



State of Idaho
DEPARTMENT OF ENVIRONMENTAL QUALITY
BOARD OF ENVIRONMENTAL QUALITY

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IDAHO BOARD OF ENVIRONMENTAL QUALITY

MINUTES

February 11 & 12, 2009

The Board of Environmental Quality convened on February 11, 2009, 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, DEQ
Greg Eager, Engineering Manager, Idaho Falls Regional Office (via conference call)
Dean Ehlert, Solid Waste and Emergency Response Program Coordinator
Paula Wilson, Rules Coordinator

OTHERS PRESENT:

Dr. Ted Carpenter, Bio-Environmental Resource Recovery International (BERRI)

Robbin Finch, Boise City Public Works
Mark Fuller, Attorney-at-Law, representing Sunnyside Park Utilities
Justin Hayes, Idaho Conservation League
Harriet Hensley, Deputy Attorney General, Natural Resources Division, representing the Board
Charles Johnson, Canyon County citizen
Paul Kelly, BERRI
Alex LaBeau, Idaho Association of Commerce and Industry (IACI)
Mona Mack, Attorney-at-Law, representing Neighbors for a Healthy Gold Fork
Alan Prouty, IACI and Idaho Council on Industry and Environment (ICIE)
Dan Romero, Canyon County citizen
Lynn Tominaga, Idaho Rural Water Association (IRWA)
Jim Wertz, U.S. Environmental Protection Agency
Robert Wilkinson, Attorney-at-Law, representing IACI and ICIE

- ❖ 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.

Dr. Ted Carpenter, Chief Scientist and owner of BERRI, presented a request for a temporary “facilities not regulated under these rules status” to the Idaho solid waste rules (Attachment 1). He explained that BERRI would like to establish multiple Resource Recovery Parks in Idaho, and the current rules require a Tier II Solid Waste Handling Facility permit. BERRI believes the permit process is too complicated, lengthy, and expensive for each site, and suggested a revision to the rules (IDAPA 58, Title 01, Chapter 06) to provide an exemption for Resource Recovery Parks using its patented Microbially Accelerated Regeneration Science (MARS™) process or a similar bio-thermal process approved by DEQ.

Dr. Carpenter said BERRI feels it is appropriate to grant an exception and make changes in the rules at this time because Idaho’s rules for handling solid waste were developed many years ago before the technology used in its process was developed. He explained how BERRI’s Resource Recovery Parks would convert solid waste into a valuable nutrient-rich soil amendment using a large windrow process that involves its proprietary inoculants, controlled nutrient ratios, specific moisture levels, ensured oxygen concentrations, and planned mixing/aeration/turning schedules.

Dr. Carpenter said BERRI will comply with all county planning and zoning requirements and would welcome frequent visits by state officials to check its facilities and detailed records of materials processed at the facilities.

Dr. Randy MacMillan asked what DEQ’s position was on BERRI’s request for a rule change. Director Toni Hardesty said DEQ reviewed BERRI’s request and feels an exemption is not the appropriate solution. DEQ offered to assist BERRI with completing the necessary paperwork and indicated that once the process has been completed, it should be easier to repeat for future operations. DEQ is concerned that some sites may not be suitable for this type of operation. She

noted that it is important to maintain the public notice and comment requirements in DEQ's regulations.

Dean Ehlert, Solid Waste Program Coordinator, explained the details of the Tier II Solid Waste Handling Facility permit and discussed some of the concerns DEQ has about granting an exemption.

Chairman Harlen thanked Dr. Carpenter and Mr. Kelly for bringing their request to the Board. The Board will review and consider the information and discuss the request with DEQ to determine if there are problems from a regulatory standpoint. The matter will then be put on a future agenda for consideration.

AGENDA ITEM NO. 1: DIRECTOR'S REPORT

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

- 2009 legislative issues – All DEQ rules were approved except the septic tank rules. She will meet with the district health department directors to reevaluate the matter.
- Coeur d'Alene Lake Management Plan – The draft plan was released for public comment, responses to comments have been compiled, and the plan is being finalized.
- DEQ Budget – Budget setting will start February 23. The Governor recommended 10% less for the FY10 budget than the FY09 budget. DEQ has already given back 8% of its FY09 budget allocation. These extensive budget cuts will impact all parts of the agency. Key areas affected include elimination of the Planning Division, reduction of the Beneficial Use Reconnaissance Program (BURP) for 2010 by one-third, elimination of financial support to the GemStars program, transfer of some positions to federally-funded work, reduction of water quality studies performed by contractors, reduction in basin and watershed advisory group activities (BAGs and WAGs), elimination of participation in Northwest Air Quest (a consortium in the Pacific Northwest that develops modeling data for air quality analysis), and reduction of training and travel. In addition, seven employees were laid off and eight vacant positions will not be filled.

AGENDA ITEM NO. 2: ADOPTION OF OCTOBER 8 & 9, 2008 MEETING MINUTES

➤ **MOTION:** Don Chisholm moved the Board adopt the minutes for the October 8 & 9 meeting as presented.

