STATE OF IDAHO
DEPARTMENT OF ENVIRONMENTAL QUALITY
Board of Environmental Quality

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Dirk Kempthorne, Governor
C. Stephen Allred, Director

# IDAHO BOARD OF ENVIRONMENTAL QUALITY

## MINUTES

## MAY 25, 2001

The Board of Environmental Quality convened at 10:00 a.m. at:

Idaho Department of Environmental Quality
Conference Rooms C & D
1410 North Hilton
Boise, Idaho

**ROLL CALL**

**BOARD MEMBERS PRESENT:**

Donald J. Chisholm, Chairman
Paul C. Agidius, Vice chairman
Marti Calabretta, Secretary (via telephone)
Dr. Joan Cloonan, Member
Dr. J. Randy MacMillan, Member
Nick Purdy, Member

**BOARD MEMBERS ABSENT:**

Senator Marguerite McLaughlin, Member

**DEPARTMENT OF ENVIRONMENTAL QUALITY STAFF PRESENT:**

C. Stephen Allred, Director
Jon Sandoval, Chief of Staff
Debra L. Cline, Administrative Assistant to the Board
Doug Conde, Deputy Attorney General, DEQ
Jess Byrne, Staff Resource Officer
Paula Gradwohl, Paralegal, Rules Coordinator

**OTHERS PRESENT:**

Kevin Beaton, Stoel Rives for IACI
Matt Eames, Idaho Power
Brent Olmstead, Idaho Assoc. of Commerce & Industry

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**AGENDA ITEM NO. 1** **REVIEW OF DRAFT RULES OF ADMINISTRATIVE PROCEDURE BEFORE THE BOARD OF ENVIRONMENTAL QUALITY, DOCKET NO. 58-0123-0001, PENDING RULE**

Doug Conde, Deputy Attorney General, reviewed the background and current draft of the contested case rules. The rulemaking process was started last summer with a draft rule. Public comments were accepted through this spring. A number of meetings have been held and correspondence exchanged with the parties who commented on the rules. The rules are scheduled for final adoption by the Board at the June 14, 2001 meeting. All but two issues have been resolved.

Chairman Don Chisholm asked how rigidly the rules must conform to the Attorney General's rules. He felt the rules should reflect who the Board is and the standards it wants to apply. The quality of the rules and what they express conveys a message about the importance of the work the Board does. Doug Conde explained that the Attorney General's rules were developed as generic rules that would apply to any agency, and there may be some areas that could be changed to better serve the Board's purpose. For example, certain provisions were not adopted because they were written to deal with a type of appeal that the Board does not deal with, or they did not apply to DEQ because it has its own process of enforcement under the Environmental Protection and Health Act (EPHA). The general substantive provisions of the Attorney General's rules should be followed, as required by the directive of the Administrative Procedures Act (APA) and the EPHA, but there is some discretion as to the language.

Doug Conde discussed the two issues that were not resolved in negotiations. The first issue deals with the appointment of a presiding officer for contested case hearings. The EPHA allows the Board to either act as the presiding officer or appoint a hearing officer. As currently drafted, the Board's rules require that one or more members of the Board would always act as the presiding officer. This is to ensure that one or more members of the Board are actually there to hear the live testimony. A hearing officer could be appointed for all the pre-hearing matters such as setting deadlines and dealing with legal briefs and motions, discovery, pre-trial hearings, etc. The hearing officer could continue to assist the Board at the hearing. Don Chisholm discussed a memo he distributed to Board members regard presiding officers at contested case hearings (Attachment 1) He felt it was important for the Board to have flexibility in this matter. He suggested an option might be to have staff initially appoint a hearing officer on all cases. The Board could review the matter and then decide whether they wanted the case to proceed with the appointed hearing officer or have the Board or a Board member act as the presiding officer.

