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

November 7 & 8, 2001

The Board of Environmental Quality convened on November 7, 2001 at 9:00 a.m. at:

Idaho Department of Environmental Quality
1410 N. Hilton
Boise, Idaho

ROLL CALL

BOARD MEMBERS PRESENT:

Donald J. Chisholm, Chairman
Paul C. Agidius, Vice chairman
Marti Calabretta, Secretary
Dr. Joan Cloonan, Member
Marguerite McLaughlin, Member
Nick Purdy, Member

BOARD MEMBERS ABSENT:

Dr. J. Randy MacMillan, Member

DEPARTMENT OF ENVIRONMENTAL QUALITY STAFF PRESENT:
C. Stephen Allred, Director
Debra L. Cline, Administrative Assistant to the Board
Doug Conde, Deputy Attorney General, DEQ
Tom Aucutt, Drinking Water Program Planning and Outreach Manager
Jess Byrne, Staff Resource Officer
Keith Donahue, DAG, DEQ
Dean Ehlert, State Waste and Remediation Program
Paula Gradwohl, Paralegal, Administrative Rules Coordinator
Orville Green, Administrator, State Waste Management & Remediation Program
Bill Jerrel, Loan Programs
Kate Kelly, Administrator, Air Quality Program
Lisa Koenig, DAG, DEQ
Dave Mabe, Administrator, Water Quality Program
Chris Mebane, Water Quality Standards Manager
Robert Wilkosz, Air Quality Program Manager

OTHERS PRESENT:

Gayle Batt, Idaho Water Users Assn.
Carl Ellsworth, City of Boise
Roy Eiguren, Givens Pursley for Safe Air for Everyone (SAFE)
Beth Elroy, Monsanto
Patti Gora, SAFE
Jane Gorsuch, Intermountain Forest Association
Jack Lyman, Idaho Mining Assoc.
Dick Rush, Idaho Assoc. of Commerce & Industry
Betsy Russell, The Spokesman-Review
Angela Schaer, Moffatt Thomas, for Pioneer Irrigation
Norm Semanko, Idaho Water User's Assn.

- All attachments referenced in these minutes are permanent attachments to the minutes on file at the Idaho Department of Environmental Quality.

Work Session

DEQ staff briefed the Board on the rule dockets to be presented at the Board meeting on November 8, 2001. No motions were made or passed and no votes were taken during the work session.

The meeting adjourned at 4:30 p.m.

November 8, 2001

The Board of Environmental Quality convened on November 8, 2001 at 8:30 a.m.:

ROLL CALL

BOARD MEMBERS PRESENT:

Donald J. Chisholm, Chairman
Paul C. Agidius, Vice chairman
Marti Calabretta, Secretary
Dr. Joan Cloonan, Member
Marguerite McLaughlin, Member
Dr. J. Randy MacMillan, Member
Nick Purdy, Member

BOARD MEMBERS ABSENT:

None

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
Tom Aucutt, Drinking Water Program Planning and Outreach Manager
John Brueck, Hazardous Waste Regulation & Policy Coordinator
Keith Donahue, DAG, DEQ
Dean Ehlert, State Waste and Remediation Program
Paula Gradwohl, Paralegal, Administrative Rules Coordinator
Orville Green, Administrator, State Waste Management & Remediation Program
Bryan Horsburg, Boise Regional Office
Bill Jerrel, Loan Programs
Kate Kelly, Administrator, Air Quality Program
Lisa Koenig, DAG, DEQ
Dave Mabe, Administrator, Water Quality Program
Chris Mebane, Water Quality Standards Manager
Diane Riley, Air Quality Analyst, Smoke Management
Robert Wilkosz, Air Quality Program Manager

OTHERS PRESENT:

Gayle Batt, Idaho Water Users Assn.
Laura Baxter, private citizen
Carl Ellsworth, City of Boise
Beth Elroy, Monsanto
Bryce Farris, Ringert Clark
Patti Gora, SAFE
Jane Gorsuch, Intermountain Forest Association
Jack Lyman, Idaho Mining Assoc.
Dick Rush, Idaho Assoc. of Commerce & Industry
Betsy Russell, The Spokesman-Review
Angela Schaer, Moffatt Thomas, for Pioneer Irrigation
Norm Semanko, Idaho Water User's Assn.
Dan Steenson, Nampa-Meridian Irrigation District (Nampa-Meridian)

PUBLIC COMMENT PERIOD – THE BOARD ALLOWS UP TO 30 MINUTES FOR THE PUBLIC TO ADDRESS THE BOARD ON ISSUES NOT SPECIFICALLY SHOWN AS AGENDA ITEMS.

