



State of Idaho
DEPARTMENT OF ENVIRONMENTAL QUALITY
BOARD OF ENVIRONMENTAL QUALITY

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IDAHO BOARD OF ENVIRONMENTAL QUALITY

MINUTES

November 12 & 13, 2008

The Board of Environmental Quality convened on November 12, 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
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
Greg Eager, Engineering Manager, Idaho Falls Regional Office
Jerri Henry, Compliance and Enforcement Lead, Drinking Water Program
Rick Huddleston, Wastewater Program Manager
A J Maupin, Wastewater Engineer Program Lead
Tim Wendland, Loan Program Manager
Paula Wilson, Rules Coordinator
Bryan Zibble, Drinking Water Program Analyst

OTHERS PRESENT:

Steve Bradbury, Attorney at Law, representing Wildwood Development

Brian Oakey, Idaho State Department of Agriculture

Mark Fuller, Attorney at Law, representing Sunnyside Park Utilities

Dan Carlson, Attorney at Law, representing Idaho Rural Council, Inc.

Robbin Finch, Boise City Public Works

Justin Hayes, Idaho Conservation League

Harriet Hensley, Deputy Attorney General, Natural Resources Division, representing the Board

Mona Mack, Attorney at Law, representing Neighbors for a Healthy Gold Fork

- ❖ 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 Management Assistant at (208) 373-0465.

PUBLIC COMMENT PERIOD

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

AGENDA ITEM NO. 1: DIRECTOR'S REPORT

Toni Hardesty, Director, updated the Board on the following issues:

- Budget discussions continue. DEQ has returned 1% of its budget to the general fund and another 1½ % is being held in reserve. DEQ has not received further direction, but it appears likely that the additional 1½ % will also have to be returned to the general fund. The main impacts will be to contracting, travel, training, and computer expenses.
- DEQ continues to work on the Coeur d'Alene Lake Management Plan. DEQ will meet with the counties to fine tune issues that have come forward as a result of the public comment process. Some issues still need to be worked through, but progress is being made on developing the lake management plan.
- The Sho-Ban treatment as a state (TAS) continues to be an important issue generating a lot of interest. DEQ has met with a number of groups on this issue. It is important to understand this is a federal, not a state, action and the state does not have veto authority over these actions. The tribe must meet certain requirements to qualify for TAS, and once the tribe has met those requirements, EPA has an obligation to grant TAS. DEQ has signed an MOU with the Sho-Ban Tribe to work with them on water quality standards so they will be compatible with state standards.
- DEQ is wrapping up actions on House Bill 586, which was passed by the legislature last year. This bill primarily affects the Treasure Valley and may require emission testing or other emission offsets in specific counties in the Treasure Valley. DEQ is conducting modeling to learn the impact some of the smaller county contributions have and whether they would be impacted by the bill. DEQ hopes to complete the modeling this week and then notify counties that will be impacted by the bill.

AGENDA ITEM NO. 2: RULES FOR THE CONTROL OF AIR POLLUTION IN IDAHO, DOCKET NO. 58-0101-0803 (PENDING RULE) (Rulemaking to include additional BMPs for controlling ammonia emissions at dairy farming operations)

Martin Bauer, Administrator, Air Quality Division, said this rule revision is being presented to add Zeolite, an ammonia-reducing product, to the Best Management Practices (BMPs) dairies can use to control ammonia emissions. Negotiated rulemaking was conducted with the original stakeholders from the negotiated rulemaking for the dairy rule. The regulated community would incur no additional cost. Using Zeolite is not a requirement; it is merely another option dairy farmers can choose to control ammonia emissions.

Mr. Bauer stated this rule regulates an activity not regulated by federal regulations; therefore, Idaho Code § 39-107D, sections (1), (2), (5) and (6) apply. The notice of proposed rulemaking clearly specifies that the rule is broader in scope than federal law. This rule is based on and establishes requirements for BMPs to limit or control the amount of ammonia from dairies and does not propose a standard necessary to protect human health and the environment. Therefore, Idaho Code § 39-107D, sections (3) and (4) do not apply to this rule. Currently, the federal government is amassing information and studies that may eventually result in regulation of confined animal feeding operations (CAFOs), including dairies, but a rule has not been developed yet; therefore, Idaho Code § 39-118B does not apply to this rulemaking.

