



State of Idaho
DEPARTMENT OF ENVIRONMENTAL QUALITY
BOARD OF ENVIRONMENTAL QUALITY

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IDAHO BOARD OF ENVIRONMENTAL QUALITY

MINUTES

November 18, 2004

The Board of Environmental Quality convened on November 18, 2004 at 8:30 a.m. at:

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

ROLL CALL

BOARD MEMBERS PRESENT

Dr. John R. "Randy" MacMillan, Chairman
Dr. Joan Cloonan, Vice-chairman
Craig Harlen, Secretary
Paul C. Agidius, Member
Donald J. Chisholm, Member
Nick Purdy, Member
Marguerite McLaughlin, Member

BOARD MEMBERS ABSENT

None

DEPARTMENT OF ENVIRONMENTAL QUALITY STAFF PRESENT

Toni Hardesty, Director
Martin Bauer, Administrator, Air Quality Division
Nancy Bowser, Senior Water Quality Analyst
Barry Burnell, Administrator, Water Quality Division
Jess Byrne, Interagency Affairs
Debra Cline, Management Assistant to the Board
Doug Conde, Deputy Attorney General, DEQ
Don Essig, Water Quality Standards Manager
Orville Green, Administrator, Waste & Remediation Division
Tom John, Microbiology Rules Manager
Lance Nielsen, Drinking Water Program Manager
Paula Wilson, Rules Coordinator

OTHERS PRESENT:

Steve Canton, Chadwick Ecological
Bert Doughty, TCMC
Robbin Finch, Boise City
Jack Lyman, Idaho Mining Association
Dick Rush, Idaho Association of Commerce & Industry

- ❖ 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 OCTOBER 20, 2004 BOARD MINUTES

The October minutes were not ready for adoption and will be mailed to Board members for review and adoption at the next meeting.

a. Review of Action Items

Doug Conde stated DEQ legal staff will investigate the question of whether DEQ could balance cost versus environmental concerns when making decisions on permits. The issue will be combined with the question regarding rulemaking and takings.

Toni Hardesty announced DEQ is in the process of updating its Web site and the DEQ Groundwater Plan will be posted on the Web site to make it more visible and accessible to the public. The DEQ response to comments and revised proposed rules will also be available on the updated Web site.

Jon Sandoval updated the Board on the actions of the Joint Legislative Environmental Common Sense Committee's Subcommittee on Servicing Communities: Planning for the Future and Land Use Planning Act issues. The Subcommittee is looking at the whole issue of area of impact, regionalization, and sharing infrastructure resources between communities. The Subcommittee met in July and worked to define its responsibilities. The land use planning issues will be assigned to an ad hoc committee with representatives of city and county government, and Senator Hal Bunderson will take up the matter through his legislative committee. On the environmental side, the Subcommittee will continue its work on regionalization and municipal wastewater, and it may include storm drainage. The Subcommittee will also look at decentralized wastewater treatment systems versus septic systems as its primary charge. They plan to meet again in mid-December or early January depending on schedules.

Doug Conde stated it was his understanding the Board did not want to go forward with proposed revisions to the Environmental Protection and Health Act (EPHA) to make contested cases record reviews until DEQ got more input from the public. Chairman MacMillan asked if Board members thought the issue should be dropped from the Action Items. Don Chisholm felt it was

an important issue and the Board should continue to follow up on the matter. Nick Purdy agreed and thought the issue should remain on the Action Item list. Dr. Joan Cloonan also thought it was an important issue worth further discussion. She suggested DEQ take the draft legislation to the regulated community and groups such as the Idaho Association of Commerce and Industry (IACI) for discussion. **Doug Conde will report back with some proposals on how to move forward with the matter.**

Doug Conde briefly discussed the Moon decision regarding the field burning issue in Northern Idaho. The decision in part will shape how takings law is viewed in the future.

