized drainfield.

DEQ staff responded to Board questions regarding consistency of rules statewide, how the flow measurements were taken, how the new rule would apply to failed systems on small lots, and setbacks to surface water.

Dale Peck, Environmental Director, Panhandle Health District, presented testimony on behalf of the Panhandle Health District as well as the Association of Health District Directors. (The Association is meeting in Idaho Falls and unable to have any other representatives present.) Mr. Peck said the seven health districts came together to request that DEQ undertake this rulemaking. All seven districts participated in the rulemaking from the beginning. The seven districts performed the research for the flow studies and were very careful to ensure the validity of the studies. He is confident that the studies reflect actual uses and demonstrate that design flows in the current rule underestimate the flows actually coming from homes in Idaho. This is the basis on which the districts support this rule change.

Mr. Peck discussed the importance of having correctly sized wastewater systems to protect ground water, surface water, and public health. He said the seven health districts support the individual changes set forth in this rulemaking and have participated throughout the negotiated rulemaking process. He further stated that the Panhandle Health District has been active with the development community in northern Idaho, and he is able to state the support of the North Idaho Builders and Contractors Association and the Coeur d'Alene Association of Realtors for the

proposed rule. Both associations participated in the negotiated rulemaking and took part in writing the rule. Some of the changes made in the rule were based on their input.

Mr. Peck stated the environmental directors of the seven health districts meet regularly and work very hard to address the issue of consistency. The directors communicate almost daily to respond to situations that arise to make sure the rules are applied consistently throughout the state. The districts also work diligently with homeowners with failed systems to ensure they provide a valuable remedy and the best possible system for the site.

In closing, Mr. Peck, both as a representative of the Panhandle Health District and the Association of Public Health Directors, recommended that the Board adopt the proposed rule to protect public health and the quality of ground water and surface water in the future.

John Eaton, Government Affairs Director for the Idaho Association of Realtors, said he wanted to clarify a statement made earlier by Mr. Peck. He stated the North Idaho Building Contractors Association and the Coeur d'Alene Association of Realtors support the changes made to the Panhandle Health District rules, which are a separate rule than the proposed rules before the Board today. They do not support the rules before the Board today. He stated a key issue for the association is the need to be able to do "spec drainfields" so that when a lot is plotted, the drainfield and septic tank are approved and a certain time period is provided to sell the lot.

Mr. Eaton briefly discussed the association's involvement in the history of this rule. He said the rule was rejected by the Idaho Legislature in 2002 and in 2007 because of realtors' opposition. He testified that the Idaho Association of Realtors opposes this rule and will again oppose it in the legislature if the Board approves it in its current form. He requested that the Board reject the rule and offered to meet with DEQ to discuss the issue. If the association can be convinced there is some kind of systemic problem with the existing flow rates, it will be willing to go forward with legislation that everyone can support.

Mr. Eaton assured that the association is committed to taking care of any problem with the homes they are selling; if in fact there is one. He believes there is no evidence in any of the discussions that have taken place in the last six or seven years that shows that the current flow rates are leading to systemic failures of septic systems. He thinks the study performed by the health districts does not directly correlate to the what they are trying to regulate and does not necessarily have a direct connection to the issue, and a study is needed to find out what the failure rate is for existing septic tanks that have been installed under today's rules. He suggested the Board send the rule back to DEQ and direct it to meet with industry representatives and go back through the negotiated rule process to reach consensus before sending a rule forward.

Dr. MacMillan asked if Mr. Eaton believed the previous negotiated rulemaking process for this rule was biased. Mr. Eaton replied that has been the association's history with this rule, and he has no reason to believe it has changed. He believes the burden should be on DEQ to show why the rules need to change, and that has not been done. In the negotiated rulemaking process, some miscommunications led the association to believe there was no room for change in the proposed rule. Mr. Eaton feels that the history with this rule indicates little room for change in the negotiated rulemaking process. He said he was told by a previous director of DEQ that it had negotiated as far as it could and would not consider further changes.

Chairman Harlen asked if the alternative methods discussed earlier such as an adsorption bed or a larger trench would be allowed under the proposed rule to keep lots viable for building sites. Mr. Burnell confirmed that the proposed rule would allow those mitigating design elements and said they are part of the rule package. Mr. Burnell believes that using the extra gravel drainfield alternative, a wider trench, and/or adsorption beds will occupy the same footprint as an existing three-foot wide standard drainfield.

Chairman Harlen asked if this question came up during the negotiated rulemaking. Mr. Eaton said he had not heard that these alternatives could be used on the same sized lot until today. His sources have told him that alternatives were much more expensive and required much more land. If that is not the case, that should be discussed.

Mr. Burnell said the alternatives were discussed during the negotiated rulemaking. The rulemaking sessions were held via teleconference to allow as much participation as possible, and emails were sent out to those who could not attend.

Carol Mascareñas asked if the association participated in the negotiated rulemaking. Mr. Eaton said the association did send in written comments before every meeting, but did not attend in person. He believes there needs to be a meeting of the minds that a problem actually exists prior to any negotiated rulemaking.

Director Hardesty said she could not speak to what happened under previous directors, but assured that DEQ has been very transparent with this negotiated rulemaking. DEQ conducts almost all of its rulemaking with the negotiated rulemaking process and takes the process very seriously. It begins with an initial proposal that is open to discussion and negotiation and almost always ends with changes to the final rule as a result of comments received.

Mr. Burnell added that Mr. Eaton's email comments were used in the negotiated rulemaking teleconferences and pointed out that the original proposal of this rule had higher flows than proposed in the rule today. After review of the data and comments from realtors and building contractors, flows were reduced to what is now being presented. This level is even lower than the Panhandle Health District had proposed for its rules. DEQ also modified the bedroom definition, as suggested by the association in its comments. These changes clearly demonstrate DEQ has been responsive to the comments and needs of the regulated community.

Mr. Burnell believes the need for the proposed rule is evident in the data set that was collected. The goal is to set an appropriate level of design for an individual septic system. The current rule allows 16% of permits issued to exceed the permitted level; one out of seven permits is undersized. This creates a higher risk for system failure. The proposed rule before the Board today is to change the flows so that only one out of 20 systems would exceed the design flow.

Kermit Kiebert commented that it seems futile to pass a rule that industry is not happy with and will not pass the legislature. He asked if there was room for further negotiation and if the legislators who were involved in the issue supported the proposed rule.