➤ **MOTION:** Dr. Randy MacMillan moved the Board adopt the Rules for the Control of Air Pollution in Idaho, as presented in the final proposal, under Docket No. 58-0101-0803.

SECOND: Dr. Joan Cloonan

VOICE VOTE: Motion carried by unanimous voice vote.

AGENDA ITEM NO. : 3 IDAHO RULES FOR PUBLIC DRINKING WATER SYSTEMS, DOCKET NO. 58-0108-0803 (PENDING RULE) (Incorporation by reference of National Primary Drinking Water Regulations for Lead and Copper)

Barry Burnell, Administrator, Water Quality Division, presented this rule to incorporate by reference the National Primary Drinking Water Regulations for Lead and Copper revisions promulgated by EPA on October 10, 2007. Incorporation by reference ensures that Idaho's rules will be neither more nor less stringent than the federal rule. The purpose of the Lead and Copper Rule is to protect populations from exposure to lead and copper in drinking water and reduce potential health risks associated with lead and copper.

Mr. Burnell said the amendment neither amends the portion of the regulations related to copper nor changes the action levels for lead and copper. It addresses monitoring, treatment processes, public education, customer awareness, and lead service line replacement.

Bryan Zibble, Drinking Water Program Analyst, explained that in 2004 Washington, D.C., experienced incidences of elevated lead levels in drinking water, prompting EPA to initiate a comprehensive national review of the Lead and Copper Rule to evaluate the effectiveness of the original rule. The review identified seven targeted rule changes intended to strengthen implementation of the Lead and Copper Rule. Those changes are included in this rulemaking

and will provide more effective protection of public health by reducing exposure to lead in drinking water.

Mr. Zibble said a public comment period was held, but no comments were received. DEQ is not aware of any controversial issues associated with this rule, and there are no stringency issues.

- **MOTION:** Dr. Joan Cloonan moved the Board adopt the Idaho Rules for Public Drinking Water Systems, as presented in the final proposal, under Docket No. 58-0108-0803.
SECOND: Dr. Randy MacMillan
VOICE VOTE: Motion carried by unanimous voice vote.

AGENDA ITEM NO. : 4 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 said this rule was presented to the Board in October 2008, and the Board asked DEQ to review the definition of eligible applicants. DEQ reviewed the language, evaluated the various unintended consequences of changing the definition, and determined that a better approach would be to adopt a separate section within the rule to address nonpoint source projects and eligible applicants for those projects.

Tim Wendland, Loan Program Manager, reviewed the revisions in the final proposal. Originally, part of the reason for this rulemaking was to expand funding assistance to owners of failing septic systems. DEQ would like to withdraw this proposal to allow more time to fully investigate the implications of widening the pool of applicants to potentially include for-profit entities. DEQ notified the negotiated rulemaking group of the proposed rule changes and would like to determine how best to widen the pool of applicants when for-profit entities are included. DEQ would like to complete a comprehensive review of the practices of other states in handling for-profit entities. A preliminary review of 14 states shows that 12 states either restrict the type of loan given to for-profit entities or put a dollar limit on the loans. DEQ requested the change regarding eligible applicants be temporarily withdrawn until this study can be completed.

- **MOTION:** Don Chisholm moved the Board adopt the Rules for Administration of Water Pollution Control Loans, as presented in the final proposal, under Docket No. 58-0112-0801 with the amendments circulated today changing the definition of “nonpoint source project sponsor” by replacing the term “qualifying/entity individual” with “applicant” and the definition for “facility plan” to correct a typographical error.
SECOND: Dr. Randy MacMillan
VOICE VOTE: Motion carried by unanimous voice vote.

AGENDA ITEM NO. 5: 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, Attorney at Law, testified on behalf of the Idaho Rural Council (IRC) petition to initiate rulemaking. Mr. Carlson said he wanted the Board to understand IRC's concerns about risks posed by land application of dairy/feedlot lagoon water. Employee housing with small children exists in the areas where land application of the lagoon water is taking place. Mr. Carlson said he did not speak for these individuals, but did want to point out this population is at risk of being impacted by lagoon wastewater with very high fecal coliform counts.