SECOND: Dr. Randy McMillan

VOICE VOTE: Motion carried by unanimous voice vote.

AGENDA ITEM NO. 3: CONTESTED CASE - *In the Matter of Sunnyside Park Utilities' Application for Sewage Disposal Permit, Contested Case Docket No. 0103-07-02, Continuation of Oral Argument on Sunnyside Park Utilities' Petition for Review of Preliminary Order*

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 this is a continuation of the matter of Sunnyside Park Utilities' application for a sewage disposal permit. He opened the floor to additional testimony from the parties.

Courtney Beebe, Deputy Attorney General, appeared on behalf of DEQ. She said she did not have additional testimony, but asked to reserve the right to respond to testimony from the petitioner.

Mark Fuller, Attorney-at-Law, appeared on behalf of Sunnyside Park Utilities via telephone. Mr. Fuller presented additional testimony and asked the Board not to send the case back for additional hearings. He feels no additional facts need to be considered in order to determine whether to uphold or deny the hearing officer's decision. Sunnyside asked the Board to find that it is not reasonably accessible to the city wastewater system.

Ms. Beebe responded to the petitioner's comments and reviewed the Board's options for responding to the petition. DEQ believes the preliminary order took into account the actual evidence presented by both parties in the record and the determination was made according to the law, which is that Sunnyside is reasonably accessible through the existing trunk line and DEQ has no legal requirement to consider the costs associated with an unwritten city annexation policy. She asked the Board to affirm the preliminary order in full.

Don Chisholm noted there is a motion on the floor that was not acted on in the previous meeting. Chairman Harlen asked that the motion be read into the record. The following motion was read by the recorder:

- **MOTION:** Don Chisholm moved the Board 1) reject the preliminary order of the hearing officer, 2) deny the motions 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. Joan Cloonan

Mr. Chisholm suggested the Board go into executive session to discuss its options with its legal counsel.

- **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. 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 room was cleared and the Board went into executive session at 10:10 a.m. The Board conferred with its legal counsel, Harriet Hensley. No deliberation or action was taken during the closed session. The executive session adjourned at 10:40 a.m. and the meeting was opened to the public.

Chairman Harlen opened the floor to discussion on Mr. Chisholm's motion.

- DISCUSSION:** Mr. Chisholm said he still believes this motion is the best course of action. He feels this is a complex issue that may need to be addressed by legislation to find a way for

property owners outside of city limits to hook up to municipal systems without paying enormous costs to annex into the city. It is in the best interest of the state to have responsible operators of central sewer systems dispose of waste. Mr. Chisholm said he would like to see firm figures on the cost for Sunnyside to hook up to the city of Idaho Fall's sewer system, and would like DEQ to further articulate its reasons for insisting that the city of Idaho Fall's facilities are reasonably accessible.

Dr. Cloonan agreed that the Board needs more information on how DEQ determines what is reasonable when applying the term "reasonably accessible." When the Board last discussed this motion, there was some concern about procedural issues. She is now confident the Board can go forward with this motion.

Dr. MacMillan said he has significant concern about the petitioner's comments on a possible takings claim. He feels this is a very serious issue where it is critical to have a clear record. He thinks it is unclear whether the record would support one side or the other in terms of resolving a takings claim; therefore, it would be in the best interest of both parties to make sure the record is as complete as it can be so the courts can address this issue. Dr. MacMillan is also concerned about the length of time it is taking to resolve this application.

Mr. Chisholm said he does not believe the takings issue is ripe until a final determination on regulatory action has been made and it is not necessary at this time to try to develop a takings record.

Carol Mascareñas said she supports the motion and feels the record would be much clearer if it included confirmed cost estimates.

- **SUBSTITUTE MOTION:** Don Chisholm moved the Board 1) reject the preliminary order of the hearing officer, 2) deny the motions for summary judgment of both parties, 3) vacate the denial of the application by 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. Joan Cloonan

DISCUSSION: Mr. Chisholm noted the only change in the substitute motion is in item 3) vacate the denial of the application by DEQ. This change would void the order denying the application and give Sunnyside an opportunity to amend its application if it chooses; DEQ could then deal with the application and articulate its reasons for either granting or denying

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. 4: RULES FOR THE CONTROL OF AIR POLLUTION IN IDAHO, DOCKET NO. 58-0101-0702 (TEMPORARY/PENDING RULE) (Development of a rule requiring stage I vapor collection at retail gasoline stations in Ada and Canyon Counties)

Martin Bauer, Administrator, Air Quality Division, presented the Stage I Vapor Collection Rule. He clarified this rule addresses stage I vapor collection only; stage II vapor collection is a separate issue and is not addressed in this rule. Mr. Bauer explained the Treasure Valley Air Quality Council, which was created by Governor Kempthorne to develop a proactive plan for air quality concerns in the Treasure Valley, issued an air quality plan that was accepted by the Idaho Legislature. That plan requires DEQ to develop a rule requiring stage I vapor collection in Ada and Canyon counties. This was a negotiated rulemaking, and six meetings were held, with participation from environmental groups, industrial stakeholders, and DEQ. DEQ estimates the

rule may entail retrofit costs of up to a maximum of \$5,000 for existing sources (underground gasoline storage tanks). DEQ worked with the Idaho Department of Transportation and COMPASS to obtain a grant to offset 50% of the installation cost (up to a total cost of \$5,000) to retrofit existing stations.