Mr. Burnell replied that DEQ is asking for approval of the rule. He understands Mr. Eaton has doubts as to the merit of the rule. He had hoped for discussions during the negotiated rulemaking meetings, but unfortunately that did not happen. Mr. Burnell is confident the data set

proves the current rule is undersizing an unacceptable percentage of septic systems and that it creates a higher risk.

Dale Peck said he could not speak to the legislators' satisfaction with the proposed rule, but he has worked very hard with the regulated community in northern Idaho to ensure their support. Mr. Peck disagreed with Mr. Eaton's assessment that the Coeur d'Alene Association of Realtors and North Idaho Builders and Contractors Association did not support this rule. He clarified that those associations supported flows (in the Panhandle rules) even larger than what are being requested in this proposed rule, with the contingency that a modification is made in the Panhandle Health District's rules regarding the spec drainfields. That change has already been posted in the administrative bulletin and a hearing is scheduled for October 24.

Mr. Eaton said while it is correct that the associations were in support of the Panhandle Health District's rule, they do not support this rule for a statewide standard because it does not include some of the things they negotiated in the previous rule. He believes the bedroom definition will cause even more problems for industry and will be a big issue that will require substantial negotiation to reach consensus. He suggested using the International Building Codes process as a model. That process involved about 20 interest groups coming together with experts to convince the technical group from the Building Contractors Association that the changes were needed. He added that he does not think the environment has changed in the legislature regarding this issue, and the rule will get the same response it has in the past.

Nick Purdy said he is a very strong advocate of the negotiated rulemaking process and has been very impressed with the results it has achieved over the years. He expressed concern that Mr. Eaton is opposing the rule without having attended any of the negotiated rulemaking meetings. He questioned the value of sending the rule back for further negotiation if all the parties will not participate in good faith.

Mr. Eaton reiterated that the association did participate through written comments and believes this matter is not appropriate for negotiated rulemaking. He thinks the development community needs to first be convinced that a problem exists before drafting any legislation or moving any rules forward. They are not convinced by the data set and believe it is more a matter of homeowners not maintaining (pumping) their septic systems, not a matter of the systems being undersized. He noted that the data set represents many houses that were built under the old building and design standards.

Mr. Peck pointed out that the issue of older homes versus newer homes built under different standards was reviewed in the study. There was no significant difference between the flows from newer homes that were built since the codes were changed and older homes. While newer homes may have low-flow fixtures, newer homes have more water-using features such as multiple showerheads.

Mr. Peck confirmed that the president of the North Idaho Builders and Contractors Association testified in person and in writing supporting the higher flows because he thought it was in the best interest of the development community for the long term to protect the waters of north Idaho. He restated that the North Idaho Builders and Contractors Association and the Coeur d'Alene Association of Realtors are supportive of the flows being presented here.

A. J. Maupin explained that homes designed and built prior to the 1985 rule change had drain fields sized at 100 gallons per day, per capita, with an assumption of two people per bedroom (total 600 gallons). After 1985, drainfields were sized based on the current set of flow data. He believes this is why the older homes are not having problems with system failure—because the drainfields were right-sized.

Don Chisholm commented it makes sense when making an investment like this to optimize the size of the system for whatever use may occur in the future. Many three-bedroom homes are later used as four or five-bedroom homes when a den or exercise room is turned into another bedroom as the family grows. He believes the proposed rule is the right thing to do to protect ground water and provide homebuyers with a right-sized system. He does not favor sending the rule back for some form of pre-negotiated rulemaking process.

➤ **MOTION:** Nick Purdy moved the Board adopt the Individual Subsurface Sewage Disposal Rules, as presented in the final proposal in Docket No. 58-0103-0801 with an effective date of July 1, 2009.

SECOND: Don Chisholm

ROLL CALL VOTE: Mr. Chisholm, aye; Dr. Cloonan, aye; Mr. Kiebert, nay; Dr. MacMillan, aye; Ms. Mascareñas, aye; Mr. Purdy, aye; Chairman Harlen, aye. Motion carried.

**AGENDA ITEM NO. 10: GROUND WATER QUALITY RULE, DOCKET NO. 58-0111-0801
(PENDING RULE) (RULEMAKING TO CLARIFY PORTIONS OF THE
GROUND WATER QUALITY RULE**

Barry Burnell presented this rule to clarify portions of the Ground Water Quality Rule to promote consistency in application of the rule to mining activities. The proposed rule addresses the following issues:

- 1) Adds definitions to improve statewide consistency with interpretation and implementation of mining provisions of the rule
- 2) Develops a procedure and process to follow for setting points of compliance for ground water quality related issues at mining areas
- 3) Authorizes ground water monitoring at mining areas
- 4) Addresses when the rule is applicable
- 5) Imposes a fee on mine operators making an application with DEQ to set the ground water quality points of compliance

Five negotiated rulemaking meetings were held via video teleconference so members of the regulated community and the public throughout the state could participate. During the rulemaking, the initial proposed rule was revised from last year's "affected ground water area" approach to be more in line with a federal rule, CFR Part 257, and with directives of the Ground Water Quality Plan.

Mr. Burnell explained the rulemaking package contains a statement regarding the stringency law, Idaho Code § 39-1047D, because the rule regulates something that is not regulated by the federal government. This is because there is no counterpart in a federal rule for ground water. There are federal counterparts for permitting of mining operations, but this is not a permit rule. This rule sets ground water quality points of compliance for mining areas, and there is no equivalent on

the federal side. The changes proposed in this rulemaking are not broader in scope or more stringent.

He reviewed each of the changes in detail and noted that the goal in this rulemaking is to strike a balance between protecting ground water and allowing for the extraction of minerals above and within ground water, which is the direction of the Ground Water Quality Plan.

Ed Hagan, Ground Water Program Manager, explained the changes made to the original proposal as a result of comments received during the negotiated rulemaking. Mr. Hagan and other DEQ staff responded to Board member questions on the details of the proposed rule.

Jack Lyman, Idaho Mining Association, presented testimony against the proposed rule. The IMA requested the Board modify or reject this rule when it was before the Board eleven months ago. The Board sent the rule back for further negotiations. The IMA drafted legislation to deal with the issues, had the legislation introduced, and in coordination with DEQ's director and the chairman of the Senate Health & Welfare Committee, reached agreement to continue the negotiations. Mr. Lyman reported those negotiations took place on a very professional basis, but the IMA continues to have two points of disagreement with the rule.

