



State of Idaho  
DEPARTMENT OF ENVIRONMENTAL QUALITY  
BOARD OF ENVIRONMENTAL QUALITY

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**IDAHO BOARD OF ENVIRONMENTAL QUALITY**

**MINUTES**

**November 15, 2007**

The Board of Environmental Quality convened on November 15, 2007, at 9 a.m.  
at:

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

**ROLL CALL**

**BOARD MEMBERS PRESENT**

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

**BOARD MEMBERS ABSENT**

None.

**DEPARTMENT OF ENVIRONMENTAL QUALITY STAFF PRESENT**

Toni Hardesty, Director  
Curt Fransen, Deputy Director  
Martin Bauer, Administrator, Air Quality Division  
Barry Burnell, Administrator, Water Quality Division  
Jess Byrne, Legislative Affairs  
Debra Cline, Management Assistant to the Board  
Douglas Conde, Deputy Attorney General  
Orville Green, Administrator, Waste Management & Remediation Division  
Ed Hagan, Senior Ground Water Hydrogeologist  
Susan Hamlin, Deputy Attorney General  
Dave Hovland, Ground Water Program Manager  
Rick Jarvis, UST/LUST Program Coordinator  
Tom John, Microbiology Rules Manager  
Lisa Kronberg, Deputy Attorney General  
Joe Nagel, State Response Program Manager  
Paula Wilson, Rules Coordinator

**OTHERS PRESENT:**

Suzanne Budge, SBS Associates, LLC  
Justin Hayes, Idaho Conservation League  
Jack Lyman, Idaho Mining Association  
Coby Tigert, Greater Yellowstone Coalition  
Jim Werntz, U.S. EPA

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

**PUBLIC COMMENT PERIOD**

No comments were received.

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

- a. August 30, 2007 meeting minutes

- **MOTION:** Don Chisholm moved the Board approve the August 30 minutes.  
**SECOND:** Dr. Randy MacMillan  
**VOICE VOTE:** Motion carried unanimously.

- b. October 10, 2007 meeting minutes

The October 10 minutes will be presented for adoption at the next Board meeting.

- c. Action Items

No action items were presented.

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

Director Hardesty gave a brief update on the following issues:

- DEQ held a meeting in Idaho Falls recently to brief legislators on environmental issues of concern in eastern Idaho and the rules DEQ will be bringing to the next legislative session. The meeting was well attended by local legislators and local Board Member Nick Purdy.
- Crop residue disposal burning negotiations continue. No resolution has been reached, but discussions are progressing.
- Director Hardesty attended a Coeur d'Alene Basin Commission meeting yesterday. The yard cleanup and human health remedy cleanup continue with good progress. All yard sampling should be completed by the end of 2008. The cleanup is expected to take six to eight years; a more accurate estimate will be available after the sampling is completed. Funding continues to be a challenge. EPA provides funding for human health issues, but not for ecological issues.

- The proposed cleanup plan for INL is out for public comment until December 21, 2007. DEQ held public meetings on the plan in Boise and Twin Falls; an additional meeting is planned for Idaho Falls tonight.

**AGENDA ITEM NO. 3:                    PROPOSED AMENDMENT TO BOARD COMPENSATION POLICY**

Chairman Cloonan opened the floor to discussion of proposed revisions to the Board's compensation policy that were presented at the April 2007 Board meeting. The revisions were developed by DEQ to clarify whether time spent reviewing materials in preparation for meetings and contested case hearings qualifies for the \$50 per day honorarium provided to Board members by Idaho Code § 59-509(h).

➤ **MOTION:** Marti Calabretta moved the Board approve the revised Board Policy for Compensation as presented (Attachment 1), with an effective date of October 1, 2007.

**SECOND:** Craig Harlen

**DISCUSSION:** Don Chisholm asked if there were any budget concerns with backdating the revisions. Director Hardesty said it would not cause a problem. Dr. MacMillan asked if legislative approval was needed for an increase in compensation. Chairman Cloonan pointed out this is not an increase in compensation, but a clarification of what services are eligible for compensation. Doug Conde said the revised compensation policy will simply define the duties already allowed by the statute.