AGENDA ITEM NO. 2: DIRECTOR'S REPORT

Director Toni Hardesty reported DEQ has established the following internal procedure for developing guidance:

1. The program must work with the Attorney General's Office to determine whether the matter should be set out as rule or guidance.
2. The director must approve the guidance.
3. The guidance is developed. Public notice is published to allow stakeholders to participate in the development of the guidance.
4. The draft guidance is put out for public comment.
5. The guidance is then finalized.

DEQ is developing language that will be available to help staff and the public differentiate between guidance and rule. Director Hardesty discussed the issue of rule versus guidance extensively at a recent DEQ Senior Staff meeting to make sure everyone is very clear on the matter. She emphasized that guidance does not have the force and effect of law. She also met with IACI to let them know what actions DEQ has taken and discuss their concerns. The issue has also been discussed at the legislative forums DEQ has been conducting throughout the state.

Director Hardesty provided brief updates on cleanup efforts at INEL, the Coeur d'Alene Basin Commission activities, and the successful opening of the first E 85 fueling station in Idaho.

AGENDA ITEM NO. 3: WATER QUALITY STANDARDS AND WASTEWATER TREATMENT REQUIREMENTS, DOCKET NO. 58-0102-0302 (UPDATE OF TOXICS CRITERIA FOR MERCURY AND OTHER METALS)

Don Essig, Water Quality Standards Manager, explained the process DEQ used to update the toxics criteria for mercury and other metals for this rule. He discussed the relation of hardness to toxicity in certain metals and why EPA recommended there be no low end hardness cap.

Chairman MacMillan asked how DEQ determined whether a proposed rule or standard is based on sound science. Don Essig said DEQ did not have any specific criteria or agency standard. As a scientist, he looked for certain hallmarks to define sound science including: the work is conducted by people with credentials who are trained and educated in the specific field, the work is conducted under a protocol or standard operating procedure with clearly spelled out methods so the work can be replicated with the same results, and the work is published or peer reviewed in some fashion. Mr. Essig believed the toxicology work performed for this rule met all the requirements to be considered sound science.

The difference between the findings of the two studies performed for the rule (Chadwick Ecological and Stratus Consulting) was discussed at length, as was the scientific support for lowering the hardness cap from 25 mg/L to 10 mg/L.

Doug Conde advised the analysis should start with a review of what DEQ's burden is in developing the water quality criteria. The water quality criteria must be protective of the designated and existing beneficial uses. The first question is, does the literature show the 25 mg/L hardness cap is protective of the use? If not, and the literature shows that relationship between toxicity and hardness continues beyond 25 mg/L, he suggested it was unlikely EPA would approve Idaho's continuing use of the 25 mg/L hardness cap.

Chairman MacMillan commented another issue the Board must consider is that the rule must be approved by the Idaho Legislature. The Legislature requires the rule to be based on sound science, and he was not confident the 10 mg/L hardness cap was supported by sound science.

Craig Harlen had similar concerns because the Chadwick study stated there was no evidence that the present metal criteria capped at 25 mg/L were under protective of biota residing in waters of hardness under 25 mg/L.

Don Essig discussed the methyl mercury standard and responded to questions regarding whether it would be protective of the Bald Eagle. After studying extensive analysis done on this issue for the California toxics rule, Jeff Fromm, the DEQ Environmental Toxicologists, concluded it would be protective of Bald Eagles. Although, there is a small chance it won't be protective, the larger chance is that it will be protective.

Jack Lyman, Idaho Mining Association, commented that while this rulemaking did not proceed exactly as they had hoped when they initiated it 18 months ago, the IMA has appreciated the way DEQ conducted the negotiated rulemaking. Although the IMA did not get everything they wanted, they did feel their views were considered fairly and DEQ was always willing to consider input and discuss issues. The IMA expressed concern about the basis on which the determination for the elimination of the 25 mg/L hardness cap was made. The IMA does not believe the data presented in the rule meets the standard set by the Legislature regarding sound science.