Mr. Lyman said there was significant opposition to this rule in the written comments submitted to DEQ. Some of these issues were also expressed during the negotiations. He believes most of the comments and objections to the rule are more appropriately directed at the Ground Water Quality Plan. The Board's and DEQ's hands are somewhat tied because the Idaho Legislature adopted a ground water plan. Some people disagree with the decisions the legislature made, but two years were spent negotiating the plan. Disagreements came up and compromises were reached, and they are reflected in the plan. The IMA disagrees that it is DEQ's role to seek a compromise between the parties to this negotiation when considering the explicit language of the plan. The IMA also disagrees that it is DEQ's role to strike a balance between the mining policy and the ground water protection policy of the plan.

Mr. Lyman discussed the intent of Section 2.c. of the plan regarding mining and pointed out there is no language that indicates it was the Ground Water Quality Council's intent to create a regulating system that would treat some mining activities differently than others. He stated that, in his view, the Council never discussed the word "extraction" having a more limited meaning than it commonly has in the mining context. He believes the rule must give the term extraction the same meaning intended by the Ground Water Quality Council and, by its approval of the plan, the meaning that was intended by the legislature.

Mr. Lyman asserted that by approving a mining section in the plan, the legislature clearly wanted mining to be treated differently than other activities in the application of the plan. In 1997 the legislature adopted a resolution directing the Board to recognize the unique aspects of mining. He believes the legislature clearly wanted mining to be defined as it was described in the list of mining activities in the plan.

To address the concerns of the IMA, Mr. Lyman made the following recommendations:

- 1) Delete the definition of extraction. The only purpose of that definition in the rule is to exclude processing activities including crushing, beneficiation, and other processing activities that typically occur in a mine setting. The term is used in the discussion of

mining activities in the plan. Deleting the definition of extraction would then mean that the term would have its usual definition as used in a mining context.

- 2) Add an additional sentence to the definition of mining activities that would read: The term “mining activity” also includes mineral processing and disposal of processing wastes, if that processing or waste disposal takes place near the area of mineral extraction.

Mr. Lyman noted he had dropped the term drilling. Concern was expressed during the negotiations that including drilling would somehow vastly expand the mining area under the rule. He said he was willing to concede this point, although he believes expansion was intended by the legislature and by the parties to the negotiation. He also noted he recommended processing only include processing that takes place near the area of mineral extraction. While he believes the Ground Water Quality Council intended to include remote processing in the term processing, he is willing to concede this point in an effort to try to reach a compromise.

Mr. Lyman distributed charts to graphically show four examples of how the IMA envisions this rule would be applied to define the mining area (Attachment 1).

Mr. Lyman concluded saying the IMA has attempted to modify what it proposed during the negotiations and presented last year to provide a workable solution it believes is consistent with the legislature’s intent in adopting the Ground Water Quality Plan.

Board members asked questions about the recommended revisions and discussed solutions to IMA’s concerns.

Marv Hoyt, Idaho Director, Greater Yellowstone Coalition, testified the coalition is very concerned about the proposed changes in the rule. While the coalition is not in agreement with the current exemption for mining, they can live with it. The coalition participated in this negotiated rulemaking and the one last year.

The coalition is concerned because it feels the proposed changes would invite mining companies to not design the best mining facilities, processes, and BMPs to prevent ground water contamination. The coalition feels the rule as currently proposed would encourage mining companies to do the very minimum possible to comply with the rules.

Mr. Hoyt is very familiar with phosphate mining in southeast Idaho and believes these changes are being brought forward as an attempt to get around the current exemption for mining by expanding the mining area that can be contaminated. He discussed ground and surface water contamination that has occurred as a result of phosphate mining in southeast Idaho. The connection between ground and surface water has resulted in selenium contamination of springs miles away from mining activities. The entire Blackfoot River above the reservoir is proposed for listing on the 303d list, and a lot of it is likely due to ground water contamination. Eight stream segments in the phosphate mining area will be placed on the 303d list this year because of selenium contamination.

The coalition feels many questions have not been answered and is concerned about what this rule would mean to surface water. Mr. Hoyt concluded by saying that the coalition thinks this rule goes too far, is too lax, will promote more contamination of surface waters, and harm fish,

wildlife, and people who depend on clean water in southeast Idaho. The coalition also believes, as the Idaho Conservation League points out in its letter (Attachment 2), the rule would create a permanent exemption. Because this rule relaxes the current exemption and makes those exemptions permanent, the coalition cannot support the rule as it is now proposed.

Nick Purdy expressed concern that no bonding or financial assurance is included to cover the cost of future cleanup and monitoring expenses and asked if something could be included in the rule. Dr. Cloonan believes including such a requirement would make it a permitting regulation, which would be inappropriate in the ground water standards and require a completely separate set of regulations.

Doug Conde said there was a question as to whether DEQ has authority to impose financial assurance requirements in this rule without statutory authorization. The legislature has given exclusive bonding authority to the Department of Lands (“Lands”), and in fact, did transfer authority DEQ had in the cyanidation process to Lands. Mr. Purdy said he was not concerned whether DEQ or Lands required the bonding; he just thinks it would be the responsible thing to do to link the monitoring that is being required at the point of compliance to a requirement for financial assurance to avoid a possible financial burden on the citizens of Idaho.

- **MOTION:** Don Chisholm moved the Board adopt the Ground Water Quality Rule, as presented in the final proposal in Docket No. 58-0111-0801 with an effective date of July 1, 2009 with the following modifications (modifications shown in underline):

Page 289, Section 007. DEFINITIONS. 21. Mining Activity.

Recovery of a mineral from mineral-bearing deposits, which includes reclamation, extraction, excavation, overburden placement, disposal of tailings resulting from processing, and disposal of mineral extraction wastes, including tailings that are the result of extraction, waste rock, and other extraction wastes uniquely associated with mining.

Page 289, Section 007. DEFINITIONS. 22. Mining Area.

The area on or within which one (1) or more mining activities occur. The Department shall determine the boundaries of the mining area as provided in Section 401. Distinct mining activities may constitute separate mining areas.

SECOND: Dr. Joan Cloonan

ROLL CALL VOTE: Mr. Chisholm, aye; Dr. Cloonan, aye; Mr. Kiebert, nay; Dr. MacMillan, aye; Ms. Mascareñas, aye; Mr. Purdy, nay; Chairman Harlen, aye. Motion carried.

Don Chisholm asked if Agenda Item No. 8 Wastewater Rules, Docket No. 58-0116-0801 could be reopened for consideration of an amendment to the motion that was approved. He pointed out that during the discussion on this issue there seemed to be agreement that a change was needed to the wording on Page 303, **Section 010.68. Reasonably Accessible.** Chairman Harlen stated Mr. Chisholm was in order to reopen that item for discussion.