Mr. Carlson distributed a letter to the Jerome County Board of Commissioners from the Idaho State Department of Agriculture (ISDA) (Attachment 1) in response to a request from Jerome County for assistance with several applications for livestock in confined operation (LCO) permits. As part of the permitting process, the county asked ISDA's state siting team to perform an analysis of the risks of airborne pathogen dispersion and aerosolization. ISDA declined, stating:

The request to evaluate the animal confinement site and the environmental impacts of manure wastewater applications through sprinkler systems including wind drift of manure wastewater to adjacent properties and pathogens associated with liquid and solid manure waste applications is within the expertise of DEQ, a member of the Team.

Mr. Carlson believes this is another example of why it is appropriate for DEQ to respond to ICL's request to do this risk analysis. After pointing out that the kind of risk analysis ICL's petition is requesting is within DEQ's area of expertise, ISDA declined to conduct the analysis as part of its State siting team review because the county had not provided a lengthy list (listed on page six of the letter) of the land application system design that is supposed to be delivered to the State siting team as part of the process.

As another option for the Board's consideration, Mr. Carlson asked the Board to table the petition until there is some guarantee that a comprehensive analysis of what is in dairy/feedlot lagoons and what risk it presents to human health is performed. He does not believe ISDA is prepared to do that. The EPA study catalogs some human and livestock health pathogens in dairy lagoon waste, but it does not catalog microbial resistant constituents, hormones, or veterinary pharmaceuticals. Mr. Carlson believes the starting point should be getting a comprehensive analysis of what is in lagoon waste and the risk to human health and urged the Board to keep this petition alive until there are some assurances that will be done.

Dr. MacMillan asked if IRC had contacted ISDA to discuss its position on this matter. Mr. Carlson said he had not spoken with anyone at ISDA, but was expecting the agency to present testimony at this meeting that its current rules address pathogen drift. He reviewed the most recent report ISDA provided as part of the MOU process to see what kind of discharges it had found during the 10 or 11 years the MOU has been in effect. The MOU report did not contain enough detail to tell whether ISDA has ever investigated a discharge involving pathogen drift. In 2007, ISDA investigated or wrote tickets for six or seven discharges.

Don Chisholm asked if Mr. Carlson was making an assumption of some uniformity in the components in liquid waste among dairies. He thinks there will probably be a high degree of variability from operation-to-operation depending on the pharmaceuticals and hormones they

use, movement of cattle, incidence of disease, etc. He believes sampling would need to be performed for several seasons to tell what is uniform and where there is variability. Mr. Chisholm agrees with the need to control the wind drift and keep the waste within the boundaries of the land-application site, but feels this would be a fairly easy problem to enforce and administer without getting into the detail of the constituents of the waste.

Mr. Carlson said he was not aware of the constituents in dairy waste other than what was included in the EPA study. He agreed it probably varied from one dairy to another, which is why he has asked the Board to consider having the rules accommodate each one on a dairy-by-dairy basis. Idaho has gone from 7,000 dairies in 1970 to around 600 now. He also agreed that buffer zones would be a good option for protection of the public, but still feels it is important to know what is in the waste stream that may impact health.

Brian Oakey, Deputy Director, ISDA, commented on the CAFO siting letter ISDA sent to the Jerome County Commissioners. The CAFO siting statute provides specific directions to the three agencies (ISDA, DEQ, and the Department of Water Resources) involved in the state siting team and designates ISDA as the lead agency. A section of the statute also specifies the role of the county and states that as part of the CAFO siting package, the county must include the information it wants the state siting team to review. The statute does not give the state siting team the ability or authority to go outside the scope of the CAFO siting package that is submitted. The state siting team is given a limit of 30 days to assemble a team, conduct a site visit, review the information, and respond to the county. Requests that require ongoing studies or studies that would take weeks, months, or years do not fit within the context of a CAFO siting request. It is the prerogative of the county to ask the applicant for such information, but given the time restriction, it is not possible for the state siting team to conduct such studies.

Mr. Oakey said a division of the U.S. Department of Agriculture is conducting studies on the pathogen drift issue that is being presented to the Board in this petition. It is difficult for ISDA to draw any conclusions based on ongoing studies. ISDA is prepared to continue to enforce the rules it has in place. If ISDA receives a petition from IRC or any other entity, it will take the petition seriously and use available information to handle it the way it would any other petition.