Dr. Randy MacMillan asked how the Board would determine whether the appointed hearing officer was suitable for the case. Don Chisholm explained that Board members would be familiar with the subject matter because they receive the petitions for review of contested cases. In order to judge the expertise of a hearing officer for a specific issue it would be helpful if the Board could review a resume of the proposed hearing officer. Doug Conde noted that all hearing officers are reviewed and approved by the Board every year. Also, in certain areas of the state there are a very limited number to choose from. DEQ is in the process of recruiting more hearing officers for the list. The pay has been increased to ensure an adequate supply of competent attorneys are available. Paul Agidius suggested the Board be informed of the

proposed hearing officer for a case prior to the actual appointment to allow Board members to comment. Paula Gradwohl stated she could supply Board members with a letter suggesting a hearing officer at the same time the petitions are sent. If comments were not received within a week, the proposed hearing officer would then be appointed. Don Chisholm felt this would be a good process and felt it would be best to put it in a rule so it is documented and is not lost with changes in staff.

Nick Purdy commented the best person to be the presiding officer was a hearing officer. He felt it was valuable to have a Board member present at the hearing, but believed it was best to have a trained hearing officer with legal expertise to conduct the proceedings correctly. If a hearing is not conducted properly and goes on to district court, that is a great burden to place on a Board member without legal training. It seems logical to continue through the proceeding with a trained professional who is already familiar with the case. Mr. Purdy felt the Board should have the flexibility to appoint either a hearing officer or Board member as presiding officer. In instances where the case involves a simple matter, or the Board member chosen has legal training, a Board member might serve well as the presiding officer.

Kevin Beaton, Stoel Rives, presented testimony on behalf of the Idaho Association of Commerce and Industry. IACI's position is to defer to the Board on this issue. It is a self-management issue. There are some instances where it would make sense to have the entire Board or one member hear a case, and in others it may not be cost-effective. IACI feels there has been good dialog on this issue, and their position is basically neutral.

No other public comment being received, Chairman Chisholm asked Doug Conde to proceed with the second outstanding issue. Doug Conde advised the current draft rules provide for a broad range of discovery. It follows the same scope of discovery allowed under the Idaho Rules of Civil Procedure (IRCP). There are concerns that this might allow the discovery process to get out of control by becoming too expensive, burdensome, invasive, etc. To address this concern, the draft rules provide that the hearing officer can have a pre-hearing conference early in the case to set deadlines and possibly limit discovery. They also give authority to the hearing officer to issue protective orders to protect against undue burden, harassment, etc. A specific provision also deals with trade secrets and other confidential information. IACI has expressed concern that: 1) The contested case process is typically intended to be more economical and speedy than a district court trial. It allows a simpler more informal means of resolving a problem. They didn't want a contested case to be able to blow up into a very lengthy process where depositions, invasive interrogatories and requests for production occur. 2) IACI wants assurance that confidential information will be protected. 3) IACI does not want the discovery process to be used by the agency or some other litigant to investigate or pursue areas that have nothing to do with the case.

Doug Conde explained the two models that could be followed to address these concerns. Many agencies have adopted a process that mandates an exchange of certain information (witnesses and exhibits) and anything beyond that has to be approved by the hearing officer. The other model, which has been used in the draft rules, is to allow a broad scope of discovery but allow the hearing officer to control the discovery process through issuing protective orders, and pre-hearing and status conferences. Mr. Conde commented that in his experience there have been no problems with contested cases getting out of control. Don Chisholm felt the Board

should be prepared for the possibility of special interest groups using the discovery process to delay or derail a project by giving the hearing officer the discretion to control matters in a realistic manner proportional to the issues involved.

Marti Calabretta asked if the Board would have the ability to intervene in the process if it felt a hearing officer was not controlling a case adequately and making balanced rulings. Doug Conde advised the rules allow an appeal directly to the district court if a party feels the hearing officer is acting in error on issues involving trade secrets. There is a provision for certain preliminary decisions to be brought up to the district court, but not directly to the Board. Don Chisholm felt it would be more timely for the Board to respond to such concerns. Director Steve Allred pointed out it was his understanding that the concern of industry was timely action. If discovery was taking place that was considered out of bounds the Board might not be able to react quickly enough. There was a desire to be able to go to someone who could immediately take action to prevent discovery.