Mr. Bauer said this rule does not regulate an activity not regulated by federal government, nor is it more stringent than federal regulations. The Clean Air Act requires in moderate ozone nonattainment areas the use of gasoline vapor collection for facilities that sell more than 10,000 gallons of gasoline per month. This rule is broader in scope than the federal regulations, as it applies to sources in an area not yet designated as a “nonattainment area.” Additionally, he noted that the National Emissions Standards for Hazardous Air Pollutants (NESHAPs) require the use of gasoline vapor collection for gasoline-dispensing facilities with throughputs of 100,000 gallons or more of gasoline per month. This rule requires gasoline vapor collection for underground gasoline storage tanks with a capacity of 10,000 gallons or more. Thus, the rule applies to a broader class of gasoline-dispensing facilities than the NESHAPs.

Mr. Bauer reviewed the details of the rule and gave an overview of how the vapor collection process works. Installation and operation of stage I vapor collection equipment will reduce volatile organic compound (VOC) emissions by over 1,000 tons per year. Because VOCs are the major contributor to ozone formation, such a reduction should reduce ozone in the ambient air and potentially lower concentrations so that ozone nonattainment may be avoided in the Treasure Valley.

Mr. Bauer said new underground storage tanks that are greater than 10,000 gallons constructed after April 1, 2009, will be required to have stage I vapor collection designed into the system. It is very inexpensive to include at that point, so no financial assistance is being offered. Existing sources have until May 1, 2010, to install collection systems. DEQ is trying to speed up installation of the equipment by supplying grant funds for 50% of the cost. It is trying to get as many gasoline storage tanks retrofitted as possible prior to the upcoming ozone season beginning May 1.

Dan Romero, Canyon County citizen, said he attended the negotiated rulemaking meetings for this rule. He is very concerned about the timing of this rule and the financial impact it will have on smaller businesses that are already struggling to stay afloat during the current economic recession. Businesses in Canyon County have been particularly hard hit.

Charles Johnson, Canyon County citizen, asked the Board to delay implementation of the Vapor Collection Rule until at least March 12, 2009. At that time, DEQ and the Governor are required to make final recommendations on nonattainment for ozone to EPA Region 10 for years 2006, 2007, and 2008. The final decision will then be available on whether or not the Treasure Valley is designated as a nonattainment area.

Mr. Johnson believes the Treasure Valley Air Quality Council’s Air Quality Plan was not accepted by the Idaho Legislature because the legislature did not vote on the plan and their inaction does not constitute an endorsement of the plan. He feels that if the legislature’s inaction constituted endorsement, the Board would not have to adopt this rule because it would already be an enforceable law by the legislature. The legislature merely received the plan and did not provide funding for the plan or the council.

Mr. Johnson said it appears the rule is being created mainly to try to avoid a nonattainment designation for ozone in the Treasure Valley. He thinks the threat of losing highway funding and potential negative economic impact are overstated and unrealistic. He quoted Leonard Herr, Airshed Manager for DEQ Boise Regional Office, that Montana is the only state that has ever had federal highway funds withheld; however, Montana had no pending highway project in need of funding, so there was no impact.

Mr. Johnson does not believe this rule meets the Idaho state law that requires DEQ's rules to use peer-reviewed science. He noted the majority of VOCs are created by vegetation, and Canyon County does not have problems complying with air quality standards. He also discussed the impact of wildfires on air quality. He believes if DEQ were to flag and appeal the wildfire events during the last three years and ask EPA for exceptions during those periods, the Treasure Valley would not be at risk of nonattainment. He again asked the Board to delay action on the rule until after March 12, 2009, and emphasized that this rule targets small businesses. (See Attachment 2 for full comments.)

Martin Bauer said DEQ is sensitive to the timing and economic impact of the rule on industry. That is why DEQ sought funding to assist with the costs associated with the rule; however, the funding is only available if the Treasure Valley is in attainment. If the Board chooses to wait until after March 12, 2009, and EPA designates the Treasure Valley in nonattainment of the air quality standards, the funding will not be available and the stations will have to pay 100% of the costs to make the retrofits. The funding is for the small stations only; the larger stations (with a volume of over 100,000 gallons per month) are already being required by the NESHAPs to install the retrofits at their own expense.

Mr. Bauer added that consensus was achieved on this rule at the negotiated rulemaking meetings.