Mr. Oakey reported that since the last Board meeting he met with his program manager and they agreed to add an addendum to the current penalty matrix in an effort to improve ISDA's enforcement and give notice to industry that this is an issue of concern. The addition to the penalty matrix specifically highlights the issue of discharges from pressurized irrigation systems and provides that, if ISDA received a complaint, it would conduct an inspection and, if that inspection provided proof of a discharge, a fine would be automatically imposed. ISDA would not use its regular matrix, which provides that first-time violations receive only a warning letter. There would be a set fine of \$1,000 unless there were certain circumstances that justified a higher penalty. Mr. Oakey said this is an effort by ISDA to put industry on notice that this is an issue of concern. ISDA will do more education on the problem and believes this will improve enforcement.

Nick Purdy believes ICL has raised a valid issue that is well known by all residents of the Magic Valley. He feels this is a serious problem that will require firm enforcement actions by ISDA in addition to changing the regulations on the type of equipment used to disperse lagoon wastewater including a restriction against high pressure systems and end guns. Mr. Purdy thinks ISDA is the

appropriate agency to address the problem, but feels it is an issue DEQ must become involved with if action is not taken by ISDA to ensure protection of public health.

Dr. MacMillan asked if ISDA had designed an education program to address the issue. Mr. Oakey said the ISDA director has signed the addendum to the penalty matrix and the program manager attended a United Dairymen meeting this week to introduce it to industry. ISDA tries to take advantage of opportunities when industry meets to address these types of issues. The new penalty matrix will be distributed throughout the industry and will be available to the public. ISDA is also unrolling a new CAFO siting package, and several public meetings will be held. ISDA will take this opportunity to update industry and other interested parties about the new penalty matrix and other emerging issues regarding CAFOs.

Dr. MacMillan suggested the inspection process also be used as an opportunity to educate industry about this problem.

Mr. Chisholm agreed with Mr. Purdy's comments regarding changing regulations on the type of equipment used to disperse effluent and eliminating the use of high pressure systems and end guns. He asked if ISDA's regulations could be revised to make those changes. Mr. Oakey believes ISDA's current rule that states waste is not allowed to leave the property boundaries would apply to this situation. If equipment were being used that did not meet this requirement, ISDA's current regulations would cover that situation. ISDA has the inspection techniques and methods, other than just visual inspection, to determine if a discharge is taking place. Mr. Oakey said without the benefit of the findings from the study being conducted by the USDA and other ongoing studies, he is hesitant to commit to or agree that an across-the-board rule needs to be created. If those studies support the need for an industry-wide restriction on the type of equipment used to land-apply wastewater, ISDA will take that into consideration.

Dr. Cloonan pointed out that the Rules for the Reclamation and Reuse of Municipal and Industrial Wastewater do not address the equipment used for dispersion of wastewater. The rules are rather minimal, and this and many other instructional and educational issues are addressed in the guidance document, which is an ongoing document. ISDA may find that a guidance document is a very useful way to educate and assist industry. Mr. Oakley said ISDA values DEQ's input and expertise and will take this suggestion into consideration.

Mr. Purdy believes this issue could be resolved by limiting nozzle pressure to 20 psi, prohibiting high-pressure end guns, and setting a wind speed restriction. These changes would be simple and inexpensive.

Chairman Harlen asked if ISDA required or utilized buffer zones in any of its regulations. Mr. Oakey said he was not aware of the mandatory use of buffer zones in any regulations or nutrient management plans.

Kermit Kiebert asked if any violations had been issued for discharges of waste. Mr. Oakey said he did not know any specifics or numbers and explained the contested case process ISDA uses when a facility is in noncompliance.

- **MOTION:** Dr. MacMillan moved the Board deny the request from IRC to initiate rulemaking given the issue is already addressed by ISDA rules for the operation of CAFOs and the issue appears to be one of regulatory enforcement.

SECOND: Dr. Joan Cloonan

DISCUSSION: Mr. Chisholm expressed concern ISDA regulations are not adequate at this point. He believes Mr. Purdy's recommendations regarding changing the equipment used to disperse the effluent are very important changes that ISDA should make. He thinks the motion should say that the Board considers this matter to be first in the purview of ISDA rather than in the purview of DEQ, and then, if ISDA fails to address the problem, the Board would entertain the issue at a future time. He feels this issue should not be responded to based on political issues or business as usual. Mr. Chisholm believes ISDA could address the problem in its regulations, but not as they currently exist. He believes ISDA may need to conduct further rulemaking.

Mr. Purdy agreed with Mr. Chisholm's comments, but feels the motion should state that the Board is concerned and believes this is a valid issue that should be addressed by ISDA, but if the problem is not resolved within a year, the Board will consider other options.