No comments were received.

AGENDA ITEM NO. 1: ADOPTION OF MINUTES

- **MOTION**: Nick Purdy moved the minutes of the October 17 and 18, 2001 Board meeting be adopted as prepared.
  SECOND: Dr. Randy MacMillan
  VOICE VOTE: Motion passed by unanimous vote

AGENDA ITEM NO. 2: DIRECTOR'S REPORT

Director Steve Allred discussed the Environmental Protection Agency's plan for the cleanup of the Coeur d'Alene basin. The state of Idaho would like to see a plan that brings more certainty and puts an end the controversy and stigma. He feared the EPA plan would only add to the economic problems in the basin. Mr. Allred felt the plan was not very definitive and was concerned that the study area appeared to include the entire basin. The state's plan has very specific work areas and identifies projects. It identifies a very small amount of the basin as being subject to environmental cleanup.

Director Allred reported on the status of the Pit 9 cleanup at INEEL and discussed growing demands for stricter regulation of the Department of Energy and INEEL.

The Astaris facility in Pocatello has been closed. A task force comprised of state and local groups has been formed to assist in the closure and address economic impacts to the area.

AGENDA ITEM NO. 3: RULES OF ADMINISTRATIVE PROCEDURE BEFORE THE BOARD OF ENVIRONMENTAL QUALITY, DOCKET NOS. 58-0123-0001 AND 58-0100-0002

Doug Conde presented the Rules of Administrative Procedure Before the Board and an accompanying docket, Non-substantive Changes Affecting Administrative Rules of DEQ, for adoption as temporary rules. These rules were adopted by the Board in June 2001 as pending rules, and do not become effective until approved by the legislature in the 2002 session. Until that time, DEQ contested cases must be conducted under the Department of Health and Welfare rules. Those rules have recently been changed making them unsuitable for handling DEQ cases. Adoption of the pending Rules of Administrative Procedure Before the Board will resolve the problem and allow DEQ contested cases to be conducted under rules designed for DEQ and already adopted by the Board.

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- **MOTION**: Paul Agidius moved the Board adopt, as temporary rules, pending Rules docket Nos. 58-0123-0001 and 58-0100-0002 with an effective date of November 9, 2001.
  SECOND: Dr. Joan Cloonan
  VOICE VOTE: Motion passed by unanimous vote

AGENDA ITEM NO. 4: RULES FOR ADMINISTRATION OF AGRICULTURAL WATER QUALITY PROGRAM, DOCKET NO. 58-0114-0101 (PENDING RULE)

Dave Mabe, Administrator, State Water Quality Program, explained this docket repeals the DEQ Rules for Administration of Agricultural Water Quality Program. This program was turned over to the Soil Conservation Commission by the legislature. They have developed a new program and adopted Rules for Administration of Agricultural Water Quality Cost-Share Program for Idaho, IDAPA 58.01.04. The DEQ rules need to be repealed so they do not have to pay for the annual codification of an unnecessary rule chapter.

- **MOTION**: Dr. Randy MacMillan moved the Board repeal the Rules for Administration of Agricultural Water Quality Program as presented in the final proposal under Docket No. 58-0114-0101.
  SECOND: Dr. Joan Cloonan
  VOICE VOTE: Motion passed by unanimous vote

AGENDA ITEM NO. 5: RULES AND STANDARDS FOR HAZARDOUS WASTE, DOCKET NO. 58-0105-0101 (PENDING RULE)

John Brueck, Hazardous Waste Policy Regulation Coordinator for DEQ, presented the annual update of the Hazardous Waste Rules. It reflects rules promulgated through the Federal Register by the EPA from July 1, 2000 through June 30, 2001. This annual procedure maintains consistency with the federal requirements as mandated by the Idaho Waste Management Act, and also allows DEQ to maintain primacy and authorization from EPA for the Idaho DEQ Hazardous Waste Program. Public notice was given, and no adverse comments were received on the rules.

