



State of Idaho
DEPARTMENT OF ENVIRONMENTAL QUALITY
Board of Environmental Quality

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Dirk Kempthorne, Governor
C. Stephen Allred, Director

IDAHO BOARD OF ENVIRONMENTAL QUALITY

MINUTES

December 18, 2002

The Board of Environmental Quality convened on December 18, 2002 at 2:00 p.m. at:

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

ROLL CALL

BOARD MEMBERS PRESENT VIA TELEPHONE:

Paul C. Agidius, Chairman
Dr. J. Randy MacMillan, Vice-chairman
Donald J. Chisholm, Member
Marguerite McLaughlin, Member

BOARD MEMBERS PRESENT IN PERSON:

Dr. Joan Cloonan, Member
Nick Purdy, Member

BOARD MEMBERS ABSENT:

None

DEPARTMENT OF ENVIRONMENTAL QUALITY STAFF PRESENT:

Steve Allred, Director
Jon Sandoval, Chief of Staff
Debra Cline, Management Assistant to the Board
Darrell Early, Deputy Attorney General, DEQ
Paula Gradwohl, Administrative Rules Coordinator
Orville Green, Administrator, State Waste & Remediation Program
Harriet Hensley, Deputy Attorney General
Jason Jedry, Administrative Services
Sharon Keene, Customer Resources
Dave Mabe, Administrator, Water Quality Program
Mike McIntyre, Surface Water Program Manager

OTHERS PRESENT:

William Eddie, Land and Water Fund

Travis Thompson, Barker, Rosholt & Simpson for Idaho Power Company

- ❖ 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.

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

Chairman Paul Agidius stated the Board was prepared to hear oral argument on the Motion to Stay filed in this matter by the Idaho Power Company. He stated each party would be allowed 30 minutes for argument including rebuttal.

- **Travis Thompson, attorney with the firm of Barker Rosholt & Simpson, appeared on behalf of Idaho Power Company (IPC).**
- **William Eddie appeared on behalf of petitioners, Idaho Rivers United (IRU).**
- **Darrell Early, Deputy Attorney General, appeared on behalf of the Department of Environmental Quality.**
- **Harriet Hensley, Deputy Attorney General, represented the Board of Environmental Quality.**

Travis Thompson argued on behalf of the Idaho Power Company. Idaho Power Company believes the Order issued by the Board on November 4, 2002 granting standing to Idaho Rivers United was a final order or action pursuant to Idaho Code § 67-5246 and the Board's rules regarding contested cases. Accordingly, Idaho Power filed a timely notice of appeal with the district court and petitioned for judicial review of that order.

Mr. Thompson argued that the Motion for Stay is necessary and appropriate. The Petitioners have indicated they will move to dismiss IPC's petition for judicial review before the district court. IPC asked that at the very least, the Board grant a stay until the Petitioner's motion to dismiss is heard and decided by the district court. If the Board believes its November 4, 2002 Order is an interlocutory order, it could enter an order on its own initiative recommending permission to appeal from the order directly to the Supreme Court pursuant to Idaho Appellate Rule 12C2.

Don Chisholm stated he circulated a memo to Board members with his comments on this matter and asked that it be made part of the record (see Attachment 1). He asked the parties to review the memo and respond to his suggestions. Mr. Chisholm noted that in previous discussions, the Board decided not to certify the order as final to preserve the right to appeal for the parties, and because no one had requested it be certified as final.

- **MOTION:** Don Chisholm moved that his memo, dated December 17, 2002 regarding the C.J. Strike Hydroelectric Facility – Idaho Power Motion for Stay, be officially entered into the record for these proceedings.

SECOND: Dr. Joan Cloonan

Chairman Paul Agidius directed that the December 17, 2002 memo from Don Chisholm be entered into the official record for the proceedings.

Don Chisholm indicated that in the memo, he suggested the Board grant a 120-day stay of the hearing officer's proceedings to allow sufficient time for someone to raise the question in the district court of whether the Order is a final, appealable order, or whether the appeal should be dismissed as premature. He asked if a 120-day stay would satisfy IPC's needs. Travis Thompson believed that would meet their needs, but asked that the proceedings be stayed until it is finally determined by a court whether or not IRU does have standing.

Chairman Paul Agidius asked to have all parties speak before the options were discussed.

William Eddie argued on behalf of the petitioners, Idaho Rivers United. Mr. Eddie filed a written opposition to IPC's Motion to Stay. IRU opposes the motion and asserts that the Board's Order of November 4, 2002 is clearly not a final order in this contested case. The Order clearly remands the case back to the hearing officer for a decision on the merits. He agreed that the Board could certify that the Order is a final order for the issue of standing, and allow judicial review. However, Mr. Eddie felt there was not a valid reason to certify the Order as final, and felt that doing so would set a precedent that could harm judicial economy. Mr. Eddie felt the suggestion of a stay for a short period of time to allow the district court to act on the matter made sense.