- **MOTION:** Don Chisholm moved the Board amend the prior motion that was approved for the Wastewater Rules, Docket No. 58-0116-0801, to add the following language (amended language is shown in underline):

Section 010.68. Reasonably Accessible. The following criteria shall be used to determine whether a project proposing a new private municipal wastewater treatment plant, or material modification or expansion of an existing private municipal wastewater treatment plant, is reasonably accessible to a public municipal wastewater collection system.

SECOND: Dr. Joan Cloonan

VOICE VOTE: Motion carried unanimously.

The meeting adjourned at 5:15 p.m.

October 9, 2008

Chairman Harlen called the meeting to order at 9:00 a.m., with all Board members present at roll call.

AGENDA ITEM NO. 11: **RULES FOR THE CONTROL OF AIR POLLUTION IN IDAHO, DOCKET NO. 58-0101-0703 (PENDING RULE) (RULEMAKING TO ENSURE THAT THE PURPOSE AND APPLICABILITY OF SECTIONS 725 THROUGH 729, AS THEY RELATE TO SULFUR CONTENT OF FUELS, IS CLEAR)**

Martin Bauer, Administrator, Air Quality Division, explained this rule is merely a clarification; there were no substantive issues to the rule. It will clarify the rules, and DEQ's interpretation of the rules, regarding the sulfur content in fuels used in fuel-burning sources in Idaho. This was a negotiated rulemaking process and stakeholders from industry and environmental consultants participated. The rulemaking also went through the public comment process. This rule change will not result in any additional costs to the regulated community. There were no controversial issues during the rulemaking, and there are no stringency issues.

Mr. Bauer explained this rule change was brought about because DEQ received a permit application from a business that wanted to extract sulfur as part of its process and use sulfur to create a sellable product. To maximize that process, it needed to use a high-sulfur content fuel. The applicability of the rule needed to be revised to clarify how it applied to this process.

➤ **MOTION:** Dr. MacMillan moved the Board adopt the Rules for the Control of Air Pollution in Idaho, as presented in the final proposal, Docket No. 58-0101-0703.

SECOND: Don Chisholm

VOICE VOTE: Motion carried by unanimous vote.

AGENDA ITEM NO. 12: **RULES FOR THE CONTROL OF AIR POLLUTION IN IDAHO, DOCKET NO. 58-0101-0801 (PENDING RULE) (OPEN BURNING OF CROP RESIDUE)**

Martin Bauer presented the pending rule for the crop residue burning program in Idaho. He explained this rule was adopted by the Board in March 2008 as a temporary rule and is currently in effect. Mr. Bauer briefly reviewed the history of the rule and provided an update on the 2008 burning season. Statewide, there were 43,200 acres eligible that paid to burn; of those acres, 29,200 have been burned (about 68%). At the end of the burning season, the program will be evaluated to see if anything needs to be improved.

- **MOTION:** Don Chisholm moved the Board adopt the Rules for the Control of Air Pollution in Idaho, as presented in the final proposal under Docket No. 58-0101-0801.
SECOND: Dr. Cloonan
VOICE VOTE: Motion carried by unanimous vote.

AGENDA ITEM NO. 13: **RULES FOR THE CONTROL OF AIR POLLUTION IN IDAHO,
DOCKET NO. 58-0101-0802 (UPDATE OF FEDERAL REGULATIONS
INCORPORATED BY REFERENCE)**

Martin Bauer presented this rule to provide the annual incorporation of rule revisions to the federal rule. The rulemaking is necessary to ensure Idaho rules are consistent with federal regulations. Negotiated rulemaking was not conducted because it is a standard administrative procedure performed every year. A public comment period was held and resulted in no changes to the rule. This rule change will not result in any additional costs to the regulated community. There were no controversial issues, and there are no stringency issues.

- **MOTION:** Don Chisholm moved the Board adopt the Rules for the Control of Air Pollution in Idaho, as presented in the final proposal under Docket No. 58-0101-0802.
SECOND: Dr. Cloonan
VOICE VOTE: Motion carried by unanimous vote.

AGENDA ITEM NO. 14: **DEQ REPORT AND RECOMMENDATIONS ON MERCURY
RULEMAKING**

Chairman Harlen said that due to the large number of people wishing to testify on this agenda item the Board will hear DEQ's report today and accept testimony at the February 2009 Board meeting. This will also allow parties adequate time to prepare a response to DEQ's report.

Martin Bauer presented the Mercury Evaluation and Rulemaking Plan (Attachment 3) that DEQ prepared in response to the Board's motion on the Idaho Conservation League's Petition for Rulemaking for Mercury. The Board had directed DEQ to prepare a plan on how to move forward on mercury and mercury regulations in Idaho.

The plan presents three options for consideration:

- 1) Emission Inventory Plan
 - a. Perform a comprehensive emission and source inventory that would include air sources, old mining tailings, geothermal and geological.
 - b. Determine top contributing sources(s).
 - c. Determine if top sources can be regulated.
 - d. If so, enter negotiated rulemaking to include determining threshold or exemption levels, determining control or technology level, and addressing stringency issues.
- 2) REMSAD Model Plan
 - a. Identify hot spots based on REMSAD modeling.
 - b. Identify water bodies within hot spots.
 - c. Test fish tissue for Hg levels within water bodies in hot spots.
 - d. Analyze the water to determine its ability to methylate Hg.

- e. Based on the results of the above analysis, initiate negotiated rulemaking or enter into a voluntary consent order with identified sources.
- 3) Emission Threshold Plan
- a. Determine amount of emissions that likely can cause hot spots through REMSAD or other appropriate model.
 - b. Initiate negotiated rulemaking that:
 - i. develops de minimis levels
 - ii. defines technology/control levels that would be required if above de minimis levels occur
 - iii. defines monitoring, reporting and recording
 - iv. defines how this applies to existing and new sources

Mr. Bauer discussed the pros and cons of each option. The emission inventory pros would be that it would result in a comprehensive picture of mercury impacts to Idaho and pinpoint the largest sources impacting Idaho. The cons are time and money. Initial bids indicate the cost would be about \$150,000 and take up to a year or more to do the inventory and a year or so more for the rulemaking.

The REMSAD Model Plan pros are that it would directly address areas with high mercury and fish tissue. It would also address local point sources identified in the hot spots. It is science-based and would allow follow-up to see if decreases in the mercury actually had an effect on the fish. The cons are that it might not address new sources. It could be written to address new sources, but that would generate a whole different set of complexities. New sources would have to put in quite a bit more analysis in the permitting process before they could get their permit. It would also require case-by-case controls on the industry, and the industry would not have assurances.