- **MOTION**: Dr. Joan Cloonan moved the Board adopt the Rules and Standards for Hazardous Waste as presented in the final proposal under Docket No. 58-0105-0101.
  SECOND: Paul Agidius
  VOICE VOTE: Motion passed by unanimous vote

AGENDA ITEM NO. 6: IDAHO RULES FOR PUBLIC DRINKING WATER SYSTEMS, DOCKET NO. 58-0108-0101 (PENDING RULE)

Tom Aucutt, Drinking Water Program Planning and Outreach Manager for DEQ, explained this proposed rule incorporates by reference citations to the 1996 Public Notification Rule, 40 CFR Part 141, Subpart Q. It includes revisions to the guidelines that require public drinking water systems to notify their customers when national primary regulations are violated thereby posing a risk to public health, makes non-substantive corrections, and adds language for clarification. The rule also incorporates by reference citations to the 1976 Radionuclides Rule that deals with radioactive contaminants. It sets levels for uranium and creates a more efficient monitoring framework to provide improved health protection. No comments were received on the rule.

Marti Calabretta questioned why the summary provided to the Board stated there would be no cost impact from the rule. Tom Aucutt responded the summary reflected costs to the Department. The cost to the water systems for the public notification would be very minimal; however, the cost of the monitoring and treatment could cost from $30 - $100 per year per household, depending on the size of the system. It is estimated that only nine to eleven systems in Idaho would be required to do the monitoring due to their uranium levels.

Nick Purdy expressed concern that the rule would put an additional financial burden on already stressed small water systems. He feared many small water systems would be forced to shut down due to the expense of all the federal and state requirements. If individuals are forced to drill private wells, there will be no testing at all. Director Allred commented the impacts of the Safe Drinking Water Act on small water systems can be frustrating. He also was concerned people would be forced into less protective systems. Many of the requirements are designed for big eastern cities and don't make sense in rural Idaho.

Marti Calabretta noted her intent in questioning the cost impact was to bring the Board's attention to the fact that there is often a cost to the Idaho citizens through other taxing entities that is not reflected in the information provided. She stated she would like to see a breakdown on the indirect costs, even if the EPA requires them. Director Allred suggested the form used to provide information to the Board be revised to show the EPA cost forecast.

- **MOTION**: Marti Calabretta moved the Board adopt the Idaho Rules for Public Drinking Water Systems as presented in the final proposal under Docket No. 58-0108-0101.
  SECOND: Marguerite McLaughlin
  VOICE VOTE: Motion passed.

Dave Mabe, Administrator of the State Water Quality Program, stated they recognized the problems small water systems were having in complying with the regulations of the Safe Drinking Water Act. He discussed alternatives they have been considering to help small water systems deal with federal and state regulations, such as variances or exemptions. Marti Calabretta commented that another alternative would be to generalize the cost of additional regulations, rather than having unfunded mandates. A case could be built, over time, by educating the public. She felt the costs should be stated in the public notice for such regulations, and not just in the information given to the Board.

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

Kate Kelly, Administrator of the State Air Quality Program, distributed a document, *Authorities Regarding Open Burning*, dated November 8, 2001 (Attachment 1). The document was prepared by DEQ in response to the Chairman's request during the work session. It is a brief summary, and time did not permit comprehensive research. The document provides a picture of what kind of authorities exist to potentially or actually regulate both field burning and prescribed burning. Ms. Kelly explained this rulemaking deals with the Air Pollution Emergency Rule. The rule has four stages for dealing with increasing levels of pollutants. Each of the four levels has progressively more stringent response requirements. This rule resulted from DEQ's concern about potentially unhealthful levels of ambient particulates (PM-2.5 and PM-10) during smoke-related events. It deals mainly with stage 1 emergency episodes, and is a required part of the State Implementation Plan adopted by DEQ under the federal Clean Air Act. The Director can declare this cautionary stage when high pollutant levels combine with atmospheric stagnation to create a potential threat to public health.