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

**AGENDA ITEM NO. 4:                    RULES REGULATING UNDERGROUND STORAGE TANK SYSTEMS, DOCKET NO. 58-0107-0701 (PENDING RULE) (NEW RULE CHAPTER IMPLEMENTING THE IDAHO UNDERGROUND STORAGE TANK ACT)**

Orville Green, Administrator, DEQ Waste and Remediation Division, presented this rule to add a new rulemaking chapter implementing the Idaho Underground Storage Tank Act adopted by the 2007 Idaho Legislature. That law directed DEQ to develop rules through negotiated rulemaking to implement the federal underground storage tank requirements as amended by the Underground Storage Tank Compliance Act of 2005.

Written comments were received on the preliminary draft rule which resulted in revisions to the rule. The majority of participants in the rulemaking wanted to focus solely on petroleum underground storage tanks and exclude hazardous substance tanks. Thus, this rule was developed to address petroleum storage tanks only and excludes hazardous substance tanks. A public hearing was held on the proposed rule and no comments were received. A separate rule section was developed to address hazardous substance tanks.

Mr. Green explained the regulated community estimates the new law will increase the cost of new tank installations by about \$7,000 per tank system; however these increased costs would be required by the new federal law regardless of what Idaho adopts. The new law also requires underground storage tank owners, operators, and their employees to be trained and states that the training must be offered on location by DEQ at no cost. DEQ has developed a program to meet this requirement. He briefly explained the provisions of the rule, inspection and training

program, and noted that there were no controversial issues associated with this rulemaking and no stringency issues.

Don Chisholm expressed concern that the one-year waiting period between putting in a tank system and then drilling a potable well was too short. The measure was put in the rule to avoid circumventing the double-wall containment system requirement for storage tanks within 1,000 feet of a potable drinking water well. He feels three years would be a more reasonable time. Mr. Green agreed that two or three years might have been better, but the negotiated rulemaking gained consensus on the one-year requirement. Mr. Chisholm asked if a provision would require notification if a potable drinking water well were about to be drilled within 1,000 feet of an underground storage tank without a double-walled containment system for protection. Mr. Green said he was unaware of any such provision, but believes it would be rare for this situation to happen. DEQ tries to identify all public potable drinking water systems.

Dr. MacMillan asked what program regulates agricultural underground storage tanks (since they are exempted from this rule). Mr. Green responded that 40 CFR 280 excludes agricultural tanks, so DEQ has no regulatory authority to regulate them; however, tank standards exist and hopefully anyone who installed an underground storage tank on his property would follow those standards since those who install the tanks are most likely to be adversely affected if a problem arises.

Dr. MacMillan asked if ground water monitoring information was available to indicate a problem from leaking agricultural underground storage tanks. Mr. Green said he is unaware of any monitoring data indicating leak problems, but spills are monitored. DEQ has authority to address spills that cause health problems. Rick Jarvis pointed out that agricultural tanks over 1,100 gallons are regulated; only those under 1,100 are exempt.

- **MOTION:** Dr. MacMillan moved the Board adopt the Rules Regulating Underground Storage Tank Systems as presented in the final proposal under Docket No. 58-0107-0701.
- SECOND:** Nick Purdy
- VOICE VOTE:** Motion carried by unanimous vote.

**AGENDA ITEM NO. 5:**                    **GROUND WATER QUALITY RULE, DOCKET NO. 58-0111-0701**  
**(PENDING RULE) (RULEMAKING TO CLARIFY PORTIONS OF THE**  
**GROUND WATER QUALITY RULE TO PROMOTE CONSISTENCY IN**  
**APPLICATION OF THE RULE TO MINING ACTIVITIES)**

Barry Burnell, Administrator, Water Quality Division, presented brief overviews of the Ground Water Quality Plan and the Ground Water Quality Rule. This rulemaking contains updates and improvements and includes changes designed to promote consistency in application of the rule to mining activities. Mr. Burnell began with the following preliminary comments:

- Ground water is a public resource and, for the most part, with mining it is a public resource that is under public lands.
- The Ground Water Quality Plan contains a series of policy statements that the Ground Water Council and the Idaho Legislature agreed were fundamental for the well-being of Idaho environmentally and economically. The policies are not independent, but rely upon each other to provide a well-balanced, comprehensive ground water quality program.