Dr. MacMillan feels the question is whether ISDA's existing rules are sufficient to allow them to address the problem, or if they need to be changed. He feels he is not familiar enough with the rules to make that decision, but the ongoing study by USDA may provide the answers for ISDA and the regulated community about the best way to address this issue.

Dr. MacMillan pointed out that this issue can be revisited at any time and IRC or any other party may bring the issue before this Board or the ISDA if the problem is not resolved. He said it appears ISDA is attempting to address the problem and is reluctant to change the motion to institute more regulation.

Dr. Cloonan agreed with Dr. MacMillan's comments and believes it is a jurisdictional issue. The regulations exist with ISDA now, and if the Board wanted to make a change, it would require more than a petition. If the matter is not resolved, she would entertain a new petition, but believes it should take a different approach. Dr. Cloonan suggested the Board encourage ISDA to both refine its regulations and develop supporting guidance for the regulations and enforcement of those regulations.

Chairman Harlen said it is his understanding ISDA has a very clear and bright line rule that says none of this material may leave the property boundary. Because that rule exists, it seems to be more of an issue that could be addressed through a guidance document similar to those DEQ uses in its land application regulations. The guidance document could utilize the suggestions made by Mr. Purdy regarding equipment or buffer zones.

Mr. Chisholm thinks since the Board has not studied ISDA's rules well enough to know whether the issue could be handled through a guidance document or if additional rulemaking is needed, the motion should say that the issue is within the jurisdiction of ISDA and the solution appears within ISDA as the reason for denying the petition, then the Board can address the problem later on if it is not addressed by ISDA.

SUBSTITUTE MOTION: Don Chisholm moved the Board deny the petition for rulemaking from IRC because the issue addressed by the petition falls within the jurisdiction of the ISDA which should be asked to deal with the issue before DEQ addresses the issue.

SECOND: Dr. MacMillan agreed to the substitute motion.

DISCUSSION: Nick Purdy asked Director Hardesty if DEQ would require additional staff and funding if it did take on this issue. Director Hardesty said it would require additional staff and extensive labor for DEQ to do something like this for each of the dairies.

VOICE VOTE ON SUBSTITUTE MOTION: Motion carried by unanimous voice vote.

Doug Conde reminded the Board the denial has to be in writing and an order will need to be prepared to reflect the motion that was passed so the petitioner can appeal the decision in district court if the organization chooses to do so.

AGENDA ITEM NO. 6: IN THE MATTER OF SUNNYSIDE PARK UTILITIES' APPLICATION FOR SEWAGE DISPOSAL PERMIT, CONTESTED CASE DOCKET NO. 0103-07-02, SUNNYSIDE PARK UTILITIES' PETITION FOR REVIEW OF PRELIMINARY ORDER – BOARD DELIBERATION TO GRANT OR DENY THE PETITION FOR REVIEW

Note: A verbatim transcript of this hearing was prepared by a court reporter and is available by contacting DEQ's administrative rules coordinator.

Chairman Harlen said the Board will hear oral argument from the appellant, Sunnyside Park Utilities ("Sunnyside") and from the respondent, Idaho Department of Environmental Quality ("DEQ"). Each party will have 30 minutes to make its presentation, which includes rebuttal time. Following oral argument from both parties, Chairman Harlen will open the floor to questions. He noted for the record that Greg Eager, Engineering Manager, DEQ Idaho Falls Regional Office, was taking part in the proceedings via conference call.

Mark Fuller, Attorney at Law, represented Sunnyside Park Utilities' Petition for Exceptions to a preliminary order entered by the Board's hearing officer. Sunnyside requested two items from the Board: a finding of fact that the completion will only cost \$2,700, and a decision that the preliminary decision is in error as to reasonable accessibility. He argued that because of the cost involved and the site-specific factors, this system which is already 80% built should not be required to be abandoned and totaled and the subdivision rebuilt and forced to annex to the city.

Courtney Beebe, Deputy Attorney General, represented DEQ in this matter. Ms. Beebe said DEQ properly denied the permit application for three reasons:

- 1) It is in accordance with the Idaho Court of Appeals case of *Lindstrom v. Panhandle Health District*, and IDAPA 58-0103-00505.
- 2) No law, rule, policy, or statute requires DEQ to consider the cost of annexation and connection associated with an individual city's unwritten voluntary annexation policy when achieving the goal of protecting public health.
- 3) Even if DEQ can or should consider costs, Sunnyside has never produced admissible evidence of what those costs are. Sunnyside has never negotiated an annexation agreement with the city and subdivision property owners to determine what the actual costs of annexation and connection are and how those costs could be divided among the property owners.