The pros to the Emission Threshold Plan are that it would be less expensive and quicker. The models could be run in about a month and would supply a basis to begin negotiated rulemaking. It would result in mercury control from air stationary sources, address new as well as existing sources, and provide consistency to industry. The cons would be in defining the de minimis level and a generic facility or source, and agreeing on what defines a hot spot. It would not be an exact fit for every source. Facilities are unique and regulation would be based on a one-size facility with one certain volume rate. This plan would not provide a specific connection between source emissions and mercury in fish.

Chairman Harlen opened the floor to questions from Board members on the three options.

Dwight Atkinson, Ph.D., EPA Office of Water, presented Atmospheric Mercury Deposition Modeling for Idaho Watersheds & Waterbodies, A Summary of Results (Attachment 4). This PowerPoint presentation provided a detailed discussion of deposition modeling, a history of the model development and EPA's Water Office involvement, the scope of the project, how the model was initialized using inputs for Idaho, and the results – where Idaho fits in the national scheme of things. Most of the presentation was focused on Idaho findings.

Dr. MacMillan asked Dr. Atkinson if he had a sense of whether putting controls on local emissions would help reduce mercury in waterbodies to the point that fish consumption advisories would not be needed. Dr. Atkinson responded that some studies had been conducted

where fish tissue studies were conducted two years or so after controls were put in place and the numbers dropped commensurately. It is usually a two-step process where an initial benefit occurs about a year or two after controls are put in place, and then a number of years later, the full benefit is seen. The mercury deposition that falls on the land in the watershed feeds down the hillside through erosion events, and it may take 20 to 30 years, depending on the dynamics, for the mercury being turned off at the headwaters of the watershed to take advantage of the controls.

Dr. Atkinson briefly discussed the impacts of wildfire on mercury depositions. Recent estimates indicate wildfire could contribute up to 20% of the annual deposition. He noted that the data is very new and the issue needs to be investigated more thoroughly.

Jim Wertz, Administrator, EPA Region 10, reported the region has been working in coordination with states, tribes, and university research entities to develop a strategy to learn what it can do to manage and control mercury locally. The draft should be final within the next two weeks, and EPA will then begin work on developing implementation. EPA does not expect to see a lot of new resources coming on this work and needs to determine how to direct its limited resources. Mr. Wertz will supply the Board with the strategy when it is final.

Mr. Wertz commented there is not enough information about methylation in Idaho and the West. The methylation potential of water bodies is not well understood. EPA is engaged with USGS and others, as part of its strategy, to focus on the Rocky Mountain West and the implications for arid impacts. Most methylation research has been done in the East. It is important to learn how the mercury depositions correlate to the fish tissue levels and why there are such high levels of mercury in fish tissue in the West.

Mr. Wertz recommended, based on experience working with Nevada and EPA Region 9, testing local hot spot sources for speciation using the Ontario hydro method to make sure the assumptions that went into REMSAD are correct. He encouraged the Board to provide feedback on how EPA can best work with Idaho on this complex issue.

Chairman Harlen opened the floor to questions and deliberation by the Board to determine how it would like to proceed on this issue.

Dr. Cloonan commented it appears there are elements in each of the three options that are needed. She feels at this point more information and input is needed from industry groups and other organizations.

Mr. Bauer clarified that Option 3, Emission Threshold Plan, would be less expensive for DEQ's out-of-pocket costs, but that does not mean that it would be less expensive to regulate or that there would not be a financial cost to industry.

Dr. MacMillan asked if the hot spots in Idaho correlate with the fish consumption advisories. Barry Burnell discussed the latest statewide assessment of water bodies, "Arsenic, Mercury, and Selenium in Fish Tissue from Idaho Lakes and Reservoirs: A Statewide Assessment." Comparing the mercury fish tissue results from lakes and reservoirs from this 2007 assessment to Dr. Atkinson's presentation, Page 16, "Annual Mercury Deposition Pattern Over Idaho" does

show some correlation to the hot spots in southern Idaho. In northern Idaho there is more wet deposition and the fish tissue consumption advisories could be related to the higher rainfall.

Dr. MacMillan asked if the hot spots had been sampled. Mr. Burnell responded that DEQ has not monitored all hot spots. The 2007 assessment was based on a randomized selection of lakes and reservoirs so DEQ could draw conclusions on a statewide basis.

Chairman Harlen said the Board will study and consider the information and schedule the mercury issue for more discussion and testimony at its February 2009 meeting.

AGENDA ITEM NO. 15: IDAHO RURAL COUNCIL, INC.'S PETITION FOR INITIATION OF RULEMAKING, IDAPA 58.01.17, RULES FOR THE RECLAMATION AND REUSE OF MUNICIPAL AND INDUSTRIAL WASTEWATER (REQUESTING AN AMENDMENT THAT WOULD ELIMINATE THE PRESENT EXEMPTION FOR DAIRY/FEEDLOT LAGOON WASTEWATER THAT IS LAND APPLIED THROUGH PRESSURIZED IRRIGATION SYSTEMS OR OTHER DEVICES)

Rich Carlson presented the petition on behalf of the Idaho Rural Council (IRC). He said concerns about pathogen drift originated when a study conducted in 1977 in the Burley area found pathogen drift from a waste stream being sprayed from wheel lines. When EPA and DEQ published studies in 2005 and 2006 (cited in this petition) regarding the environmental impacts of pathogens from confined animal feeding operations (CAFOs), the IRC began wondering what is in dairy lagoon waste, how far it travels when it is put through a pressurized irrigation system, and what if anything should be done to protect public health and livestock health from the effects of pathogen drift.

The EPA study found strong evidence of many pathogens in the waste stream from CAFOs. The IRC has collected samples of overspray from dairy lagoon waste being land applied through a pressurized irrigation system. The spray sometimes crosses public roads. Independent water quality testing found very high levels of fecal coliform.

Mr. Carlson explained that the IRC petition asks the Board to initiate a process that would put dairy lagoon waste that is land-applied through pressurized irrigation systems under the same rules and the same microscope that DEQ uses to regulate land application of liquid waste from municipal and industrial sources. The IRC believes it is important to learn what happens to this waste stream and if it is a danger to public health and the environment when it drifts off a land-application site as a result of wind drift.

The IRC would like the negotiated rulemaking process to first determine what is in the waste stream, through an authoritative analysis, and then determine what should be done to prevent the spread of the germs in the waste stream.