Mr. Lyman introduced Steve Canton, Chadwick Ecological, who was the author of one of the reports prepared in response to the proposed rule. Mr. Canton discussed the process used by EPA to develop its recommendation for eliminating the hardness cap in the rule. The recommendations of EPA are based on different levels of science. He pointed out the process used to make the recommendation to eliminate the hardness cap did not use anywhere near the level of analysis used to develop the criteria. The criteria are developed by amassing a large amount of toxicity data on as many species as possible. The data is ranked and put in order of sensitivity. They then develop relationships where you have data between the hardness and the toxicity. He believed the recommendation on the hardness cap was simply EPA saying they are not sure it is safe down below this number.

Mr. Canton stated this issue was raised in South Carolina several years ago and they decided to retain their hardness cap at 50 mg/L. The concern was that if they dropped the cap they were going down to the level where streams cannot support aquatic life in any robust amount. They

were worried that if they removed the cap they would have to remove an aquatic life use on those streams.

Mr. Canton discussed the potential impacts of lowering the hardness cap in Idaho. In reviewing water quality characteristics for their clients, they found there would be no compliance issue if the hardness cap were dropped. However, there is a difference between a compliance issue and an NPDES issue. Lowering the hardness cap could have an impact on discharge permit levels and cause an unnecessary extra layer of stringent requirements on a permit that currently does not have problems with compliance.

In summary, Mr. Canton stated there is not enough data to show the hardness toxicity trend continues significantly beyond 25 mg/L. He believed it would be best to retain the 25 mg/L hardness cap in the rule and did not think there would be any streams harmed by that action.

Chairman MacMillan asked if lowering the hardness cap to 10 mg/L would require NPDES permit holders to do increased monitoring. Mr. Canton did not believe it would cause an increase in sampling, but thought it would potentially change the permit limits and cause additional expense for more treatment.

Paul Agidius asked what effect it would have on permit holders if the Board approved a rule with a 25 mg/L cap and EPA did not approve the rule. Jack Lyman replied he believed it was the Board's statutory obligation to establish the rules and standards based on the best scientific information available. He stated the impact to permit holders would depend on what action EPA took. If EPA accepts the rule but eliminates the hardness cap, there will be some benefit regarding the mercury criteria, but without the hardness cap there may be problems both in terms of compliance as well as the establishment of permit limits for any new NPDES permits. It would have a significant impact.

Although he was not pleased with many of the things added to the rule, Mr. Lyman stated the IMA supported the rule and requested the Board adopt the rule as presented with the exception that the hardness cap be left at 25 mg/L.

Craig Harlen pointed out the impact would not just affect existing permit holders and industry; it would affect new industries that might want to come into the state.

Chairman MacMillan asked Jack Lyman about his comment that the Board had a statutory obligation regarding the use of "good science." Jack Lyman said Idaho Code § 39-107D(2) stated, "to the degree the department action is based on science, in proposing any rule they shall utilize the best available peer reviewed science and supporting studies conducted in accordance with sound and objective scientific practices, and data collected by accepted methods or best available methods if the reliability of the method and the nature of the decision justifies the use of the data." That is the law – that is §39-107D(2) of the code. It is arguable whether it applies specifically in this case because the code containing that language applies specifically to issues that are more stringent or broader in scope than federal regulations. Mr. Lyman believed, however, that this was a fair characterization of the legislature's expectation on all rules developed whether statutorily mandated or not, and that this is the standard by which they will judge this rule when it is presented to them.

Don Chisholm was concerned about adopting a rule that would not meet EPA recommendations and the problems that might occur if EPA does not approve the rule. Doug Conde discussed the consequences of EPA not approving the rule. If EPA does not approve a rule, they have a statutory obligation to promulgate a new rule. First they allow the state an opportunity to fix the rule. If the state does not amend the rule to EPA's satisfaction within a certain timeframe, a federal standard will be promulgated. The existing rule stays in effect until EPA approves a new rule. Dr. Cloonan asked if it was possible for EPA to approve parts of the rule. Mr. Conde said EPA had approved rules in part before under certain circumstances where litigation was involved, but was unsure how EPA would respond to this situation. Dr. Cloonan commented the Board should not wait and second guess EPA before taking action.