She asked that if the Board disagrees with DEQ's position that no law, rule, or policy requires DEQ to consider costs, the Board find Sunnyside's motion as filed was a partial for summary judgment because it did not include all of the issues, and secondly that the Board can issue a narrow ruling restricting the effect of this decision in this case.

The parties responded to questions from the Board and presented rebuttal. Chairman Harlen opened the floor to deliberation by Board members.

- **MOTION:** Nick Purdy moved the Board remand the case back to DEQ with a request to form a committee of interested parties to determine the definition and criteria of reasonable accessibility. He further moved that after the committee determines the definition of reasonable accessibility, the case be brought back to the Board for a decision.

SECOND: MOTION DIED FOR LACK OF SECOND

- **MOTION:** Dr. Cloonan moved the Board go into executive session as authorized by Idaho Code § 67-2345(f) to advise and seek advice from its legal counsel regarding probable litigation.

SECOND: Dr. MacMillan

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

The meeting was closed to the public for the executive session at 2:15 p.m. The Board consulted with its legal counsel, Harriet Hensley, regarding the case. No action was taken during the executive session. The executive session adjourned at 2:43 p.m., and the meeting was reopened to the public.

- **MOTION:** Don Chisholm moved the Board 1) reject the preliminary order of the hearing officer, 2) deny the motion for summary judgment of both parties, 3) remand the application to DEQ, 4) require DEQ to allow the applicant to amend its application to provide all information relevant to its application, and 5) require DEQ to articulate its reasons for granting or denying the amended application.

SECOND: Dr. Cloonan

DISCUSSION: Dr. MacMillan asked if there was a timeframe for the actions directed in the motion.

Nick Purdy believes item 4) should include a list of criteria or a definition of the criteria used to determine reasonable accessibility.

AMENDMENT: Nick Purdy moved the motion be amended to add an item 6) require DEQ to define the term reasonable accessibility as part of its guidance.

SECOND: Kermit Kiebert

DISCUSSION: Dr. MacMillan was concerned this could be a burdensome and time-consuming requirement for DEQ. Dr. Cloonan noted that reasonable accessibility is in rule and she does not believe it can be defined without going through rulemaking. She thinks the Board would achieve its ends by asking DEQ to articulate the criteria it uses in making its decisions (as set out in item 5 of the motion). This would show how DEQ interprets the term reasonable accessibility as well as the other criteria in the existing rule. Mr. Purdy said if that is the intent of the motion, he would withdraw his amendment. The amendment and second were withdrawn.

Dr. Cloonan believes the intent of the motion is that the Board is looking for a means to judge whether DEQ's decision was arbitrary, capricious, or an abuse of discretion, and the Board cannot do that unless DEQ articulates why it made that decision.

Don Chisholm believes it would be helpful if DEQ were to bring stakeholders together to develop guidance, but thinks the motion on the floor is the most effective way to deal with the issue before the Board.

Chairman Harlen asked Director Hardesty to respond to Dr. MacMillan's question regarding the timeframe.

Harriet Hensley advised the Board to confine its discussion to this contested case and that the facts in this contested case, and proceed on the motions made by the parties. At another forum the Board could discuss policy issues and timeframe for rulemaking.

Mark Fuller said it was his opinion the actions requested in the motion were not a permitted option in the Board's rules, which say, "The Board may remand the matter for further evidentiary hearings where the factual development of the record is necessary before issuing a final order." He does not believe the Board can remand it and say start over.

Courtney Beebe said she agreed with Mr. Fuller on this point. She believes the Board can remand the case to the hearing officer with instructions for DEQ to produce the application and other documentation to support its claims. The applicant can produce whatever they would like to go along with it. She does not believe the contested case rules allow the Board to require DEQ to accept an amended application or articulate reasons for denial or granting without simply getting rid of the entire preliminary order. If the Board would like to remand the case to the hearing officer for further evidence from both parties, DEQ will gladly provide further evidence and will work with the hearing officer on setting a timeframe. She believes that would be the closest way for everyone to comply with the contested case rules. By remanding the case to the hearing officer, a scheduling order can be developed, which would take care of the timeframe question.