Nick Purdy asked if the IRC had contacted the Idaho State Department of Agriculture (ISDA) regarding its concerns. Mr. Carlson said he submitted a public records request to DEQ and ISDA requesting any studies containing information regarding the constituents of dairy lagoon waste. Both departments indicated they had no such studies. The ISDA has information on the nutrient value (nitrogen, potassium, and phosphorus values) that it collects for use in its Nutrient Management Plan Program.

Dr. MacMillan said as a Magic Valley resident he could attest to the unpleasant experience of driving his car and being sprayed by a waste stream going across the road. He believes it raises concerns about health issues and thinks something should be done to alleviate or minimize the possibility of this happening. He asked if EPA was taking any action on this issue. Mr. Carlson said he thought EPA was asked to do something about pathogen drift as part of its jurisdiction in a lawsuit several years ago, but to his knowledge that was not successful and EPA does not believe it has jurisdiction to regulate pathogens that are aerosolized as a result of this process. He added that California and most other large dairy states do not have widespread use of pressurized irrigation systems to land apply wastewater; the large majority of them use flood irrigation.

Mr. Carlson discussed reports of negative health affects from exposure to pathogen drift from CAFO waste. No concrete epidemiological evidence exists because studies have not been done.

Nick Purdy asked if IRC wanted to limit the drift of the effluent off the property or to eliminate pressurized application. Mr. Carlson clarified the IRC is asking the Board to consider placing the pressurized process of land applying dairy lagoon waste through the same risk management process used for land application of industrial and municipal waste through pressurized irrigation systems. A thorough study of the constituents of dairy lagoon waste may show that the risks are lower than those associated with land application of industrial or municipal waste. The process DEQ has been using for 30 years, which is part of the permit process for land application, looks at what is in the waste stream that could affect humans and other populations. Based on an EPA report that found harmful bacteria and other harmful substances in CAFO waste streams, they should be controlled in the same manner as waste streams from municipal and industrial sources.

Dr. Cloonan agreed with Mr. Carlson that there may be a legitimate concern regarding pathogen drift, but was not certain the Board was the correct entity to respond to this problem. She was involved with the development of the regulations and guidance for the land application of wastewater, and that process was designed to address how specific waste streams are treated. It did not consider dairy or any waste streams other than industrial and municipal. It also did not discuss pressurized irrigation or flood irrigation; it was for land treatment of wastewater from various types of operations. It was understood that dairy and feedlot wastewaters were exempt because they were regulated under other statutes and the ISDA. Most of those regulations focus on the impact on ground water and soils. In short, she believes pathogen drift is a whole separate issue—very different from the land application of wastewater and the reuse regulations. She asked if the IRC wanted the Board to look only at pressurized irrigation with these wastewaters or at how the wastewaters are treated.

Mr. Carlson sees no logical reason for excluding this type of waste stream from the rules. The waste streams are very similar and appear to have the same pathogens as a municipal wastewater treatment plant. DEQ has the scientific background and expertise to regulate what is essentially an air quality problem that is directly associated with human health impacts. The ISDA has an interest in making farmers successful through the reuse of all of the byproducts of animal and food production, whereas DEQ's mission and expertise is in protecting Idaho's air quality. He also pointed out that in 1988, when those rules were developed, lagoons were not in widespread use as they are now.

Dr. Cloonan noted that the land application regulations and guidelines essentially allow for use of municipal wastewater for certain purposes if it is treated to a certain level. They do not specify how to treat it, just the level or class of treatment. Dairy wastewater comes from a lagoon which might have some kind of treatment, but it is very minimal compared to municipal wastewater. She believes what is being requested in the petition would require a whole new set of treatment regulations for dairy wastewater because it does not combine well with the existing land application process. The quality of wastewater from a dairy lagoon is most likely nowhere near the quality of wastewater being land applied from a municipal wastewater treatment plant. A step is missing, and it is not clear whether it should be DEQ, ISDA, or EPA that should address that step.

Mr. Carlson said he understands that dairy lagoon wastewater can be 20 times or 100 times more concentrated than municipal wastewater. He urged the Board and DEQ to do whatever it takes, be it treatment or regulation of pressure systems, to ensure protection of public health as well as livestock health. He discussed a recent article on the spread of bovine tuberculosis and recent tests to locate and test dairy bulls imported into Idaho from California. Another article announced that California and New Mexico had lost their bovine TB-free status as a result of outbreaks of bovine TB. With such problems presenting a risk to Idaho, he asked that the Board and DEQ apply all their scientific methods to research and study necessary to ensure the public, including IRC members who raise beef and dairy cattle as well as children and grandchildren, are protected from the risks presented from dairy/feedlot lagoon wastewater that is land applied.

Nick Purdy commented that the petition seems to speak to equipment problems such as pivot end guns discharging across the road and wind drift. He thinks modifying the equipment used for pressurized irrigation would solve many of the problems. He questioned whether the ISDA might be able to specify in its nutrient plans the type of equipment that could be used to spread this type of effluent. Mr. Purdy said his business specializes in this type of equipment and he is very familiar with pivots used to apply water and wastewater. He believes there should be no end gun on the pivots used to distribute dairy effluent. The wastewater should be distributed through drops and low-pressure applications through sprinklers. This would keep the effluent within several inches of where it is being applied and prevent it from spreading into the air. He thinks these changes alone might be able to address the concerns expressed in the petition.

Mr. Carlson agreed that such equipment modifications would be part of the solution; however, he is not convinced that the ISDA, because of its mission, is the appropriate agency to perform the type of analysis that is necessary to determine the risk. He believes it would be appropriate for the ISDA and its engineers to be part of the discussion about how to reduce the impact of the drift. He is concerned about the black effluent being distributed on the ground regardless of whether it is coming out of an end gun or a low-pressure drop nozzle close to the road.

Mr. Burnell reviewed the disinfection standards for land application of municipal wastewater.

Carol Mascareñas asked about the history behind the decision to exempt dairy waste from the Rules for the Reclamation and Reuse of Municipal and Industrial Wastewater. Mr. Burnell said it was his understanding that when the rules were adopted in 1988 there was an effort to establish the applicability of the rules. Municipalities and industries were looking for alternatives to discharging to surface waters and land application was the upcoming method to treat wastewater.

At that time it was decided that the rules would not apply to the dairy industry, and since that time various rules and statutes have been developed under the purview of ISDA.

Dr. Cloonan commented that when the rules were being developed, the land application program was focused on municipal and industrial sources. At that time, CAFOs in general were covered by EPA NPDES permits and the details regarding wastewater were covered under the terms of the NPDES permit. Therefore, it was considered unnecessary to include CAFOs in the land application program. Issues such as aerosol drift came about after 1988 when the rules were adopted. The issues today are far more sophisticated than those considered in 1988 when the rules were developed.