Robbin Finch, Boise City, testified in support of the rule in general and the implementation guidance. Mr. Finch participated in the negotiated rulemaking as a representative of Boise City and the Association of Idaho Cities. He stated it was an excellent rule that represents a consensus view from the environmental, municipal, and industrial stakeholders regarding mercury. The human health approach is a significant improvement over the old approach of water column standards. It assesses the environmental endpoint of concern, human health, and directly relates that into NPDES and TMDL requirements without going through extremely expensive modeling and monitoring efforts. As a practical matter, municipalities are very supportive of the rule. He discussed the complex global nature of the mercury problem and why fish tissue monitoring was a better way to protect human health than a point source standpoint. Municipalities also support DEQ's approach of reserving the acute and chronic mercury aquatic life criteria.

Mr. Finch stated as a practical matter, the hardness cap issue has no impact on municipalities in Idaho. There are no NPDES issues because there are no municipal discharges to waters where hardness is a problem. He noted, however, that in other states where hardness is a problem, municipalities have supported a hardness cap. He discussed the procedural issues regarding federal promulgation of a hardness rule for Idaho. This is something EPA does infrequently and it seems unlikely it would happen over a hardness cap issue.

Mr. Finch briefly discussed mercury trading and the EPA national policy on pollutant trading. The policy allows for trading of nutrients and other nontoxic pollutants. EPA generally has not supported trading of toxics because of concern about the development of hot spots in water bodies that can create significant problems. However, EPA is currently funding a pilot program with the city of Sacramento for trading mercury.

Justin Hayes, Idaho Conservation League (ICL), testified in support of the proposed rule. Mr. Hayes participated in the entire negotiated rulemaking process. ICL had hoped this rulemaking would be an opportunity to more comprehensively update Idaho's toxic metals criteria. Many of the state's criteria are very old. The state has failed to do the mandated triennial review, and as a result, is potentially very vulnerable. ICL originally asked that DEQ address this issue and take this opportunity to update all of the metals criteria; however, ICL was unable to convince the rulemaking body to take on that perspective.

ICL supports all of the updates proposed in the rule and the lowering of the hardness cap to 10 mg/L. Originally, ICL requested DEQ follow EPA guidance and eliminate the low end hardness cap completely, but after further discussion and review of documentation ICL is comfortable

with 10 mg/L. He believed the documentation had enough data points to justify going from 25 mg/L to 10 mg/L.

ICL has some concerns about the decision to eliminate the water column standards for mercury. Because this is the first fish tissue standard for methyl mercury in the nation, ICL suggested a check be put in place by continuing to monitor for water quality in ambient conditions in the water column. This would allow a data set to compare with the fish tissue samples to see if the fish tissue sampling is sufficiently protective. ICL was unable to convince the rulemaking body, and did not request the Board to make a change to the rule. Mr. Hays felt the rule represented a delicate balance and urged the Board to adopt it as presented.

Mr. Hayes commented that EPA Region 10 was consistent throughout the negotiated rulemaking in saying they were going to support the EPA national recommendations and were looking for a total elimination of the hardness cap. DEQ may have a challenge gaining EPA approval for a hardness cap of 10 mg/L.

Chairman MacMillan asked about the status of DEQ's triennial review with EPA. Don Essig said the last DEQ triennial review was in 1994, and was indeed overdue. DEQ is working with a contractor to scope issues and begin the review.

Chairman MacMillan asked Mr. Essig if he considered the documentation used to determine justification for recapping hardness to be peer reviewed. Mr. Essig replied he considered them to be peer reviewed because they were reviewed by Stratus, Chadwick, and the DEQ environmental toxicologist.