Harriet Hensley suggested an executive session to provide legal counsel to the Board. She asked Ms. Beebe how the matter would proceed if the Board were to reject the preliminary order and deny all motions for summary judgment. Ms. Beebe believes the case would then proceed to hearing before the hearing officer on all of the claims. DEQ could supplement with new evidence, support its claims with new witnesses and testimony, and at that time, the hearing officer could issue a second preliminary order.

Mark Fuller said he does not believe the contested case rules allow such a process and require the Board to enter a final order within 56 days of the written briefs or oral argument, whichever is later, unless waived by the parties or for good cause shown. He believes the Board's choices are to issue an order or remand for further factual development of the record if it is necessary to issue a final order.

Don Chisholm said the Board would like to hear DEQ's reasons for denying the permit, which is why the motion asked to remand the matter to DEQ and not the hearing officer. He feels the record is somewhat devoid of explanation by DEQ and would like DEQ to better articulate its reasons for denying the application. Ms. Beebe said she understands the concern with the lack of explanation in the record. She said testimony during the hearing would provide that in a transcript from Greg Eager. She also pointed out that the issue of the decision being arbitrary and capricious is not on the table; the issue is whether the subdivision is reasonably accessible to the wastewater system. Ms. Beebe pointed out as a procedural matter, DEQ does not have the burden of proof; the burden of proof is on Sunnyside as the plaintiff. DEQ is willing to accommodate the Board by going to trial to provide an explanation properly by presenting evidence as witnesses.

(THIS MOTION IS STILL ON THE TABLE.)

- **MOTION:** Don Chisholm moved the Board go into executive session as authorized by Idaho Code § 67-2345(f) to advise and seek advice from its legal counsel regarding probable litigation.

SECOND: Dr. Cloonan

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

The Board went into executive session at 3:20 p.m., and the meeting room was cleared. The Board conferred with its legal counsel. No actions were taken during the executive session. The executive session adjourned at 3:48 p.m., and the meeting was opened to the public.

➤ **MOTION:** Dr. Cloonan moved the Board extend the hearing to a time indefinite, but as soon as possible.

SECOND: Dr. MacMillan

VOICE VOTE: Motion carried by unanimous voice vote.

Dr. Cloonan said the Board would like to have more time to investigate procedural issues and confer with legal counsel.

Harriet Hensley noted for the record that the hearing has not concluded.

Mr. Chisholm clarified for the parties that the Board may communicate with its legal counsel, but it will not be deliberating outside the presence of the parties.

The meeting adjourned at 3:53 p.m.

NOVEMBER 13, 2008

9:00 a.m. Call to Order and Roll Call

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

AGENDA ITEM NO. 7: ***IN THE MATTER OF SECTION 401 WATER QUALITY CERTIFICATION, WETLAND FILL AND BOAT DOCKS ALONG LAKE CASCADE, CONTESTED CASE DOCKET NO. 0103-07-04, NEIGHBORS FOR A HEALTHY GOLD FORK PETITION FOR REVIEW OF PRELIMINARY ORDER – BOARD DELIBERATION TO GRANT OR DENY THE PETITION FOR REVIEW***

Note: A verbatim transcript of this hearing was prepared by a court reporter and is available by contacting DEQ's administrative rules coordinator.

Chairman Harlen said the Board would hear oral argument on the Neighbors for a Healthy Gold Fork petition for review of the preliminary order. The parties will have 30 minutes for their presentation, which includes time for rebuttal.

Mona Mack, Attorney at Law, testified on behalf of the Neighbors for a Healthy Gold Fork. Ms. Mack argued that the calculations and modeling show that the runoff from this project is not being handled and the phosphorus from the drainage areas has almost doubled from what it was prior to development; therefore, DEQ's certification of the project was inappropriate and there

was not a sufficient factual basis for reasonable assurance that water quality standards and wastewater treatment requirements would not be violated.

Ms. Mack responded to questions from Board members.

Doug Conde, Deputy Attorney General, represented DEQ in this matter. He explained that the TMDL gross allocation is to all nonpoint sources. From these nonpoint sources, a 30% reduction in the existing load of phosphorus is expected. The Gold Fork Development will replace one of these existing uses, and the testimony in this case shows there will be a 30-60% reduction in phosphorus. This is consistent with the TMDL and will meet state water quality standards. For that reason, the hearing officer was correct in confirming DEQ's certification of the project.