- It is important that the Board consider all aspects of the Ground Water Quality Plan collectively when considering the rule, and not rely just on pieces or portions of a single policy within the Ground Water Quality Plan.
- It is likely that the Board will be asked to remove DEQ's ability to use discretion when reviewing mineral extraction projects. DEQ does not believe that would be in the best interest of resource protection. DEQ needs this type of authority via the rule to review mineral extraction processes and to set the affected ground water areas as they relate to mineral extraction. DEQ has made changes to the rule that improve the current rule and identify the procedure it will use to set the affected ground water area, as it's influenced by mineral extraction in a practical manner that is protective of the resource.
- The negotiated rulemaking group was unable to reach consensus because the mining interests wanted to be exempt from ground water quality standards with no DEQ oversight at their operations, and the environmental groups believed that mining operations should not have an exemption. Mr. Burnell said DEQ believes this rule presents a balance between those two wide viewpoints.

Ed Hagan, Senior Ground Water Hydrogeologist, reviewed the comments received on the rulemaking and the ten changes DEQ made to the proposed rule based on those comments.

Dr. MacMillan commented that a main issue of contention seems to be how the "mineral extraction area" is defined. The Idaho Mining Association (IMA) wants the area strictly defined, and DEQ wants to be able to define the area on a case-by-case basis. He asked what the practical significance was of each position. Mr. Burnell explained it is important for DEQ to have discretionary authority to look at the various mining activities that could qualify for an exemption. Excavation, overburden placement, disposal of waste rock, and reclamation activities could each have a large impact to the land area, ground water, and the watershed, depending on where they are placed and how they are handled and managed. Mr. Burnell thinks having a strict definition that requires DEQ to consider all those activities when setting a mineral extraction area ties the agencies hands to some degree. DEQ may want to offer an exemption only to the activities that truly need an exemption, rather than having broad applicability to all activities.

Board members asked a number of questions about how the rule would be applied, the size and scale of mining activities it would be applied to, how DEQ's discretion would be reviewed, and in general, more details about how the process would work. Mr. Burnell responded that the proposed rule changes would not change how the existing rule has been applied or would be applied; it would direct the agency on how it should take action to assure clarity among the regulated community and the environmental groups on how DEQ makes its decisions. The trigger for the mineral extraction portion of the rule has been based upon the federal permitting process. When the Bureau of Land Management (BLM) requires a mining operation to comply with all state and federal laws, the mining facility is then obligated to demonstrate to the BLM (as part of its permit application) that it has complied. When a facility predicts its operations are going to have an environmental impact, it is required to work with DEQ to achieve compliance. If DEQ takes an action, typically via a letter, an aggrieved party can file an appeal with the Board.

Don Chisholm asked if there was an opportunity for public comment before DEQ makes such decisions. Mr. Burnell said there is no opportunity before DEQ makes such rule interpretations

and decisions that affect a party; it is not subject to public comment (this is the same with all DEQ rules). An aggrieved party may file an appeal with the Board as of the date of the letter or other correspondence that takes the action.

Doug Conde explained the triggers and process used to re-categorize an aquifer and discussed the differences in the consent order process and how the proposed rule will work. He clarified that the discretion DEQ uses remains the same under the proposed rule; it is just an effort to give more form to the decision-making process and provide more clarity regarding exemptions, the length of time an exemption lasts, and the area it covers.

Don Chisholm asked if DEQ had ever received a request to reclassify an aquifer prior to or after a mining activity occurred. Mr. Burnell replied DEQ has never received a request to reclassify an aquifer; however the rules for reclassification would allow a request for reclassification both prior to or after initiating mining activity.