Justin Hayes, Idaho Conservation League, testified in support of the Stage I Vapor Collection Rule. The ICL participated throughout the rulemaking and feels the process was very well conducted by DEQ staff. He commended Leonard Herr for his efforts, and said the expertise he brought to the rulemaking contributed to the strength and quality of this rule. The ICL also commended the regulated industry for stepping up and participating in a rulemaking that would require them to take actions that would cost them money but was seen as being good for the community as a whole and therefore good for their bottom line as well.

Dr. MacMillan asked if all levels of industry were represented at the rulemaking meetings and if there was consensus from smaller businesses. Mr. Hayes said industry was represented at all levels. The smaller stations were represented by individuals as well as through their association and their lobbyist. There was unanimous agreement that this was a rule whose time had come and timely action upon it would allow small station owners access to matching funds they would not be eligible for otherwise.

Chairman Harlen asked what DEQ's position was on the impact of wildfires on air quality and if those events were flagged and appealed to EPA so they would not contribute to nonattainment status. Mr. Bauer explained that DEQ is allowed to flag data due to an exceptional event, such as a wildfire, but only if an exceedance of the air quality standards has been measured. During

the wildfires, there was no exceedance of the air quality standards for PM2.5 or ozone, so DEQ could not flag that data.

➤ **MOTION:** Dr. MacMillan moved the Board adopt as temporary and pending rules, the Rules for the Control of Air Pollution in Idaho, as presented in the final proposal under Docket No. 58-0101-0702, with the temporary rules becoming effective April 1, 2009.

SECOND: Dr. Joan Cloonan

VOICE VOTE: Motion carried by unanimous voice vote.

AGENDA ITEM NO. 5: I DAHO RULES FOR WASTEWATER SYSTEMS, DOCKET NO. 58-0116-0802 (TEMPORARY RULE) (Rulemaking to allow for the creation of a very small wastewater treatment and collection system classification)

Barry Burnell, Administrator, Water Quality Division, said DEQ initiated this rulemaking to allow for the creation of a new classification for very small wastewater treatment and collection systems for communities with 500 connections or less. The operators of these small systems struggle with trying to obtain the various licenses currently required for the different aspects of very small system operation. A similar classification already exists for small drinking water systems, and the regulated community has asked that this be extended to small wastewater systems.

Ester Ceja, Senior Water Quality Analyst, presented the details of the rule. The rule is being requested as a temporary rule because it will benefit the citizens of the state by making the licensing requirements less burdensome, thus reducing the number of noncompliant systems. DEQ will achieve greater administrative efficiencies and expend fewer funds enforcing the requirement. DEQ intends to undertake proposed rulemaking in May 2009. The rule will result in no added cost to the regulated community; the rule will actually reduce the cost to small communities by reducing the number of license fees from two to one.

Ms. Ceja said this rule regulates an activity not regulated by federal government. No federal law or regulation is comparable to the provisions governing wastewater treatment and collection system classification set forth in the Wastewater Rules; therefore, the changes to the rules are not broader in scope or more stringent than federal law or regulations.

Dr. Cloonan suggested a minor change to provide consistent language regarding the classification rating form. Mr. Burnell will make a change to the language in the definition of Very Small Wastewater System to reference Subsection 202, instead of ~~202.02~~.

Lynn Tominaga, representing Idaho Rural Water Association (IRWA), applauded DEQ for proposing changes to requirements for smaller wastewater systems. IRWA had some concerns about the licensure for smaller systems. One of the major issues for small communities and small wastewater systems is that the Licensure Board has defined one year of experience as 1600 hours. IRWA wants to know if this also applies to systems larger than 500 connections. In small communities, it is nearly impossible for these part-time employees to get 1600 hours. IRWA feels this rulemaking is a good start, but wants the Board to know that these small systems still face a problem. IRWA is working with the Licensure Board to try to develop alternatives and will keep the Board informed regarding its concerns.

- **MOTION:** Dr. Cloonan moved the Board adopt as temporary rules the Wastewater Rules, as presented under Docket No. 58-0116-0802 and amended to change the words “Subsection 202.02” to “Subsection 202” in the definition of Very Small Wastewater System, with an effective date of April 1, 2009.

SECOND: Nick Purdy

VOICE VOTE: Motion carried by unanimous voice vote.

AGENDA ITEM NO. 6: C ONSIDERATION OF HEARING OFFICER APPLICATIONS FOR BOARD APPROVAL

Paula Wilson, Administrative Rules Coordinator, presented a list of attorneys who applied to be hearing officers for contested cases. She reviewed the process she uses for selecting a hearing officer for a contested case. She refers to the resumes on the approved list and selects the attorney with the most expertise in the matter of the contested case. The Board’s policy requires an attorney licensed to practice law in Idaho with at least five years’ civil or administrative trial experience, and experience in environmental law is preferable. Board-approved applicants are used on an as-needed basis at a rate of \$110 per hour. DEQ received more applicants than are needed to maintain an adequate list of approved attorneys.