Mr. Conde responded to questions from Board members.

The parties presented rebuttal, then Chairman Harlen opened the floor to deliberation by the Board.

Chairman Harlen said the Board has two questions before it: first, the order issued by the hearing officer, and second, a request for award of attorney's fees from the intervenor, Wildwood Development. He opened the floor for oral argument from the intervenor.

Steve Bradbury, Attorney for Wildwood Development, the intervenor in this matter, presented testimony requesting his client be reimbursed for the attorney fees expended in the administrative case over the last two years. He asserted this case has no reasonable foundation in fact or law and is asking the Board to adopt an illogical and impractical interpretation of the TMDL, the effect of which would be to prohibit all new development in the Lake Cascade watershed.

Chairman Harlen asked if DEQ intends to ask for attorney fees in this case. Mr. Conde said DEQ has not requested an award of fees. He will wait to see if DEQ is the prevailing party before making such a request. He will discuss the matter with his client if DEQ prevails.

Mr. Chisholm commented that typically in judicial proceedings the decision is made and then the parties are given an opportunity to present their claims and the dollar amount, as well as their argument as to why they should be awarded fees.

Mr. Bradbury agreed the details of the claim would have to be raised after the Board issues a decision. He simply wanted to preserve the argument because he was not sure there would be an additional hearing to present oral argument.

Mr. Chisholm suggested the Board issue its decision and written opinion, then allow the parties to submit documents in support of or in opposition to award of fees. This issue can be scheduled for a subsequent hearing.

➤ **MOTION:** Dr. MacMillan moved the Board adopt the preliminary order of the hearing officer in Contested Case No. 0101-07-04.

SECOND: Dr. Cloonan

DISCUSSION: Don Chisholm said he understands that expert testimony is very expensive to produce, but feels the case would have been cleaner and might have resolved some of the questions that have been raised. He believes the purpose of the Clean Water Act and the TMDL and certification process have been fulfilled and he favors the motion.

Ms. Mascareñas agreed and said she feels DEQ has done its due diligence in reviewing and responding to the questions at hand including the modeling results.

Kermit Kiebert said he is very familiar with the amount of effort required to meet all the rules and regulations of developing such a project and also understands the opposition of the neighbors around the project; however, he believes using a regulatory agency to stop this type of development is probably not the best way to resolve the situation. He feels DEQ represented its case very well and was diligent in protecting public welfare.

Dr. MacMillan commented this is a very complicated issue and determining wasteload allocations for TMDLs is very difficult and uncertain. Nevertheless, this TMDL was adopted and approved. He supports DEQ's actions and feels it did an exceptional job in being diligent and making sure its decisions were correct.

Dr. Cloonan thinks the hearing officer's decision was very well crafted and noted that the TMDL was approved and was not challenged. She feels if anyone had interpreted it to mean there would be no further development or change in use of any facility or land, it never would have been approved, but would have been challenged.

Nick Purdy said he was still uncomfortable with some of the issues raised. He complimented DEQ, especially Doug Conde and Barry Burnell for their fine work.

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

AGENDA ITEM NO. 8: CONTESTED CASE AND RULE DOCKET STATUS REPORT

Paula Wilson reviewed the current contested case and rule docket status report. The Stage One Vapor Recovery Rule will come before the Board as a temporary and pending rule in February 2009. Two additional rules are pending approval from the Governor's Office: a new water quality standards rule regarding arsenic and cadmium planned for presentation in July 2009, and a wastewater rule to allow for creation of a combined license for very small wastewater treatment and collection systems for February 2009.

Barry Burnell presented a discussion on the background leading to the water quality standards rule regarding arsenic and cadmium that will be coming to the Board at its February 2009 meeting.

AGENDA ITEM NO. 9: SET 2009 BOARD MEETING SCHEDULE

➤ **MOTION:** Don Chisholm moved the Board set the following meetings for 2009:

February 11 & 12 – Boise

April 21 – Boise

July 15 & 16 – location to be determined

October 7 & 8 – Boise

November 12 & 13 - Boise

SECOND: Dr. Cloonan

VOICE VOTE: Motion carried unanimously.

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

No items were presented.

The meeting adjourned at 1:37 p.m.

/s/

Craig D. Harlen, Chairman

/s/

Kermit V. Kiebert, Secretary

/s/

Debra L. Cline, Management Assistant and Recorder