The Board adopted the rule as a temporary rule last summer with the condition that negotiated rulemaking commence immediately. Negotiated rulemaking began and five public meetings were held across the state. As a result of the discussions, an initial rule was proposed, published in the Administrative Bulletin, and put out for public comment. A significant amount of public comment was received. One of the main changes from the rule adopted by the Board and the proposed rule, is a decrease in the particulate level from 100 to 80. Ms. Kelly reviewed the changes to the initial proposed rule. They include:

- Add 24-hour and one-hour averaging levels for particulate matter
- Add visibility criteria to help determine whether an emergency episode Stage 1 should be declared
- Allows consideration of meteorology and weather conditions, and for consideration of source perimeters in determining an emergency

- Provides an emergency can be declared when levels are forecasted to reach those numbers identified in the rule
- Clarifies that once a Stage 1 emergency is declared, no new fires can be started; and provides the Director with the option, when possible, to require existing fires be put out.
- Clarifies (for all emergency stages) the means by which and to whom emergency episode situations will be transmitted. This will help get the information out to the people who need it.

Ms. Kelly summarized the comments and DEQ's responses. One comment stated that the practice of field burning should be banned out right, or at a minimum, the number of acres to be burned should be very limited. However, this is outside the scope of this rulemaking. This rulemaking deals with the very specific issue of emergency episodes and the Director's authority. She noted that under this rule, when a Stage 1 emergency is declared, acreage burned will be limited and people will not be allowed to start new fires.

The incidents of last summer regarding field burning and wild fires were discussed. Robert Wilkosz, Air Quality Program Manager, discussed the events that led to the air quality problems. DEQ is working with the Department of Agriculture to try to predict and prevent such problems. It is a complex situation that involves interstate issues, tribal authorities, and other authorities.

Patti Gora testified on behalf of Safe Air for Everyone (SAFE). (See Attachment 2 for full testimony.) SAFE is a new, nonprofit organization founded by the local physicians in the Sandpoint area. Over 85% of the local physicians have organized to call for an end to the practice of field burning because it is incompatible with human health. The doctors feel it is an unacceptable situation and they must respond to protect human life. They have reviewed the temporary rule, and based on the results of last summer when it was in place, feel very strongly that it is not protective of human health.

SAFE submitted documentation (Attachment 3) they feel clearly demonstrates from a scientific, and medical prospective that a level of 80 micrograms per cubic meter, even in a one-hour period, is really not protective of human health. The documentation includes a large number of complaints from residents of Northern Idaho documenting the health effects of field burning, including medical personnel from Bonner County General Hospital and Kootenai Care Center and many other regional care facilities.

Ms. Gora urged the Board to consider the rule carefully to address this public health issue. The physicians of SAFE want to make the strongest statement possible that grass field burning is not compatible with human health and public health. Ms. Gora distributed an article from the September 3, 2001, *U.S. News & World Report* (Attachment 4) detailing how Marsha Mason, a Rathdrum, Idaho resident, died from air pollution caused by field burning. The materials submitted by SAFE in Attachment 3 include evidence from both the Idaho Medical Association and the Spokane Medical Society condemning field burning. Basic scientific studies that document clear and conclusive scientific evidence that increased particulate matter is associated with increased mortality and morbidity was also enclosed. She noted there are also toxins contained in the smoke from pesticides and other materials applied to the crops such as carcinogens, mutagens, and tumorogenic components as demonstrated in several scientific studies. The EPA is currently conducting research that should be available by June 2002.

Roy Eiguren, Givens Pursley, has been retained as legal counsel for SAFE. Mr. Eiguren stated he understood the Board's authority in this matter and notified the Board his client intended to address the issues in other forums under separate jurisdictional authorities. He noted that SAFE does not contest the fact that the scope of this rulemaking is confined to specific issues dealing with emergency episodes. However, in the broader context of both the Clean Air Act and the Idaho Environmental Protection and Health Act, they believe the Board does have authority, if it would so choose to exercise it, to ban grass field burning relative to concerns for public health. He acknowledged that was not the issue before the Board at this time, and did not ask the Board to take that action.

Mr. Eiguren discussed the documentation submitted in Attachment 3 which attempts to identify all the medical literature currently available on the health effects of grass burning. The studies are quite definitive as to the impacts on both mortality and morbidity associated with the toxic elements of grass burning. Mr. Eiguren did not recommend a specific level because medical studies simply do not support any particular level. The literature suggests that at even very low levels, depending on the individual involved, there are potentially deadly impacts from grass burning. In conclusion, he stated the information was being supplied for the record to identify what they believe to be the case as it relates to the medical impacts of grass burning. SAFE will address the broader issue of a ban on grass burning through a variety of different forums. Mr. Eiguren thanked the Board and stated he looked forward to working with the Board and DEQ on this issue over the longer term.