- a. Dean A. Martin, Boise, Idaho
- b. Michael E. Kelly, Boise, Idaho
- c. Jay Webb, Boise, Idaho
- d. Robert A. Wallace, Boise, Idaho
- e. Edwin L. Litteneker, Lewiston, Idaho
- f. Bryant E. Bushling, Coeur d’Alene, Idaho
- g. Jill W. Eshman, Ketchum, Idaho
- h. Michael J. Kane, Boise, Idaho
- i. Mark R. Petersen, Pocatello, Idaho
- j. David M. Swartley, Boise, Idaho
- k. Trent B. Marcus, Boise, Idaho
- l. Robert R. Gates, Boise, Idaho
- m. Mitchell R. Barker, Boise, Idaho

Board members reviewed and discussed the qualifications of the applicants and selected candidates whose qualifications best matched the Board’s needs.

- **MOTION:** Don Chisholm moved the Board approve the following applicants for use as hearing officers in contested cases: Jay Webb, Robert Wallace, Edward Litteneker, Jill Eshman, Michael Kane, Mark Petersen, and Trent Marcus.

SECOND: Dr. Joan Cloonan

VOICE VOTE: Motion carried by unanimous voice vote.

AGENDA ITEM NO. 7: C ONTESTED CASE AND RULE DOCKET STATUS REPORT

Paula Wilson reviewed the current contested case and rule docket status report. Barry Burnell said Idaho may be receiving some federal stimulus money for its drinking water and wastewater grant and loan accounts. DEQ hopes to have its FY2010 Intended Use Plan and priority lists ready for the Board’s approval at its April 21, 2009, meeting.

Chairman Harlen said he is very sensitive to the costs incurred by bringing the Board together for a meeting, and asked if the April Board meeting could be conducted via telephone to save money. Doug Conde said he thought it would be acceptable to conduct the April meeting via telephone as long as one Board member is present. Dr. Cloonan and Don Chisholm said they could be present at the April meeting.

The Board concurred to reschedule its July 15 & 16, 2009 meeting to July 29 & 30, 2009.

Chairman Harlen reported he had received information from Orville Green regarding the BERRI request for a waiver or rule change. Mr. Green said the results from the first test of BERRI's MARS™ process at the landfill in Bingham County were very interesting, and DEQ would like to see a full-scale, rigorous test of the process. Mr. Green will have the DEQ regional office assist BERRI in writing another test that can be conducted under DEQ's review. Chairman Harlen said it appears BERRI will be able to work with the existing permit process with some assistance from DEQ. Director Hardesty said DEQ is ready to assist BERRI in working through the process.

The meeting adjourned at 2:18 p.m. Board members attended the Senate Health & Welfare Committee meeting at 3 p.m. for the confirmation hearing of members Cloonan and Mascareñas.

FEBRUARY 12, 2009

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. 8: DEQ REPORT AND RECOMMENDATIONS ON MERCURY RULEMAKING

Martin Bauer, Administrator, Air Quality Division, updated the Board on mercury issues and reviewed the options presented at the October 2008 Board meeting (Mercury Evaluation and Rulemaking Plan, Attachment 3). He pointed out that funding is a very big issue for any of the options due to budget problems the state is experiencing.

Mr. Bauer said some errors and inaccuracies were identified in the emission data used in the REMSAD model. New emission data provided by P-4 and Potlatch Pulp and Paper have much lower numbers. Dr. Atkinson will run the REMSAD model with the corrected data and provide the results to DEQ in early March 2009.

Dr. Randy MacMillian asked if any of the options identified in the plan provide a specific connection between the source of emissions and mercury in fish. Mr. Bauer believes the REMSAD model is the only option that might show a connection. It would allow DEQ to locate a hot spot, check the fish to see if the mercury levels were high, implement some sort of control, then recheck the fish at a later date to see if the mercury levels were decreasing in response to the controls.

Chairman Harlen clarified that the term “hot spot” referred to air deposition of mercury, not a hot spot of mercury levels in fish tissue.

Barry Burnell, Administrator, Water Quality Division, distributed a presentation showing the results of fish tissue sampling conducted by DEQ in lakes and reservoirs in 2007, in rivers in 2006 and 2007, and recent sampling around P4 Production (Attachment 4). The studies found:

- 30 out of 50 lakes were below the mercury criterion.
- 63 out of 89 fish samples were below the fish tissue criterion for mercury.
- 32 out of the 40 sites sampled in Idaho rivers were below the mercury criterion.
- 65 out of 73 fish samples taken from Idaho rivers were below the mercury criterion.
- Three fish tissue samples and six water samples taken from waterbodies around P4 Production were all below the mercury criterion.