Don Chisholm discussed the regulations and laws regarding reuse and land application that existed in the 1970s and whether any of them might still exist at some level. He believes this is a very complex issue that needs more scoping to learn what needs to be accomplished and how to best achieve it within the statutory and regulatory framework. Mr. Chisholm feels the spraying issue is just a small part of the whole picture. The issue of the risk presented by lagoon wastewater, whether it is spread on the ground or sprayed, needs to be addressed. There are questions regarding pathogens, pharmaceuticals, and hormones. He believes it is too early to go to rulemaking, but thinks the petition raises an issue that warrants bringing more parties to the table to discuss how best to address these concerns.

Justin Hayes, Program Director, Idaho Conservation League (ICL), testified the ICL and its members are also interested and concerned about this matter. He is encouraged by the level of discussion today and feels some very good questions have been raised about applicability of the rules. He feels it is clear something needs to be done and encouraged the Board to act on this rule and move forward to learn how to best address the situation.

Brian Oakey, Deputy Director, ISDA, discussed the rules in place and the distribution of authority between DEQ and ISDA. He clarified that the rules governing dairy waste ISDA has in place and is enforcing do not necessarily segregate the different constituents of dairy waste, but actually defines it all as dairy waste, whether it is nutrients or other negative constituents. The definition most applicable in this case is “discharge violation” which is defined as:

A practice or facility condition which has caused an unauthorized release of livestock waste into surface or ground water or beyond the dairy farm’s property boundaries or beyond the property boundary of any facility operated by the producer.

Mr. Oakey said if ISDA were to receive a petition similar to the one before the Board today, it would consider this rule applicable. The rule does not currently restrict application practices; it simply states that nothing is to go beyond the property boundaries. If ISDA were to receive a petition requesting additional restrictions or requirements on how waste is handled or applied, this is the rule that would be open for negotiation.

Mr. Chisholm commented that buffer zones were used in the settlement of a lawsuit regarding land application in Gooding County and asked if buffer zones were part of ISDA’s rules for land application of waste and if it could be part of the solution.

Mr. Oakey said no buffer zone requirements are in place to restrict land application in ISDA's rules; the rules just state that nothing is to go beyond the property boundaries. If the producer needs to have a buffer to ensure that nothing gets beyond the property boundary, it is up to the producer to determine and establish. He received a copy of the permit related to the lawsuit in question this morning and knew that it contained buffer zones and setback requirements, but had not had an opportunity to review the permit fully.

Nick Purdy asked if ISDA could promulgate a rule that set specific requirements for land application of wastewater such as the type of nozzle, height of nozzle from the ground, prohibition of end guns, and pressure levels. Mr. Oakey believes ISDA has broad discretion in its rulemaking authority to regulate waste and, in his opinion, would have authority to add further restrictions. Mr. Purdy asked if ISDA had adequate manpower to enforce such restrictions. Mr. Oakey believes ISDA would have adequate staff to enforce such restrictions. ISDA has 16 field staff, several of whom are in the Magic Valley and who conduct an average of 2½ inspections on every dairy facility annually. This type of regulation would be another part of inspections they are currently performing.

Dr. MacMillan commented there appears to be an enforcement problem with the current regulation regarding dairy waste. Dairies are clearly exceeding their boundaries with the application of waste. He asked if ISDA had received complaints and was taking appropriate actions. Mr. Oakey said ISDA has an enforcement history, most often on end guns that are shooting beyond the property boundaries. He was not certain how many complaints or enforcement actions have been taken. He said the issue of pathogens and aerosolization, while more complicated and complex to investigate and prove for purposes of enforcement, would also be considered a violation of the rules governing dairy waste.

Dr. MacMillan asked if the petition were submitted to ISDA it would review its rules to see if this problem were already covered, or if it would consider revising its rules to better respond to this problem. Mr. Oakey responded yes to both questions. He said ISDA would first see if existing rules covered the concerns, then review the matter with its lawyers and probably initiate a negotiated rulemaking process.

Dr. MacMillan asked Mr. Oakey if he believed ISDA was a more appropriate agency than DEQ for addressing this issue. Mr. Oakey responded in light of the fact that ISDA has MOUs in place with DEQ and EPA regarding waste management practices and enforcement of environmental issues related to CAFOs, he believes it is appropriate for ISDA to consider a similar petition. The MOU anticipates the agencies would work closely in promulgating any additional requirements or restrictions.

Don Chisholm asked if ISDA were restricted by a stringency rule similar to Idaho Code § 39-107D, which prevents DEQ from promulgating a rule that is more stringent than federal rules or regulates an activity not regulated by federal government. Mr. Oakey said he was not aware of any stringency rule applying to ISDA, and noted it has the ability to regulate waste that goes beyond the property boundaries of a dairy facility, which is more restrictive than the Clean Water Act. To a certain extent, ISDA may have a little broader authority with respect to dairies than DEQ or EPA.

Dr. MacMillan asked Mr. Carlson if the IRC would consider filing a petition with ISDA since it appears it may be in a better position than DEQ given the MOUs and stringency constraints. Mr. Carlson responded that based on eight or nine years of experience with problems associated with big dairies, ISDA is not only understaffed to deal with this sort of thing, but has been very protective of the dairy industry, rather than being protective of neighbors and the rest of the population. He said the IRC presented this petition to the Board of Environmental Quality because it trusts the Board to put aside ISDA's other mission; to promote agriculture. Many members of the IRC and the public are skeptical about ISDA's enforcement of its rules. For example, when dairy waste is sprayed across a public roadway into a barrow pit on the other side of the road, it is not interpreted by ISDA as a violation if the property on the other side of the road is owned or leased by the dairy owner.

Dr. Cloonan asked if any agricultural exemptions or barriers in Idaho law exist that would prevent DEQ from acting on the petition. Doug Conde said the MOU shifts primary enforcement of regulatory authority for CAFOs to ISDA. The statutory authority for ISDA also states it is intended to be the primary regulatory force for dairy and beef cattle operations. In respect to beef cattle operations, the legislature specifies ISDA is to implement Clean Water Act provisions and to protect water quality in addition to other aspects of operations. That being said, Mr. Conde continued, the authorities DEQ has with respect to surface and ground water quality remain in effect. The MOU provides that in situations where an eminent and substantial danger exists (as defined in the Environmental Protection and Health Act), DEQ is allowed to act. ISDA may also ask DEQ to use its regulatory authorities over discharges that have impacted ground or surface water. Mr. Conde said his concern with amending the rules as requested in this petition is that DEQ would have a direct overlap with something that is regulated by ISDA.