Kevin Beaton stated, as he read the rules, there is not an ability to appeal to a higher authority outside of the trade secret issue. Most of the time, the issues hearing officers will be asked to decide will be questions of whether discovery is oppressive or someone is on a "fishing expedition" and going beyond the issues of relevancy. As currently written, the only avenue of appeal would be simply to ask the hearing officer to reconsider his initial decision.

Marti Calabretta pointed out that in district court the presiding officer would make such decisions. The Board should be proactive by having someone control the case from the serving stage. Doug Conde felt if preliminary decisions are allowed to be appealed to the Board, boundaries should be set to prevent parties from delaying the process by appealing everything to the Board level. For example, only certain important decisions could be appealed to the Board. Doug Conde pointed out the Board had the option of not appointing a hearing officer, being involved individually, or as a Board through all stages of contested cases.

Don Chisholm suggested they make it clear that the Board exercises supervisory power over the hearing officer and set deadlines to limit frivolous discovery. This might be more efficient than providing for an interlocutory appeal to the Board. Ms. Calabretta agreed and added that the Board could direct one member to be the supervisor on the case on an ongoing basis. Steve Allred questioned whether an individual member could legally take necessary actions without a full meeting of the Board. Open meeting law requirements may prevent timely response, particularly in discovery issues. Doug Conde also believed a single Board member could not legally fulfill such a supervisory role. More formal action would be required. The Board member would have to be appointed as the presiding officer.

Marti Calabretta questioned the intent in getting Board members more proactively involved in contested cases. If additional oversight from the Board is not needed and was not the intent of legislation, the process used in the Administrative Rules by other agencies is apparently sufficient. Don Chisholm clarified that there are two issues; ensuring discovery is done in a timely manner, and to have a Board member present at hearings to personally judge the credibility of witnesses and the validity of the expertise of witnesses. This kind of input could be gained by letting Board members attend hearings on an as-desired basis, while allowing a hearing officer with legal training handle the preliminary matters. Ms. Calabretta commented

that based on the discussion, she agreed with Nick Purdy's comments that the hearing officer should be the presiding officer and a Board member or any number of members who wish to be present, be observers in the process.

Kevin Beaton felt the suggestion to set a time limit on which a decision should be rendered in a contested case hearing was an excellent one. He believed it would address some of the unresolvable questions discussed earlier regarding controlling discovery. This issue as it relates to whether a Board member should be the presiding officer or not is consistent with the position Steve Allred took when the legislation creating the Department of Environmental Quality was being negotiated. Other issues discussed among the parties were having a time limit on contested case hearings and having a Board member serve as presiding officer. So these are not new issues that just came up.

Doug Conde commented he was not comfortable with setting a "hard and fast" deadline for all cases. He felt there should be an option to allow extensions for more technical cases. He supported measures to ensure a timely process, but felt they should be careful in setting rigid deadlines for all cases unless they were very conservative. Don Chisholm suggested setting up a feedback loop where the hearing officer would provide the Board with results of status conferences with projected timelines for the completion of discovery and setting of the hearing. If an issue is urgent, the Board could act as presiding officer to accelerate the process. He felt having a good supply of competent, well trained hearing officers was the most important factor in these issues.

Nick Purdy felt having timelines set in advance would be very valuable. They need not be rigid deadlines to be effective in moving the process along. He also thought it was very important to always have a Board member present during the hearings, even if it was only as an observer. On lengthy cases, different Board members could attend so the time commitment wouldn't be too great on one member. It would also provide input from various points of view.

Director Steve Allred noted that the hearing officer always enters a scheduling order at the beginning of the case. It is mandatory and parties are liable for performing with the scheduling order. He cautioned the Board to keep in mind that there are some very controversial issues, such as the power projects, that may come before the Board for which it will be held politically liable. These are substantial policy matters and the Board will want to be very comfortable with its decisions. It would be hard to make such significant decisions without being directly involved. He felt the public would hold the Board accountable for these decisions and demand more than just observation of the proceedings. The rules should allow flexibility for the Board to assume the role expected by the public.