Justin Hayes, ICL, thanked the Board and DEQ for the time they have put into reviewing this issue. He noted that mercury is a dangerous, potent neurotoxin and the original question posed by ICL’s petition is, “Does Idaho have existing rules that are protective of human health and the environment from mercury contamination?” Mr. Hayes still believes the answer to that question is “No.” Idaho has good water quality rules regarding fish tissue levels, but unfortunately the air rules are insufficient to protect human health. The IACI report amassed a lot of good information about natural sources of mercury, global mercury, and Idaho sources. The report attempts to show that Idaho’s industrial contribution is so small that it is not worth regulating. Mr. Hayes disagrees with this attempt to take advantage of the confusion created by natural versus industrial and global versus local sources. He believes the primary concern is still that industrial sources in Idaho, specifically the P4 Production facility, have the potential to create local hot spots because of their significant mercury emissions. Nothing has changed in that regard. Sound science has been presented to the Board regarding how mercury goes into the atmosphere, deposits on the landscape or water, and is picked up by fish, which are consumed by the public. Citing large global numbers does not change the fact that solid evidence demonstrates that local emissions can lead to localized hot spots and elevated levels of local deposition.

Mr. Hayes said neighboring states have taken steps to reduce emissions from local sources and he encouraged Idaho to do the same. ICL believes Idaho’s current air quality rules are inadequate and inappropriate because they are based on inhalation risk and are designed to protect a person standing at a fence line or a person working in a facility. This methodology does not protect human health and allows facilities to emit enormous amounts of mercury. If the rules are to protect human health, they must be based on the vector that is most likely to affect people. Facilities in neighboring states have used technology and options to dramatically reduce their emissions; it is only fair that Idaho facilities do the same to protect human health and the environment on a local, regional, and global level.

Alan Prouty testified on behalf of IACI and ICIE. He said IACI and ICIE came together after the Board’s April 2008 discussion regarding the possible need for additional regulation of mercury in Idaho. The two business organizations identified areas they felt needed to be better defined such as current sources of mercury in Idaho, the existing regulatory structure, and the regulatory mechanisms other states have for mercury. Since that April meeting, the two associations have spent a considerable amount of time reviewing materials and doing research to better understand what is going on in terms of mercury in Idaho’s aquatic environment. Very

clearly, the industrial component of mercury sources in Idaho is relatively small. There does not appear to be a direct correlation between elevated mercury emissions from industry and elevated mercury levels in fish. This lack of a direct correlation obviously creates a question as to whether further regulation of industry is necessary.

Mr. Prouty was not able to find any state in the Northwest or the West that has set up regulations that establish a permitting threshold based simply on the deposition in relation to fish. In conclusion, after reviewing the information currently available, IACI and ICIE see little, if any, benefit to the environment in terms of dealing with the areas of elevated mercury levels in fish tissue by further regulation of industry.

Mr. Prouty said as part of their research into this matter, IACI and ICIE have asked Dr. Steve Lindberg to give a presentation, *Pathways of Mercury in Idaho Waterways* (Attachment 5). Dr. Lindberg said he has worked on both sides of the mercury issue for several decades. He organized two global conferences on mercury, one in Germany and one in Japan. He said his goal today was to present the state of science as it is most relevant to the issue facing Idaho—elevated mercury levels in fish tissue causing consumption advisories. Dr. Lindberg believes the question that must be answered is where is it coming from and what can be done about it so that Idaho can most effectively direct its resources toward something that will benefit the environment. The major points of discussion included:

- Complex cycle with numerous pathways.
- West is unique (in the air and on the ground).
- Idaho industrial emissions are comparatively small
- Modeling is useful, but has its limitations.
- REMSAD significantly over-predicts hot-spots & the impact of P4.
- Methylmercury is influenced by much more than just mercury.
- Geologic Hg deposits are ubiquitous in the West.
- The atmosphere is not the only route of Hg entry to waters.
- Inflow and sediment transport exceeds atmospheric deposition of Hg to some western waterways.
- Additional regulation of Idaho industrial atmospheric sources may not achieve measurable reduction in fish Hg.

Dr. Lindberg said he is in favor of responsible mercury control, but he also believes there should be an expectation, when expending resources, to have some specific benefit or result. He thinks until we have a better understanding of all the sources of mercury on the ground and in the atmosphere and how they contribute, it is difficult to justify reducing the emissions from some particular point source. He said it would be very hard for him to say that P-4 in particular would have a demonstrative effect if its emissions were reduced. He suggested before considering further regulation, information should be gathered from Blackfoot Reservoir to confirm the estimates made by P-4.

Dr. Cloonan asked if Dr. Lindberg thought some level of emissions, threshold, or best available control technology mechanism should be used so Idaho is not adding to the global mercury burden. Dr. Lindberg said it was his understanding that best available control technology is already being used. He is not sure how EPA defines BACT right now, but believes it is probably sulfur scrubbers and P-4 already uses them.

Nick Purdy said it seems the Option 1 – Emission Inventory Plan in DEQ’s recommendation should be the first step taken. Dr. Lindberg agreed, but thinks a comprehensive emission inventory already exists in the information contained in the IACI report and the ICL petition and attachments.

Dr. MacMillan asked Dr. Lindberg if he believes the current Idaho rules for mercury are protective of public health. Dr. Lindberg said he has reviewed the Idaho rules for mercury and believes the air rules are protective of something simulating worker exposure at a fence line; however, they don’t relate to other pathways and issues of mercury that might concern the population in Idaho. Dr. Lindberg recommended that those regulations be looked at again. The TMDL process may address those issues. He feels this is more of a policy or philosophy question, and there may be other answers.