Darrell Early, Deputy Attorney General, argued on behalf of the Idaho Department of Environmental Quality (acting in Doug Conde's absence). DEQ is concerned about the status of the case and the Motion for Stay primarily because the record indicates that the Board made it very clear that the Order would not be issued as a final order without a request from the parties. IPC had the opportunity to submit a request to have the Order issued as a final order subject to judicial review, and did not. Therefore, this is very clearly an interlocutory order. It is also an order on a denial of a summary judgement, which ordinarily is not an appealable order. DEQ believes the case is not properly before the district court at this time. Mr. Early noted that the hearing officer has already been briefed on the merits of this case, so there would not be substantial expense to the Department for the hearing officer to issue a ruling on the merits. DEQ does not feel there is any reason to stay the case at this time; however since Mr. Eddie did not object to a stay while the motion to dismiss is resolved, Mr. Early believed DEQ would not object either.

Board members and the parties discussed the possibility of certifying the Order as a final order. Chairman Agidius opened the floor to general discussion. He pointed out that in previous discussions, the Board indicated that it wanted the courts to make a ruling on the standing issue to provide guidance on the matter.

➤ **MOTION:** Dr. Joan Cloonan moved the Board go into executive session pursuant to Idaho Code § 67-2345(f) to consider legal advice from its legal counsel, Harriet Hensley, Deputy Attorney General.

SECOND: Nick Purdy

VOICE VOTE: Motion passed unanimously.

The meeting room was cleared of everyone except the Board members, Harriet Hensley, and the Board's management assistant at 2:35 p.m. No deliberation took place and no votes were taken. The meeting reconvened and was opened up to the public at 3:07 p.m.

Travis Thompson stated if the Board believes the rules require a party to move to designate the Order as a final order, and if the Board would entertain an oral motion, then IPC would move to designate the Board's November 2002 Order as a final order at this time. Harriet Hensley advised that the motion could be made verbally, but the Board would need to schedule a meeting to provide notice and take action on the motion. William Eddie stated IRU would request the opportunity to respond to the motion.

➤ **MOTION:** Travis Thompson moved to have the Board designate its November 4, 2002 Order In the Matter of the Section 401 Water Quality Certification for Relicensing of the C. J. Strike Hydroelectric Facility as a Final Order.

Don Chisholm was concerned that the motion might be improper because an appeal has already been filed with the district court. He questioned whether the Board would have jurisdiction to certify the Order as final when the matter is pending in the district court. He suggested that if Idaho Power wanted the Order certified as a final order, they should first dismiss their appeal in the district court.

Travis Thompson withdrew his motion. He noted that since there is no time limit, IPC can file a formal motion at a later date, if needed.

➤ **MOTION:** Don Chisholm moved the Board grant a stay of the proceedings of the hearing officer for 120 days to allow a determination by the district court.

SECOND: Dr. Joan Cloonan

DISCUSSION: Chairman Agidius stated his support for the motion. William Eddie asked if the motion could be amended to provide that the matter be stayed for 120 days, or until such time as the district court dismisses the petition for judicial review.

AMENDMENT: Don Chisholm moved the motion be amended to provide a 120-day stay, or until the district court has dealt with a motion to dismiss the appeal, whichever is shorter.

SECOND ON AMENDMENT: Dr. Joan Cloonan concurred with the amendment.

VOICE VOTE ON AMENDED MOTION: Motion passed unanimously.

Don Chisholm suggested the Board schedule a briefing on the Idaho Water Quality Standards and how they were developed. He felt it would be helpful for the members to have a deeper understanding of how the standards are determined and what they consist of. Chairman Agidius agreed and requested Department staff to schedule the training.

Chairman Agidius suggested the Board consider whether to have legal representation before the district court when it hears the matter of whether the Board's November 4, 2002 order is an interlocutory order or a final order.

➤ **MOTION:** Dr. Joan Cloonan moved the Board have legal representation before the district court when the district court hears the matter of whether the Board's November 4, 2002 order is an interlocutory order or a final order.

SECOND: Nick Purdy

VOTE: Motion passed unanimously.

➤ **MOTION:** Don Chisholm moved the Board have legal representation before the district court to offer assistance to the court, without taking an adversarial position, if the district court denies the motion to dismiss and hears the substance of the order regarding standing.

SECOND: Marguerite McLaughlin

DISCUSSION: Chairman Agidius asked Mr. Chisholm to confirm that his intent was to have the Board's legal counsel enter an appearance, but not file any briefs or other documents without further direction from the Board. Mr. Chisholm confirmed that was his intent.

VOTE: Motion passed unanimously.

Harriet Hensley asked for clarification regarding the order granting the stay. Darrell Early will draft the order because Ms. Hensley will be unavailable for the next week. Mr. Early said it was his understanding that the order should state that a stay is granted for 120 days or upon issuance of a decision by the district court, whichever is shorter. Don Chisholm clarified that it is the decision of the district court on whether the November 4, 2002 Order is an appealable order. Chairman Agidius asked if both IPC and IRU stipulated to that action. Mr. Thompson and Mr. Eddie confirmed that they had so stipulated. Chairman Agidius asked that the order reflect that the parties stipulated to the order.

Jon Sandoval, DEQ Chief of Staff, asked for clarification on the Board's February agenda. The Board previously requested training on the Idaho Air Quality Program during the February meeting. Don Chisholm said the water quality standard training need not be set for February. Director Allred said training on both matters will be scheduled if time permits.

Marguerite McLaughlin asked if the Board had a policy regarding the recording of voice votes in the minutes. The matter will be discussed at a future meeting.

The meeting adjourned at 3:30 p.m.

(Approved by the Board on April 24, 2003)

Paul C. Agidius, Chairman

Debra L. Cline, Management Assistant and Recorder