Craig Harlen asked if there was ongoing research in this matter since EPA feels they do not have enough data and DEQ does not seem to have enough. Don Essig replied that some of the best data available on this issue is the data collected in Idaho recently for the development of the South Fork Coeur d'Alene River site-specific criteria. Some research is going on, but nationally toxicity testing has decreased because it is very costly. The testing that is taking place is looking at high and low hardness and some of the other factors that affect toxicity.

➤ **MOTION:** Nick Purdy moved the Board adopt the Water Quality Standards and Waste Water Treatment Requirements as presented in the final proposal under Docket No. 58-0102-0302.

SECOND: Don Chisholm

DISCUSSION: Craig Harlen stated he was not comfortable with supporting the entire rule as presented because he thought portions of it were not based on good science. Paul Agidius agreed with Mr. Harlen's comments and felt it was the Board's duty to act on what they had in front of them based on good science and set aside the reality of what EPA or the Idaho Legislature will approve. If EPA does not approve a portion of the rule, there is a mechanism to make any mandated changes.

Dr. Joan Cloonan said it appeared the change in the hardness cap seemed to be the main issue of contention and suggested the rule be adopted as presented without the change to the hardness cap.

Nick Purdy feared it would create problems to start changing the rule at this point after 18 months were spent in negotiations to create a rule that represents a delicate balance with all the stakeholders. He felt the Board should accept the recommendations of the experts and scientists who developed the rule.

Paul Agidius asserted that if Idaho Code §39-107D(2) does apply, it specifically states the best available peer reviewed science. No science has been presented from EPA. The Board has been presented two reports and both contain comments that seem to indicate there is no justification for going down to a hardness cap of 10 mg/L.

MOTION TO AMEND: Craig Harlen moved to amend the motion to read:

I move the Board adopt the Water Quality Standards and Wastewater Treatment Requirements as presented in the final proposal under Docket No. 58-0102-0302 except for the provision of section 210.c.i., and that the low-end hardness cap remain at 25 mg/L.

SECOND ON MOTION TO AMEND: Dr. Joan Cloonan

DISCUSSION: Don Chisholm commented on the motion stating he agreed with Mr. Purdy's comments and believed for the efficiency and the predictability of the regulated community it would be in their best interest to adopt the rule as presented with a hardness cap of 10 mg/L. Since EPA controls the final outcome, it seems a waste of time to adopt something that will have to be changed.

Chairman MacMillan felt he had an obligation as a scientist to try to determine if something is scientifically sound or not. He believed EPA erred in removing the cap because there is no scientific evidence to support the position.

ROLL CALL VOTE ON AMENDMENT: Motion carried. 4 ayes (Cloonan, Harlen, MacMillan, McLaughlin, Agidius); 2 nay (Chisholm, Purdy); 0 absent.

VOICE VOTE ON AMENDED MOTION: Motion carried unanimously.

AGENDA ITEM NO. 4: IDAHO RULES FOR PUBLIC DRINKING WATER SYSTEMS, DOCKET NO. 58-0108-0401 (PENDING RULE) (CLARIFICATION OF RULES REGARDING ENGINEERING STANDARDS)

Barry Burnell stated this rule is brought forward to clarify language in various sections of the rule, make corrections to cross-reference citations, and address other minor housekeeping issues.

Tom John, Microbiology Rules Manager for the DEQ Drinking Water Program, explained the revisions to the rule in detail. The revisions:

1. Broaden the language dealing with the use of disinfectants in public water systems and bring requirements into line with current science.
2. Improve language in sections that have posed interpretive difficulties and other minor language changes to make the rules easier to read and understand.
3. Minor modifications in language regarding contracting for operator services to reflect the statutory change of authority for the licensure of drinking water and wastewater operators from DEQ to the Idaho Bureau of Occupational Licenses.

Negotiated rulemaking was conducted with the stakeholders and public comment was accepted. No cost impact is anticipated to the regulated community. The changes are expected to increase flexibility and options, and some may actually reduce costs for the regulated community. There were very few new requirements, and they will not be applied retroactively. However, water systems will be expected to incorporate them during future capital improvements.