Dr. Lindberg discussed some of the epidemiological studies that have been done in other countries. All of the estimates of methylmercury toxicity are based on very high exposure levels. Some controversy still exists about methylmercury toxicity, especially in the levels that have been set.

Don Chisholm asked Dr. Lindberg if he thought Idaho should do something to prevent additional new sources of mercury emissions in the state. Dr. Lindberg said coal-fired power plants are being directly addressed by EPA in terms of control technology, so whether Idaho had something or not, a new source coming into Idaho would fall under federal guidelines that are going to be as protective as possible whether it is maximum achievable or best achievable. He said very little technology is available today to reduce emissions from a coal-fired power plant or some other source a lot more than the scrubbers in place right now.

Mr. Chisholm asked if Dr. Lindberg would recommend allowing another facility such as P-4 to be built in Idaho. Dr. Lindberg said he would certainly favor having regulations in place requiring BACT, but he believes this exists already. He stated he is not a policy person, so this is a difficult question for him to answer. He said he would not be in favor of allowing a chlorine alkali plant using mercury cells in Idaho.

Robert Wilkinson, Environmental Counsel for P-4 and speaking on behalf of IACI and ICIE, testified regarding the three options proposed by DEQ in its Mercury Evaluation and Rulemaking Plan (Attachment 3). He said IACI and ICIE do not support Options 2 or 3 because in large part they do not consider the role of other sources such as natural geological sources and are based on the assumption that there is a link between atmospheric emissions and methylmercury concentrations in fish tissue. They are committed to responsible and appropriate regulations carefully crafted to technically address important environmental issues. As pointed out in Dr. Lindberg’s presentation, the factors that lead to high methylmercury levels in fish tissue are quite complex and result from a complicated cycle among local, regional, and global sources of mercury.

Mr. Wilkinson said IACI and ICIE think Option 1 may provide a sound starting point; however, because methylmercury concentration in fish tissue is more closely related to water quality, they believe a more effective and efficient way to address the methylmercury issue is through a water quality-based evaluation. Such a program and process are already in place in the water quality

standards to protect against high methylmercury concentrations in fish. Enforcement and implementation of that standard through the processes available to DEQ can provide an effective and efficient process for identifying sources of mercury, evaluating methylation conditions in specific water bodies where high mercury levels in fish tissue are observed, and implementing appropriate regulatory actions for those water bodies.

Mr. Wilkinson concluded by saying IACI and ICIE believe Idaho already has adequate programs such as the new source review program in place to regulate new sources of airborne mercury. They encourage DEQ to continue to enforce the methylmercury water quality standard and are willing and available to take part in future discussions as this issue unfolds.

Nick Purdy asked if IACI and ICIE supported Option 1. Mr. Wilkinson said they feel it is important to use the water quality standard to address the problem. Option 1 is preferred over Options 2 and 3, but they believe the focus should be on areas where fish tissue levels are high.

Chairman Harlan asked Martin Bauer to provide a brief review of Idaho rules regarding new facilities. Mr. Bauer stated any new source or modification of any existing source of mercury would be required to meet the Idaho Toxic Air Pollutant (TAP) regulations. This is an inhalation-based standard that would allow a large amount of mercury to be emitted and still be in compliance. No federal mercury standards exist at this time. The closest thing to a federal standard was the CAMR rule.

Dr. Cloonan asked if Idaho's TAP regulations are adequate to protect against new sources generating mercury or if some type of technology standard should be developed for new sources of mercury above a specified threshold.

Mr. Bauer said he believes the TAP regulations are protective of public health and the environment from an inhalation base. He noted that there is a section in the TAP rules that exempts a toxic from TAP rules if there is a federal rule for the toxic, thus preventing double regulation.

Nick Purdy asked how the TAP rules would be applied to mercury to regulate deposition. Mr. Bauer said that is the question this process is attempting to answer.

Justin Hayes expressed concern that Idaho's current rules have no breaks that would allow a feedback loop. The TAP rules would allow a new facility to come into Idaho and emit 500,000 pounds of mercury a year. He pointed out that the control technology in place now is because of regulatory requirements for other pollutants, not mercury. Although there is a co-benefit for mercury emissions, they are not designed to be mercury controls. Mr. Hayes said control technologies specifically for mercury are available, and they are being used in the Nevada gold mines. This equipment is reducing mercury emissions well below regulatory required pollutant levels, and he has been told that the cost is very reasonable.

Chairman Harlan reviewed the actions taken by the Board at previous meetings: the ICL petition to initiate rulemaking was rejected, and the Board approved a motion directing DEQ to prepare a proposed plan of negotiated rulemaking to control mercury emissions from Idaho sources to reduce mercury contamination in fish tissue which exceeds public health standards. He opened the floor to discussion by the Board.