Kevin Beaton restated and stressed his support for setting time limits in contested cases. Power projects are a good example of the need for such deadlines. These projects involve hundreds of millions of dollars and no money will flow into the project when a cloud is over the process because it is not known when it will be resolved. If a case is complex or there is reasonable cause, parties can stipulate to extending the timelines. Don Chisholm suggested the Board supervise the hearing officer by reviewing the scheduling order to ensure a timely process. Doug Conde reiterated that the rules require a pre-hearing conference as soon as possible after the filing of a petition to set a scheduling order that sets a time schedule. This should provide for

an early estimate of when a final decision will be reached in a case. Don Chisholm suggested a sentence be added to the rules stating the Board has the power to review the scheduling order on its own motion. This would perhaps add a dimension of urgency.

Dr. Randy MacMillan asked if the current provision in the draft rules for protecting trade secrets in the discovery process was acceptable to IACI. Kevin Beaton confirmed it was an acceptable process. It provides for direct appeal to the district court. It is the other matters such as fishing expeditions or excessive discovery for purposes of delaying the process that IACI feels are not addressed in an acceptable manner.

Paul Agidius pointed out that the law talks about being "least restrictive." He recommended wording be changed from, "the presiding officer may . . ." to say that it would be the least invasive, burdensome, inexpensive . . . Don Chisholm requested the suggested language be added. Doug Conde noted there is a directive in the rules that the hearing officer should try to ensure a just, speedy, and economical determination. That language could be tightened up some. Kevin Beaton felt this was an excellent suggestion. He suggested the rules also define what is speedy and economical.

Chairman Chisholm suggested the Board members review the rules one-by-one and provide comments. Based on comments the following revisions were suggested to the draft rules:

- DEQ will revise the rules for the Hazardous Waste Permit Program. They currently provide that the Director's decision is appealed to the Director. The rules will be amended so the Director's decision is appealed to the Board except for appeals that are governed by Idaho Code (which state the appeal is made to the Director). The Hazardous Waste rules will be amended by November 2001.
- Rule 011, Liberal Construction section - delete the words: ~~to the Board~~ in the second line, and ~~before the Board~~ in the last line to avoid confusion. In No. 12, change ~~communications~~ to pleadings.
- Rule 39, 40, 41, and 42 regarding rulemaking will be moved to rule 800 with the rest of the sections on rulemaking.
- Rule 44, Declaratory Rulings in Contested Case Proceedings - language added to provide: the hearing officer shall be deemed to be the presiding officer unless the Board orders otherwise.
- Rule 47 - Delete the section Withdrawal of Parties: ~~any party being withdrawn from the proceedings in writing or at the hearing.~~
- Rule 51 - To clarify the statement: Notice of receipt of a petition for declaratory ruling may be issued by the Board, add language to say that if the Board determines that the public interest requires that the public be notified of the filing of this petition, notice shall be given pursuant to Chapter 1, Title 60.
- Rule 209 - delete the necessary party rule.
- Rule 211(02) - change contested cases to contested case.
- Rule 102 - correct spelling of preponderance.
- Rule 213 - change to read: All pleadings requesting the Board or presiding officer to take any action in a contested case. . .
- Rule 302 - add service by other means such as by fax or hand delivery.

- Rule 352 will be revised and sent to Board members for review.
- Rule 411 - clarify that it is discretionary – either the hearing officer or the Board
- Rule 413 - delete the last part of (02): " . . ~~when authorized before the Board~~.".
- Rule 510 - add section (03) to add wording to acknowledge that the Board or its designee may review and revise prehearing conference orders. Add language to set time deadlines – Unless there are unusual circumstances, the presiding officer shall attempt to determine a schedule that results in a preliminary recommended order within 180 days of filing of the petition.
- Rule 511, Record of Conference - change from ". . ~~may~~ be reduced to writing" to "shall be reduced to writing."
- Rule 512, Orders Resulting from Prehearing Conference - change ". . .~~may~~ issue a prehearing order or notice" to "shall issue a prehearing order or notice."
- Rule 545(01) – line 2, change to add ". . generated or requested . ." Add (03) stating the presiding officer may review materials in camera outside the presence of the opposing party.
- Rule 550(01)c. – correct plain~~t~~ to plain. Under (02) Time for Service – change to read, "The Notice of Hearing shall be served on all parties at least fourteen (14) days before the date set for hearing, . . ."
- Rule 558, Testimony Under Oath – Add or affirmation to end.
- Rule 601, Documentary Evidence – Change ~~authenticated~~ to authentic.