Mr. John stated the rulemaking had no contentious issues, and the parties in the negotiated rulemaking were able to easily reach consensus on the rule. He noted there was one issue that could be seen as a stringency issue in the definition of a public water system. Language was

included to prevent small water systems from breaking into small clusters to avoid regulation. This practice has happened in the past and would invariably cause problems later when capital improvements are needed. DEQ does not consider the language to be more stringent because there have been interpretations by EPA in court cases that found breaking up a water system that is under common ownership for the purpose of avoiding regulation is poor public policy and inconsistent with the intent of the Safe Drinking Water Act.

Dr. Joan Cloonan expressed concern about the number of other standards that are referenced or adopted by reference in the rule. Mr. John said it was a kind of shorthand in the engineering community to use the very important standards published by the American Water Works Association and the National Sanitation Foundation, rather than trying to recreate them in the rule. Barry Burnell added the references are often added simply to let the reader know where they can find specific information. Dr. Cloonan's concern was whether the referenced standards became enforceable as law by DEQ. She urged DEQ and the Board in the future to look carefully at what they are adopting by reference and making enforceable by law.

Don Chisholm asked whether adoption by reference adopted only the standard in place at the time or if it included all future revisions. Doug Conde responded it would only include the standard as it was at the time of adoption. Any future amendments would not automatically be included and would require changing the rule. The Administrative Procedures Act specifically provides direction on the matter.

➤ **MOTION:** Dr. Joan Cloonan moved the Board adopt the Idaho Rules for Public Drinking Water Systems as presented in the final proposal under Docket No. 58-0108-0401.

SECOND: Don Chisholm

VOICE VOTE: Motion carried unanimously.

AGENDA ITEM NO. 5: **IDAHO RULES FOR PUBLIC DRINKING WATER SYSTEMS, DOCKET NO. 58-0108-0402 (PENDING RULE) (REPEAL OF OPERATOR CERTIFICATION RULES)**

Barry Burnell explained this rulemaking was conducted to implement provisions of the Drinking Water and Wastewater Professionals Licensing Act which transferred authority for licensure of drinking water and wastewater operators from DEQ to the Drinking Water and Wastewater Professional Board and the Idaho Bureau of Occupational Licenses.

Lance Nielsen, DEQ Drinking Water Program Manager, reviewed the specific revisions and deletions in the rule. This rulemaking deletes references to licensing obligations that individuals would have to DEQ and retains only the requirement that community, non-transient non-community, and surface water systems must have appropriately licensed operators at their facility. All of the licensing activities have been transferred to the Governor appointed Drinking Water and Wastewater Professional Board.

DEQ provided an opportunity for public involvement through a 45-day written public comment period. No negotiated rulemaking was conducted due to the non-controversial nature of the rule. Direct mailings were sent to over 5,000 entities to provide notification about the rule and no objections were received. There should be no cost to the regulated community, and costs to DEQ should decrease due to a reduction in technical staff time. The rule is no more or less stringent than federal law.

- **MOTION:** Nick Purdy moved the Board adopt the Idaho Rules for Public Drinking Water Systems as presented in the final proposal under Docket No. 58-0108-0402.
SECOND: Marguerite McLaughlin
VOICE VOTE: Motion carried unanimously.

AGENDA ITEM NO. 6: WATER QUALITY STANDARDS AND WASTEWATER TREATMENT REQUIREMENTS, DOCKET NO. 58-0102-0402, (PENDING RULE) (REPEAL OF OPERATOR CERTIFICATION RULES)

Barry Burnell stated this rulemaking was conducted to implement provisions of the Drinking Water and Wastewater Professionals Licensing Act which transferred authority for licensure of drinking water and wastewater operators from DEQ to the Drinking Water and Wastewater Professional Board and the Idaho Bureau of Occupational Licenses.