Jack Lyman, Idaho Mining Association, testified in support of the rule with the changes proposed in the motion he submitted (Attachment 2). He said after reviewing the public comments on the proposed rule, he feels there is a misconception that the mining industry is seeking a blanket exemption from the ground water quality standards. He said that is not the intention of the mining industry, and believes that a blanket exemption would be contrary to the Ground Water Quality Plan and the ground water quality rules.

Mr. Lyman pointed out that the Ground Water Quality Plan, which was adopted unanimously by the Idaho Legislature, recognized that mining is unique because it can occur in ground water and may cause “localized” contamination that may result in ground water being unavailable for other beneficial uses. He explained that the IMA’s purpose in seeking this clarification in the rule is to more accurately reflect legislative intent that recognizes that mining can have an impact in a “localized” area, not over some broad range, that some of those mining activities will impact the ground water temporarily beyond the area where the mining activities are being conducted, and that the area would shrink over time as reclamation activities and other best management practices were implemented.

He said he understands the concerns expressed about this approach, but noted that those concerns were discussed and debated extensively by the Ground Water Quality Council during development of the Ground Water Quality Plan. Those issues were resolved in the plan and the legislature accepted those compromises and those provisions that are incorporated in the Ground Water Quality Plan. Mr. Lyman feels those who think this is the wrong way to go should seek changes in the Ground Water Quality Plan or statutory changes that would make known a different legislative intent—but not to try to override the legislative intent through modification of the rule process.

Mr. Lyman reviewed each of the four amendments the IMA is proposing (Attachment 2):

1. Point of Compliance. IMA believes it is contrary to the Ground Water Quality Plan to measure compliance in a mineral extraction area. This amendment would state that the point of compliance will not be in a mineral extraction area or an area classified as a mineral extraction area. If this amendment is accepted, it would also

require the definition of “affected ground water area,” which now includes the “mineral extraction area,” to be changed.

2. Definition of “mineral extraction” and “mineral extraction area.” IMA seeks to remove DEQ’s role in determining whether excavation in a particular case is or is not mineral extraction. IMA accepts DEQ’s appropriate role in determining the size of the affected ground water area that will surround a mineral extraction area. The amended definitions would read:

20. Mineral Extraction. Recovery of a mineral from mineral-bearing deposits, which includes extraction, excavation, overburden placement, disposal of waste rock, and reclamation.

21. Mineral Extraction Area. The area determined by the Department that is necessary for mineral extraction. It includes excavation, overburden placement, disposal of waste rock, and reclamation.

3. Subsection 400.06.a.i. Current wording of Subsection 400.06.a.i would be deleted and amended to read:
  - a. Mineral Extraction. Naturally occurring constituents found in ground water within the affected ground water area, as determined by the Department, will not be considered contaminants as long as all applicable best management practices, best available methods or best practical methods appropriate for the aquifer category, as approved by the Department, are applied.
    - i. The affected ground water area shall not extend beyond the mineral extraction area unless the mine operator can demonstrate an actual current or projected future beneficial uses of ground water or interconnected surface water will not be injured as a result of the increase in naturally occurring constituents.
    - ii. The extent of the affected ground water area will be established by the Department based on information developed by the mine operator using methods approved by the Department. The Department will also consider technical evaluations provided by other persons if those evaluations are developed using methods approved by the Department and are provided in a timely manner.
4. Applicability. The first sentence in 400.06.c would be deleted and replaced with the following sentence:

400.06.c Applicability. The provisions of this rule apply to mineral extraction activities that commenced after July 1, 1998. All consent orders, compliance schedules, and other agreements adopted or issued by the Department prior to July 1, 2008 pertaining to ground water protection at mine sites shall remain in full force and effect. When the provisions of Subsection 400.06.a. are no longer applicable, ground water quality standards must be met within the affected ground water area unless the aquifer is recategorized, or a site-specific level or point of compliance is set under Subsection 400.05.