Kermit Kiebert encouraged DEQ to gather more information before taking action.

Nick Purdy asked how the TMDL program could be used to control mercury contamination in fish tissue. Mr. Burnell said the Salmon Falls Creek Reservoir TMDL identifies various sources of mercury and sets a percent reduction for those sources. The next step proposed by IACI was for DEQ to enter into voluntary consent orders with sources to reach agreement for reductions.

Mr. Purdy pointed out that emissions were reduced significantly at the cement plant in Oregon through a voluntary process with EPA. He asked what the targets were for the TMDL program. Mr. Burnell said 18 water bodies are listed as impaired for mercury on the integrated report. DEQ is looking for the most efficient way to develop TMDLs for these water bodies.

Chairman Harlen said he is pleased the Board has been proactive on this issue. Over the last 18 months, the Board has heard from two of the top experts in the field and reviewed the most current data available. Still, he is certain of only two things: the Board is very concerned about mercury levels in fish in Idaho, and the science is nowhere near robust enough to support good rulemaking. He fears taking action at this time would result in a rule that no one is pleased with and does not accomplish the intended goal.

Dr. Cloonan is not sure the TMDL process would help control new sources. She questioned whether a policy guideline or something similar might work and asked if the air rules included a narrative standard to protect human health and the environment.

Don Chisholm suggested setting a standard at some level, such as 100 pounds per year, to require sources to show they will not increase the methylmercury level of water bodies within their areas of deposition. He is concerned that having no standard might encourage an industry to try to come into the state and force the Board to come up with something at the last minute to prevent a problem. Other members were concerned that setting such a standard might be considered arbitrary or that it would not be feasible to prove no impact.

Mr. Purdy suggested that until more science is available, the Board instruct DEQ to make mercury a major concern and develop a policy or guidance to encourage industry, on a voluntary basis, to use the best available technology and best practices to reduce mercury emissions. He believes there is a spirit of cooperation in industry.

Doug Conde commented on the idea of using the narrative standard in the air rules. He said the air rules provide that if a source complies with the applicable TAP standard, the narrative standard does not apply.

Chairman Harlen asked when the next Salmon Falls fish study would be conducted. Mr. Burnell said with the current budget, no study is planned, but additional data could be collected during the five-year review cycle for TMDLs.

Dr. Cloonan feels it is reasonable to move forward with gathering more information, but questioned how it could be financed given the budget restraints. Director Hardesty said DEQ could not commit to do further studies at this time due to lack of funding. She believes this is a very important issue, but with the recent budget cuts, DEQ is struggling to complete the day-to-

day work required by statute. Should the budget change, this is obviously something DEQ would look at as a priority. She added that DEQ has specific procedures for developing policy and guidance which include a public comment process. Policy and guidance are both voluntary and do not create any kind of regulatory authority.

Mr. Purdy said he is still concerned that Idaho has a hole in its regulations that would allow a business to come into the state and legally emit tons of mercury. Even though funding is not available for additional studies and rulemaking at this time, he feels it is important to take action to block that hole by developing guidance or policy to put the public and business community on notice that Idaho is going to look very hard at any industry with the potential to emit mercury coming into the state. He thinks public persuasion and policy could be used until funding and science are available to develop a rule.

➤ **MOTION:** Nick Purdy moved the Board direct DEQ to develop guidance or policy on the use of best available technology for reducing mercury on any permitting for new businesses or modification of old businesses and bring it back to the Board for further review.

SECOND: Dr. Cloonan

DISCUSSION: Dr. Cloonan said she understands that policy and guidance do not have the force and effect of law, but thinks some simple, nontechnical language could relay the sense of the agency that mercury is a concern and businesses coming into the state should have adequate controls.

Chairman Harlan asked if it would create problems for DEQ to have a guidance policy that said new or modified emission sources of mercury must meet best available technology.

Director Hardesty explained the process DEQ uses to develop guidance or policy. A draft is developed by technical staff, reviewed by legal staff to ensure there is no confusion between rules and regulations and policy and guidance, put out for public comment, revised as appropriate in response to the comments, and then issued as a final policy document or guidance. She noted that criticism has occurred in the past that DEQ used policy and guidance to enforce regulations it did not have. Since becoming director, she has worked very hard to make sure this is not the case, and believes any actions should be taken very carefully to ensure the process is very transparent and no confusion exists between guidance and policy and rules and regulations.

VOICE VOTE: Motion failed. (Mr. Purdy, aye; Mr. Chisholm, nay; Dr. Cloonan, nay; Mr. Kiebert, nay; Dr. MacMillan, nay; Ms. Mascareñas, nay; and Chairman Harlan, nay.)

AGENDA ITEM NO. 9: LOCAL REPORTS AND ITEMS BOARD MEMBERS MAY WISH TO PRESENT

No items were presented.

The meeting adjourned at 2:30 p.m.

Craig D. Harlan, Chairman

Kermit V. Kiebert, Secretary

Debra L. Cline, Management Assistant and Recorder