Director Steve Allred reported on a number of prospective actions and concerns at the Department. DEQ will be making a decision today regarding the enforcement of air quality laws for odor complaints in the Twin Falls area. The problem has escalated to the point that there are vigilante actions and major petitions taking place. The county commissioners are ready to take court action. Recent reports and study results indicate a health risk exists from the hydrogen sulfite levels. There will be a very controversial regulatory action in the Twin Falls area in the coming weeks. Marti Calabretta requested a copy of the reports. Steve Allred noted the report would also be available on DEQ's web page.

DEQ is concerned that the Department of Energy may not be fulfilling its requirements to the state under the settlement agreement. Two shipments of spent fuel may be sent to Idaho without assurance that the federal government is complying with existing agreements. Action may be taken to stop those shipments from coming into the state.

The Department is concerned about efforts by some to require that TMDLs be adopted as rules. Such action would almost certainly cause the federal government to adopt them as federal TMDLs. The state would then lose or have limited ability to change them. Marti Calabretta asked if EPA had stated they would take that action. Director Allred explained that DEQ would not be able to meet the court-mandated dates, and if the dates are not met EPA is required to adopt the TMDLs. Given the current process under the law, there is no way DEQ could meet the required deadlines.

Doug Conde stated DEQ is currently involved in a district court action filed by Hecla, Asarco, and Core over the South Fork Couer d'Alene TMDL. A hearing is scheduled for next month. The state currently has close to 400 TMDLs done. If the court determines they have to be adopted by rules and invalidates the South Fork TMDL, arguably that means the rest of the

TMDLs are not properly adopted. This would put DEQ in a very difficult position trying to comply with the time schedule and the Clean Water Act. DEQ is also currently defending a lawsuit brought by environmental groups who want the EPA to take the program over because they believe DEQ is not acting quickly enough on the TMDLs.

Marti Calabretta asked how many of the 400 TMDLs were controversial. Doug Conde advised there is a potential challenge on the Portneuf TMDL. The Snake River TMDLs have been very controversial and the Hells Canyon Complex is expected to be a major issue. Marti Calabretta asked what role or responsibility the Board had in the process. Director Allred indicated he was presenting the information to the Board to keep it advised of the situation. Since it is in court, there is no action required by the Board.

Director Allred discussed the 3700 megawatts of power generation and the two coal fired plants being proposed in Idaho. These will be complex, controversial issues that will put great demands on the Department's resources and possibly the Board. Doug Conde added that applications for hydroelectric projects continue to be received every week for every free flowing section of the Snake River.

Marti Calabretta asked if DEQ had testified in the South Fork Couer d'Alene trial that the Department was unable to meet a timetable to have the Board review TMDLs. Doug Conde stated the Department is arguing that case and they have raised the issue. Ms. Calabretta asked if the testimony stated the Board would not be able to meet the present timetable or that it would not be able to review the TMDL at all. Mr. Conde replied that DEQ has argued: 1) there is no requirement to make TMDLs a rule; and 2) practical difficulties exist that support the position that TMDLs were never intended to be rules. DEQ has not taken the position that it is impossible, they just pointed out the practical implications. Ms. Calabretta stressed the Board's interest in TMDLs and clarified that they were not lower in priority or status than other issues such as reviewing applications for power generation. She emphasized that TMDLs are very important to her community and many others.

Paul Agidius was excused and left the meeting at 1:15 p.m. due to travel arrangements. Randy MacMillan was excused and left the meeting at 1:45 p.m. due to a previous commitment.