Mr. Burnell commented that the proposed amendments, some of which are quite substantive in nature, are essentially bringing the negotiated rulemaking process to the Board. He asked that, if the Board feels these amendments have merit and should be considered, it reject the rule, send it back to DEQ, and direct the negotiated rulemaking team to review and further negotiate the proposed amendments.

Chairman Cloonan said she is reluctant to make substantive changes to the proposed rule without significant input from DEQ and others.

Mr. Lyman said while he understands the concern, these are all positions that have been consistent from the start of the negotiated rulemaking and were included in the IMA's comments. He thinks it is appropriate for the Board to exercise direction to the agency by making these kinds of decisions. He agreed the implications of these changes are far-reaching, but they are not complicated. He feels further negotiations will not change the fundamental disagreement on these issues.

Mr. Lyman emphasized this is a critical issue to the mining industry, and IMA believes it is essential that it be presented to the next session of the Idaho Legislature. Chairman Cloonan asked if the IMA had to choose between having the rule adopted without the amendments or not having the rule adopted at all, which it would prefer. Mr. Lyman replied the first amendment regarding the point of compliance is critical to the IMA; if the Board approves a rule without that amendment, he believes it would be contrary to the Ground Water Quality Plan and legislative intent. The second proposed amendment is a matter of the efficient use of resources, but is not essential to the IMA. He feels the applicability issue is less an issue of legislative intent and not a major issue for the IMA. DEQ and others may have some concern that the IMA is trying to get this rule to apply to historic mines, but it is not.

Craig Harlen expressed concern that the requirement in the rule for DEQ to review each proposed mineral extraction activity to determine whether it meets the definition of mineral extraction could cause problems and increase costs for mining companies when they are trying to raise capital from out-of-state investors.

Mr. Burnell discussed the IMA's concerns regarding point of compliance. He believes there may be some misunderstanding regarding DEQ's request for a ground water monitoring well at the bottom of a backfill pit. He clarified that DEQ uses the information from the monitoring well to analyze and evaluate how well the predictive model estimates the level and extent of contamination; it is not used as a point of compliance. There is a different point of compliance outside of the backfill pit. He believes more communication may be needed on this issue.

Mr. Lyman feels it was clear in the negotiations, and from the rule as presented, that DEQ expects the monitoring well in the backfill pit to meet drinking water standards eight years after permanent cessation of mining. He believes DEQ has taken the view that within eight years after mining quits, the site must meet drinking water standards, or go through the aquifer reclassification process with great uncertainty at some future time. The IMA feels this is unacceptable.

Chairman Cloonan pointed out the site-specific ground water quality process was another option that is specifically available in the rule.

Mr. Lyman noted that during the negotiations, DEQ continued to state that the water should be restored to original conditions and meet drinking water standards within eight years. IMA believes this is an unrealistic expectation that does not reflect the intent of the Idaho Legislature when it approved the Ground Water Quality Plan.

Doug Conde explained briefly how compliance is conducted under the current rule. DEQ has two consent orders in place that limit application of the exemption. These companies have agreed that the exemptions will apply only for the specified time. The consent orders expressly say that after the exemption is gone, all standards must be complied with everywhere—but DEQ can set, on a site-specific basis, a point of compliance that is appropriate, or DEQ can change the levels to a site-specific level or the aquifer categorization can be changed. So options are available, and they are reflected in current consent orders that apparently the mining companies feel are appropriate. Mr. Conde noted the current rule contains discretion for DEQ to determine the area that is covered by the exemption. The mining companies have not indicated that DEQ having this discretion has caused any problems for them in securing financing.

Mr. Burnell explained it is important to understand the continuum of impact—if there is no impact from mining operations, then they do not need the mineral extraction area exemption. If there are short-term impacts, the facilities can take advantage of the opportunities that are provided in the mineral extraction exemption. If there are long-term impacts from a mining activity that go past the mineral extraction area provisions, then DEQ believes they should follow the process to either reclassify to a site-specific standard or set a different point of compliance.