Nancy Bowser, Senior Water Quality Analyst, detailed the changes in the rule to delete sections and definitions that include requirements for mandatory wastewater operator certification and wastewater treatment and collection system certification that have been transferred to the authority of the new Drinking Water and Wastewater Professional Board. The operator certification licensure requirements that are those of the system remain with DEQ. Minor changes were made to change terminology from “certification” to “licensure.”

Ms. Bowser stated the rulemaking had no contentious issues and was not more stringent than federal requirements.

- **MOTION:** Paul Agidius moved the Board adopt the Water Quality Standards and Wastewater Treatments as presented in the final proposal under Docket No. 58-0102-0402. He further moved that the Board amend the February 2004 temporary rule as presented in the final proposal with the amendments becoming effective December 1, 2004
SECOND: Dr. Joan Cloonan
VOICE VOTE: Motion carried unanimously.

AGENDA ITEM NO. 7: RULES FOR THE CONTROL OF AIR POLLUTION IN IDAHO, DOCKET NO. 58-0101-0401, (PENDING RULE) (PERMITTING CLARIFICATION)

Martin Bauer, Administrator, DEQ Air Quality Program, explained this rulemaking is to revise the structure of the air quality permitting rules to modernize, update and improve the efficiency of the rules. It will take several rulemakings to achieve this goal, and this is the first of those proposed rules.

Mr. Bauer explained the negotiated rulemaking process being conducted and detailed the proposed changes. This rule removes the modeling requirement for permit to construct exemptions to align those provisions with EPA statements.

- **MOTION:** Dr. Joan Cloonan moved the Board adopt the Rules for the Control of Air Pollution in Idaho as presented in the final proposal under Docket No. 58-0101-0401.
SECOND: Craig Harlen
VOICE VOTE: Motion carried unanimously.

AGENDA ITEM NO. 8: RULES FOR THE CONTROL OF AIR POLLUTION IN IDAHO, DOCKET NO. 58-0101-0402, (PENDING RULE) (UPDATE OF FEDERAL REGULATIONS INCORPORATED BY REFERENCE)

Martin Bauer presented this rule to update citations to the federal regulations incorporated by reference to include those revised as of July 1, 2004. The rulemaking is necessary to ensure that the Rules for the Control of Air Pollution in Idaho will remain consistent with federal regulations.

- **MOTION:** Marguerite McLaughlin moved the Board adopt the Rules for the Control of Air Pollution in Idaho as presented in the final proposal under Docket No. 58-0101-0402.
- SECOND:** Craig Harlen
- VOICE VOTE:** Motion carried unanimously.

AGENDA ITEM NO. 9: CONTESTED CASE AND RULE DOCKET STATUS REPORT

Paula Wilson briefly reviewed the status of pending contested cases and rule making efforts. She noted the Glanbia case had been settled by stipulated agreement. The Board decision on the Young's Septic Service case was not appealed and the case is now closed.

Chairman MacMillan asked about the status of the hydrogen sulfide rule. Ms. Wilson stated action on the rule is pending additional research and submission of additional information from DEQ regarding the public health risks of hydrogen sulfide. She noted the Board would need to provide public notice before going forward with the rule, or vacate the rule and start the whole rulemaking process over.

Don Chisholm asked if EPA had taken any further action to promulgate a federal hydrogen sulfide standard. It was his impression that DEQ did not have the funding to carry out the necessary studies and would most likely wait until EPA adopted a national ambient air standard and adopt it by reference. He did not think vacating the current rulemaking would hurt that process, and doubted the Board could go forward with it based on the quality of human experimentation that was insisted on during previous Board action

Nick Purdy asked if DEQ had contacted the Department of Agriculture to supply them with the information collected on the hydrogen sulfide rule for their odor control rulemaking. Chairman MacMillan noted the DEQ rule was a human health standard, not an odor issue. Director Hardesty added that some DEQ staff were working with the Department of Agriculture on the issue.