Kevin Beaton thanked the Board and Director Allred for the opportunity to participate in the informal rulemaking. He felt it was unclear whether the scope of discovery issue was resolved. IACI continues to have concerns because DEQ has very powerful information gathering opportunities, which they exercise fully and effectively. This gives rise to the decisions they make on the record. IACI has some concerns that DEQ would be able to expand upon that through this discovery process. Another, greater issue, is that a third party could come in and go on a "fishing expedition." IACI wants to ensure that there is adequate protection in the rules to stop such actions. Don Chisholm pointed out another draft of the rules would be available the first week of June before the Board's meeting in Post Falls on June 14. This will allow for further review and comment before the rules are adopted. Mr. Beaton added that this informal rulemaking process has been very productive and produced a much better product.

The meeting adjourned at 3:00p.m.

Donald J. Chisholm, Chairman

Marti Calabretta, Secretary

Debra L. Cline, Administrative Assistant and Recorder

MEMO

May 23, 2001

TO: DEQ Board Members

FROM: Donald J. Chisholm, Chairman

Re: Presiding Officers at Contested Case Hearings

The proposed administrative rules for the Department of Environmental Quality for contested case hearings requires participation of one or more Board Members at all contested case hearings. The proposed rules allow for appointment of a hearing officer to assist the presiding officer with administrative and procedural details, but the hearing officer does not make findings of fact and rulings on legal issues.

I understand some people's concern that a hearing officer with an inadequate background to understand the case or one with a particular bias may issue a decision which the Board would adopt without hearing live testimony of witnesses and making independent judgments about the credibility of individual witnesses. Having one or more Board Members serve as presiding officers has the potential to create the same problem. All Board Members are not going to be equally conversant with subjects of all of the contested cases, and each Board Member will apply his or her own view of the world in reaching decisions in contested cases. Having one Board Member as a presiding officer does not guarantee a better result than having a hearing officer preside.

In a perfect world, each contested case would be heard by the full Board. We do not live in a perfect world. Board Members are busy people with other careers. The State has not allocated money to employ full-time Board Members. Even at the $50 per day honorarium plus per diem, it would not be a good use of the State's resources to have the full Board hear all contested cases.

We need to recognize that a wide variety of contested cases may come before the Board. Some will involve relatively simple issues, such as whether an applicant for a permit has submitted all of the material which is required. Other contested cases may have vigorously disputed issues about scientific fact. Some cases will involve relatively small economic issues. Other cases will involve Statewide issues of great importance. Some cases will need to be

**ATTACHMENT 1**

decided rapidly. Other cases will not present the same degree of urgency.

Some of the petitioners or appellants will be represented by highly competent legal counsel. Some parties appearing pro se or represented by inexperienced counsel will be very unsophisticated as to the legal and procedural issues.

The Board should have the flexibility to have a contested case heard in the first instance by the full Board, to have a case heard by one or more Board members who will serve as the presiding officer with or without the assistance of a hearing officer and to have other cases heard by the hearing officer as the presiding officer. We should also have the flexibility to refer specific issues of fact or law to a Board Member or a panel of Board Members as presiding officers or to a hearing officer as presiding officer for hearing. The Board should reserve the right to have a de novo hearing on issues relating to the credibility of witnesses or inferences to be drawn from evidence if the initial determination of fact is made by less than the full Board on very close issues of fact.

We do not want to create a situation in which a contestant gets two bites at the apple by making one presentation of evidence to a presiding officer and a different presentation of evidence to the full Board. The parties should prepare for and make their presentation to the presiding officer as if that is the only hearing they will receive. Otherwise, the hearing before the presiding officer is just a dress rehearsal for the hearing before the full Board.

The rules could provide that a party request to have the initial hearing before the full Board. The request should state the reason the hearing should be held before the full Board. The Board should have discretion to schedule the matter for hearing before the full Board or refer it to a hearing officer or panel of Board Members.

If the procedural rules do not give the Board flexibility to manage cases, we will create the opportunity for a litigant who has a particular agenda to tie up the Board in ways which will keep it from fulfilling its obligations. No one should not object to our adoption of rules which will give us the flexibility to manage our case load in a business-like manner.