Don Chisholm observed that changing the point of compliance to a place other than the bottom of the pit seems like a discretionary maneuver to allow a facility to avoid the reclassification process. If it is possible to change the point of compliance, he feels it is in effect allowing reclassification of the aquifer without going through the process. The public seems to be seeking more certainty about what is happening, and Mr. Chisholm feels allowing the discretion to change the point of compliance will not allow the level of protection many people are asking for. He suggested industry might need longer to comply, depending on the constituents.

Mr. Lyman clarified the IMA does not oppose placement of monitoring wells to test the validity of the models; it opposes DEQ's expectation that mines will meet drinking water standards using the monitoring wells as a point of compliance inside that area. He feels it is unrealistic to set that as the standard, particularly in context of what the legislature declared in adopting the Ground Water Quality Plan—that local contamination will preclude other beneficial uses. Mr. Lyman said the IMA is not seeking to let the contamination go beyond the mineral extraction area on a long-term basis.

Mr. Burnell commented the fundamental question is, “What steps should mining facilities undertake when they are having a long-term impact on ground water?”

Justin Hayes testified on behalf of the Idaho Conservation League. He said the ICL received an overwhelming number of comments on this issue and participated in the entire rulemaking process. He feels it has been a robust rulemaking and believes the ICL's comments have been heard.

Mr. Hayes commented individually on each of the amendments proposed by the IMA, and asked the Board to reject the rule and send it back to DEQ to continue the rulemaking process if it believes the amendments need to be addressed. He believes adopting the amendments at this

point would be short-changing the rulemaking process and minimizing the value of participating in the rulemaking process.

Mr. Hayes expressed the following concerns and comments about the amendments proposed in the motions submitted by the IMA in Attachment 1:

- Increasing growth in the state puts increasing demands on ground water and prioritizes the importance of protecting ground water in all aquifers across the state.
- Expectations of Idahoans about ground water have changed since the time the Ground Water Quality Plan was written, so it may be appropriate for DEQ to go to the Idaho Legislature to address specific unanswered questions and issues that have evolved and to see if the plan should be updated.
- The Ground Water Quality Plan mandates protection of ground water and recognizes the advantages of prevention over cleanup.
- The Ground Water Quality Plan recognizes the uniqueness of mining's impact upon ground water, but ICL does not believe the legislature intended to extend special treatment to this industry just because its activities can occur directly in ground water. The ICL does not think the definition of mining would include storing waste material above the ground water; mining should be defined as the extractive activity—not the storage and disposal of waste.
- The ICL does not support the first amendment proposed by the IMA regarding point of compliance. The ICL believes it is unacceptable to have a single source of ongoing contamination that can become a traveling ground water plume.
- The second amendment proposed by the IMA would remove DEQ's discretion in how mining is defined. The ICL would prefer no discretion, and a very narrow list of allowed activities. DEQ's desire to have the discretion is understandable, and after discussing the issue during rulemaking sessions, the ICL's level of comfort with the discretion DEQ is seeking is very high. There are things in the rule that are protective; however, IMA believes that eliminating the section that defines mining (Subsection 400.06) would eliminate the requirement to use best management practices. The ICL feels the changes being sought are very significant and would remove DEQ's discretion in favor of the mining industry and eliminate the need to comply with the BMPs before having access to the exemption. The ICL believes such a significant amendment should be sent back for consideration by the full rulemaking process and not presented to the Board at the last minute.

Mr. Hayes believes the language in the existing rule is inadequate and this is a very important rulemaking. He thinks the proposed rule is better than the existing rule, but because so many issues are at question both by the IMA and the ICL, Mr. Hayes urges the Board to reject all of the amendments requested in the IMA motions and send the rule back to DEQ for continued negotiated rulemaking to resolve the issues of concern with any guidance it feels appropriate.

Coby Tigert, Greater Yellowstone Coalition, submitted written comments (Attachment 3). He said most of the Coalition's concerns were the same as those expressed by Justin Hayes. The Coalition also requests the Board send the rulemaking back to DEQ to continue the negotiated rulemaking to resolve the concerns expressed by the ICA and in the Coalition's written comments including the issues regarding RCRA and the drinking water standards. Mr. Tigert believes the negotiated rulemaking process is the most appropriate way to resolve the remaining

issues and will give the public an opportunity to be involved in the protection of their public resource.