AGENDA ITEM NO. 11: LOCAL REPORTS AND ITEMS BOARD MEMBERS MAY WISH TO PRESENT

- a. Board Meeting Schedule for 2005

The Board set the following meeting schedule for 2005:

February 8 & 9	Boise
June 22 & 23	Location to be determined

August 17 & 18	Location to be determined
October 12 & 13	Boise
November 16 & 17	Boise

The schedule is subject to change and additional meetings may be scheduled as needed. Nick Purdy commented on a problem he encountered with the wastewater rules regarding the land application of Class A wastewater adopted at the last meeting. The new class of wastewater cannot be used in many situations because of certain restrictions, and a definition of recharge needs to be added. Barry Burnell stated DEQ could revisit the rule to look at the buffer/separation issues if the Board desired. After studying regulations in surrounding states, the rule was initially set at a middle ground. More will be learned about how the rule works with local issues as information is gathered and evaluated. Based on that experience, DEQ can then revise the standard to make it more responsive to local needs. The Idaho Department of Water Resources (IDWR) may be proposing legislation to further clarify the definition of recharge.

Chairman MacMillan asked if the rule was usable as it stands. Mr. Burnell stated there were four or five projects in the works that will be able to benefit from use of the rule for landscape irrigation purposes. For uses with water features that act as recharge, the rules take a cautious approach. There is an avenue within the rule to waive certain requirements. With site-specific analysis, DEQ can consider the geology and issues of each project. Mr. Burnell thought it would be worthwhile for DEQ to take a second look at issues such as distance and time travel as they relate to buffer and separation issues in the rule.

Director Hardesty pointed out withdrawing the rule at this time would mean the pending projects could not go forward. It may be more useful to allow the rule to go forward, then immediately begin to evaluate the rule. Modifications can be made through another negotiated rulemaking to correct any problems, and interim issues could potentially be handled with a waiver.

Nick Purdy discussed the need for definitions or clarifications to ensure the rule is interpreted and applied consistently. Dr. Cloonan said the aquifer recharge guidance interprets aquifer recharge as “formal aquifer recharge projects” and not incidental recharge. She felt a change in the rule or some guidance was needed to clarify the matter.

Don Chisholm questioned how an approved land application project would affect future down-gradient well applications; is there a mechanism set up to let IDWR know about such projects? Will the projects preempt the drilling of a new well?

Chairman MacMillan felt Director Hardesty’s suggestion to go forward with the rule and then immediately begin evaluation and negotiated rulemaking sounded reasonable. **The Board concurred and requested DEQ maintain the current course with the rule as adopted at the last meeting, then as soon as it is adopted by the legislature, begin negotiated rulemaking to reexamine the rule to address the issues of concern.**

The meeting adjourned at 2:15 p.m.

/s/

Dr. John R. MacMillan, Chairman

/s/

Craig Harlen, Secretary

Debra L. Cline, Management Assistant and Recorder

ACTION ITEMS

1. Investigate the question of whether DEQ could balance cost versus environmental concerns when making decisions on permits. (Doug Conde)Page 2
2. Update on the actions of the ECSC Servicing Communities: Planning for the Future Subcommittee and Land Use Planning Act issues. (Jon Sandoval).....Page 2
3. Create a “How are we doing?” link on the Board’s Web page for feedback and comments
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4. Gather input from the stakeholders such as IACI, the ECSC, and the germane legislative committees regarding how the current contested case appeal process functions to see if there is interest or support in revising the EPHA to make contested cases record reviews and make recommendations on how to proceed. (Doug Conde)Page 2
5. Presentation reviewing the legal parameters of the guidance versus rule issue including the provisions of the APA and the Idaho Supreme Court decisions (Doug Conde & Harriet Hensley October 20, 2004 minutes, Page 13
6. Begin negotiated rulemaking to reexamine the Wastewater Rules regarding the land application of Class A wastewater (after adoption by legislature). (Barry Burnell)Page 12