Nick Purdy asked if the Board could accept the petition and then develop a separate MOU to regulate spraying. Mr. Conde said the Board's options in responding to the petition are to

- 1) Deny the petition
- 2) Proceed with negotiated rulemaking
- 3) Proceed with regular rulemaking

If the Board chooses to deny the petition, DEQ can continue to investigate the options. A lack of information regarding regulatory scope and authorities, lack of information for factual basis, or a desire to study an issue before proceeding to rulemaking are valid reasons for denial of a petition.

Don Chisholm asked Mr. Oakey if the director of ISDA provided any guidance or directions on this matter. Mr. Oakey said his instructions were to explain ISDA's rulemaking authority to the Board and respond to any questions the Board might have regarding the rules. He said ISDA takes any petition for rulemaking seriously and would consider it just like it would any other petition.

Don Chisholm suggested the Board table the matter and ask ISDA to respond at the November Board meeting as to whether it can address the issues raised by this petition without the necessity of the Board making a decision on whether to accept or reject the petition. The Board could then make a decision on how to proceed. ISDA could take a number of actions to address the problem such as adding buffer zones, pressure levels, and equipment restrictions to its rules.

Dr. Cloonan pointed out that buffer zones and the equipment used to distribute wastewater are not part of DEQ's land application rules. Doug Conde clarified if a municipality chooses to reuse its wastewater for certain things, such as residential irrigation, very strict requirements apply to how wastewater is disinfected and how it may be applied. For a typical industrial facility, those requirements are not specific and can vary from facility to facility; however, the permit should include conditions necessary for protection of the environment and public health. Requirements can include nozzle height, buffer zones, when wastewater can be applied depending on wind speed, etc. These are not requirements in the rules, but are in the general authority DEQ has to set permit conditions.

Mr. Conde clarified the Board's choices for acting on the petition under the Administrative Procedures Act and the Board's rules. At its first regularly scheduled meeting after a petition is filed, the Board must either initiate rulemaking proceedings in accordance with the APA or deny the petition in writing, stating the reasons for denial. The Board may also file a notice of intent to initiate rulemaking, which would allow DEQ to proceed with a negotiated rulemaking for the specific reason of getting additional information and input on whether to proceed with the rule. Mr. Conde does not believe the Board can choose to not take action and table the issue.

Mr. Chisholm suggested if the petitioner agrees to table the petition, it would be much like a continuance in any judicial proceeding.

Kermit Kiebert believes the problem could be resolved if ISDA enforces its current rules regarding not spraying across property boundaries. He feels this is a germane subject for the ISDA; the legislature has spoken on the matter. ISDA can proceed with additional rulemaking or some process to address IRC's concerns. If this does not happen, then IRC can come back to the Board to take action to protect public health.

Carol Mascareñas agreed this matter does seem to be under the purview of ISDA, and it appears it could be resolved through enforcement of its rules. An MOU is in place so that if assistance is needed from DEQ, whether it is on the expertise of pathogens or other biological factors, the MOU can facilitate that process.

➤ **MOTION:** Nick Purdy moved the Board deny the petition based on the fact that the legislature has given ISDA authority to regulate dairy waste and DEQ has passed its authority to ISDA through an MOU, and ISDA has rules in place to regulate the matter.

SECOND: Kermit Kiebert

DISCUSSION: Dr. MacMillan expressed concern about this approach since there is no assurance ISDA will act on the matter. He prefers the option of filing a notice of intent to initiate rulemaking to allow the parties to collect more information. ISDA can then step up and take action if it chooses.

Dr. Cloonan said she is concerned with both approaches. She is more inclined to deny the petition and does not think separating one segment of the rules would fit into the structure of the land application rule. It is already regulated under ISDA's Nutrient Management Plans. She believes it would be an overlap of regulation and that the present statute does not allow DEQ to regulate this matter. She encouraged the IRC and ICA to continue thinking about the matter to discover a solution with a different approach.

Don Chisholm asked Mr. Carlson if the IRC would consent to having the Board table the petition and continue the matter until the November 2008 Board meeting to give ISDA an

opportunity to respond. He feels it would best serve all interests. Mr. Carlson responded he would be happy to have the item continued until the November meeting. He said he would like to take that opportunity to communicate with ISDA and ask it to verify whether it would treat pathogen drift as a discharge. He believes ISDA currently does not treat the potential of pathogen drift from land application sites as a discharge. He would bring that information to the Board so it could know exactly where the ISDA stands both in its willingness and ability to deal with this potential health risk.

- **SUBSTITUTE MOTION:** Don Chisholm moved the Board table this matter with the consent of Mr. Carlson and the IRC and ask the ISDA to report at the November 2008 Board meeting as to whether it is prepared to address the concerns raised by the petition and how ISDA proposes to proceed.

SECOND: Dr. MacMillan

VOICE VOTE: Motion carried by unanimous vote.

AGENDA ITEM NO. 16: CONTESTED CASE AND RULE DOCKET STATUS REPORT

Paula Wilson briefly reviewed the current contested case and rule docket status report. She reported that two oral arguments are scheduled for the November 12 & 13 Board meeting. Three rule dockets will be presented on the 12th followed by continuation of the IRC petition for initiation of rulemaking, then the Sunnyside Park Utilities case. The Neighbors for a Healthy Gold Fork case will be heard on November 13.

AGENDA ITEM NO. 17: LOCAL REPORTS AND ITEMS BOARD MEMBERS MAY WISH TO PRESENT

Chairman Harlen said the 2009 meeting schedule will be set at the November meeting.

Director Hardesty asked if the Board would like to pursue scheduling a mining tour in 2009. Chairman Harlen said Board members have expressed an interest in a mining tour to gain more expertise in mining issues. Monsanto has offered to host a tour. Chairman Harlen feels it would be beneficial for the Board to see Smoky Canyon rather than Agrium because Smoky Canyon is an example where some manipulation of the rocks is occurring close to the mine site and the Board would have the opportunity to see what is happening to the ore in the pit or within the mining area. Director Hardesty asked whether the mining tour would be in concert with a Board meeting or as a separate tour. Chairman Harlen said he would like to wait to see how many meetings are needed before making that decision.

Don Chisholm said there may also be interest in touring a hard rock mining facility in northern Idaho since most Board members had already visited phosphate mines.

The meeting adjourned at 5:00 p.m.

/s/

Craig Harlen, Chairman

/s/

Kermit Kiebert, Secretary

/s/

Debra L. Cline, Management Assistant and Recorder