- **MOTION:** Nick Purdy moved the Board instruct DEQ to continue the negotiated rulemaking on Docket No. 58-0111-0701, and that in that negotiated rulemaking they further define “affected ground water area” and “mineral extraction area,” and that the “point of compliance” be clarified and the applicability as to the date that DEQ uses be further investigated.

**SECOND:** Don Chisholm

**DISCUSSION:** Marti Calabretta said she supports returning the rule to DEQ for further negotiation, but noted the motion did not include any direction from the Board on how it would like those issues addressed. She asked if the Board would like to include any recommendations or guidance to direct the negotiations. Nick Purdy said he wants to see more consensus. It may be impossible to reach complete consensus, but further negotiations could bring it much closer. Kermit Kiebert commented it is specifically the role of the Board to make such decisions when the parties cannot reach consensus. He supports sending the rule back if the parties think they can get closer to consensus. Barry Burnell responded there is a chance the parties can get closer with further negotiations, but it depends on the parties and the positions and concessions they are willing to make. Mr. Kiebert said that is a two-way street; both sides have to be somewhat willing or it will be futile. Chairman Cloonan asked Mr. Burnell if based on the testimony and motions made today he believed there was room for discussion and further negotiation. Mr. Burnell said he believes if additional negotiated rulemaking meetings take place, it is likely DEQ would make revisions to the rule; they may not be major revisions, but minor revisions are possible. Chairman Cloonan said she did not need a foregone conclusion that revisions would be made, but feels it is important the issues of concern be considered and supporting reasoning be presented.

Dr. MacMillan commented one of the biggest issues is the real intent of the legislature. He feels the Ground Water Quality Plan is conflicted. This is a fundamental problem, and it would help to have some clarification from a higher authority. Chairman Cloonan said she was present during the development of the Ground Water Quality Plan and feels the language in the plan was carefully drafted to avoid conflict and find balance and recognize the physical realities of mining and agriculture. Dr. MacMillan asked if she thought the intent was to defer the “hard decision.” Chairman Cloonan said she did not know if the plan was to defer the hard decision, but believes the intent was to provide direction on some very difficult decisions. The policy on mining has language about balance and best management practices and is consistent with other language such as “to the greatest extent practical.” She believes the language directs that the difficult physical realities of mining be taken into consideration in the context of overall ground water protection and thinks the language provides flexibility to do that.

Nick Purdy pointed out that the negotiated rulemaking process was quite abbreviated for such a contentious issue. He thinks not giving the negotiated rulemaking process a fair chance to resolve the differences would destroy a lot of goodwill developed over the past few years. He feels accepting the proposed motions of the IMA without giving the rulemaking process an opportunity to resolve the issues would be subverting the process. He suggested the Board send the rule back for continued negotiations; if it doesn’t work, the Board can then look to the legislature or make the hard decisions itself.

Don Chisholm expressed concern about the unintended consequences of adopting the proposed motions of the IMA without having adequate time to fully consider the impact the

amendments may have on other parties. He also noted the importance of recognizing that a different director may not have the same level of sensitivity toward these issues as Director Hardesty. He thinks it is important to have rules that apply regardless of who is in the director's chair and supports sending the rule back for further negotiated rulemaking.

Craig Harlen suggested the parties in the negotiated rulemaking focus on only those parts of the rule that are not working; there is no need to rewrite the Ground Water Quality Rule, just clarify and put sideboards on those portions that are not functioning properly. It appears to have already strayed significantly during the rulemaking process.

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

Marti Calabretta asked if the Board thought it would be appropriate to take some action to encourage updating the Ground Water Quality Plan. The plan is supposed to be a "dynamic document" to be reviewed and revised as needed. Don Chisholm suggested the Board could send a letter to the germane legislative committees relating the concerns discussed today and suggesting the Ground Water Quality Plan be updated in light of the pressures on the aquifers across the state to supply water. The letter could clarify why the Board sent the rule back and ask if the committees felt the plan needed to be updated before the Board considers the rule again.

Chairman Cloonan said she would like to review the law regarding the Ground Water Quality Plan before the Board makes any specific recommendations. Craig Harlen suggested the item be noted as an action item for further discussion at the next Board meeting. He feels the matter should be investigated to see if it is appropriate for the Board to take action.

Doug Conde commented that during the public comment process and the hearings for the Ground Water Quality Plan, the hearing officer noted that the statute says the plan is to have the force and effect of law, but it can't because there are no enforceable provisions here, just a set of policies. This basic statement of policies for how the state feels about ground water protection resulted in direction for DEQ and other responsible agencies to conduct rulemaking to implement the set of policies. Mr. Conde explained this is why it is sometimes difficult to apply the Ground Water Quality Rule—because it is a set of policies DEQ tried to put into an implementable form.

Marti Calabretta discussed the idea of moving to a permit process that would give more surety to industry, more effectively put best management practices in place, and clarify DEQ's responsibilities. A permit process is used in Montana, and many people are asking about moving Idaho to a permit process. Ms. Calabretta asked if there were any legal constraints that would keep Idaho from using a permit process at some point in the future and if it was discussed in the Ground Water Quality Plan. Mr. Conde did not recall any discussion of a permit system in the Ground Water Quality Plan, but it is mentioned in the rule. The negotiated rulemaking clarified the rule would not create a permit system, but would create standards that could be applied in existing ground water protection programs like the land application permit rules and cyanidation rules.

Chairman Cloonan agreed it makes sense to look at the idea, but believes it would take direction from the legislature to create a permit program for mining in Idaho.

**AGENDA ITEM NO. 6: CONTESTED CASE AND RULE DOCKET STATUS REPORT**

Paula Wilson briefly reviewed the contested case report and provided updates on several cases. The petitions from the City of Pocatello and the J. R. Simplot Company regarding the American Falls TMDL have been dismissed by the hearing officer and the case is closed. The Association of Concerned Sandpoint Businesses has completed the mediation process regarding the Sand Creek Byway 401 Certification case and is back in front of the hearing officer. A pre-hearing conference is set for the end of November 2007.

a. Set 2008 Board Schedule

DEQ staff requested the Board set meetings for April 23 & 24, October 8 & 9, and November 12 & 13, 2008, to address rulemaking activities. Chairman Cloonan noted the Board has three members (Craig Harlen, Randy MacMillan, and Nick Purdy) who have been reappointed and must be confirmed before the Senate Health & Welfare Committee. A meeting may be scheduled to coincide with the confirmation hearing after the date is set. Another meeting and tour may also be scheduled during the summer if additional agenda items come up. Dr. MacMillan said he would like to have additional education on mining.

The Board asked for continued updates on the mercury issue and fish tissue and monitoring results through the spring and summer.

Chairman Cloonan asked that Board members be notified when DEQ's rules are before the legislative committees.

**AGENDA ITEM NO. 7: LOCAL REPORTS AND ITEMS BOARD MEMBERS MAY WISH TO PRESENT**

Board members and staff discussed upcoming workshops and seminars of interest including the Idaho Environmental Summit and the 18<sup>th</sup> Annual Water Quality Workshop on Monitoring Assessment and Management on January 8, 2008.

Marti Calabretta reported the city of Riggins recently approved a general revenue bond by an 85% vote to upgrade its sewage treatment plant. The city initiated the improvements in response to an anticipated increase in the number of tourists and concerns about flooding.

The meeting adjourned at 2:10 p.m.

/s/

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Dr. Joan Cloonan, Chairman

/s/

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Craig Harlen, Secretary

Debra L. Cline, Management Assistant and Recorder

### **ACTION ITEMS**

- a. Ground Water Quality Plan – Response to Board questions, “Does it need to be updated, and is it appropriate for the Board to take any action?”
- b. Update on the mercury issue and fish tissue sampling and monitoring results throughout spring and summer.