Paul Agidius asked if SAFE supported approval of the proposed rule, or if they felt it would be detrimental. Roy Eiguren stated they supported passage of the rule, but wanted to stress that based upon the work of the 46 physicians associated with SAFE, and an in-depth review of the medical literature, there is simply no level that can be identified that fully protects human health.

Don Chisholm asked if Mr. Eiguren believed SAFE, in light of the Smoke Management Crop Residue Disposal Act, could make a request for rulemaking asking the Board to eliminate mass field burning, and if the Board had the authority to make such a rule. Mr. Eiguren responded he believed SAFE could make such a request and the Board would have the authority both under the Environmental Protection and Health Act and more specifically under the Clean Air Act. SAFE will be addressing that issue in a multiplicity of forums including the EPA. Chairman Chisholm asked if SAFE planned to make such a rulemaking request to the Board. Mr. Eiguren responded they have not made that decision yet. The organization was recently formed and has not had the chance to fully assess that option. They are associated with another law firm, Arnold and Porter in Washington, DC, which will also advise the group. They are looking at a variety of different ways to address the health issue. The bottom line is they believe the only way to be fully protective of human health is to stop grass burning.

Chairman Chisholm pointed out the Idaho Legislature has stated it is a permitted practice under rules adopted by EPA or DEQ. He asked if SAFE would still ask the Board to adopt a rule that would ban grass burning under any circumstances, even when there are no forest fires or other conditions affecting the ambient air quality. Mr. Eiguren asserted that under the delegated authority provided by the EPA and the Clean Air Act, there is authority for the Board to take such action. It may in fact be preemptive of other state actions or agencies. They do not have a complete answer at this time, but it is an issue that is on the table. Since the rules adopted by the

Board must be approved by the legislature, Chairman Chisholm suggested the most efficient venue might be to bring the issue to the legislature. Mr. Eiguren confirmed that was clearly their intent.

Marguerite McLaughlin questioned whether an autopsy had been performed on the woman discussed in the literature submitted by SAFE. She was concerned about using the information in the context it was used if no autopsy had been performed. Roy Eiguren responded no autopsy was performed, but pointed out that as a matter of law, a death certificate is the legal presumption as to the cause of death and it speaks for itself. It very specifically identified the cause of death to be the impacts associated with field burning. Marguerite Mclaughlin remarked the coroner was a doctor who had previously treated the woman and performed a mastectomy on her the previous year. Mr. Eiguren asserted the doctor received his medical degree from Harvard Medical School and was very competent to make the determination.

Steve Allred stated DEQ has experienced difficulties because the studies primarily look at chronic exposure. They have not seen any studies that focus on episodic exposure. Such information would be very beneficial. Patti Gora advised the American Heart Association just published a study in March 2001 demonstrating that even a one-hour exposure at 25 micrograms per cubic meter leads to a 17% increase in heart attacks. Exposure over a 24-hour period of just 20 micrograms also has that increased effect on heart attacks. The evidence seems to be very clear that even short exposures at much lower levels are indicative of severe health problems. Steve Allred asked where the study was performed. Don Chisholm asked what population level was used to determine the 17% level. Ms. Gora will report back with that information. She indicated they do know that the smoke predominately effects children and the elderly.

Paul Agidius asked if SAFE took the same position on stubble burning. Ms. Gora indicated they had no position on stubble burning at this time. They are currently concerned with grass burning in Northern Idaho.

Steve Allred pointed out this matter previously failed in the legislature. Only through extensive reasoning, were they able to get the temporary rule extended. The proposed rule will actually be less than the temporary rule. It may be difficult getting the proposed rule approved by the legislature—even at the 80 micrograms level. He stressed the difference between a criteria and a standard. Idaho law prohibits having standards more stringent than EPA standards. EPA has a standard, which is not yet implemented, that is considerably higher than the 24-hour criteria in this rule.

Roy Eiguren responded to an earlier comment regarding the availability of studies dealing with short-term exposure. The "Six City Study" conducted by Harvard University reviews impacted populations for up to 16 years. Several of the researchers from Harvard Medical School that conducted the study have agreed to serve as consultants to SAFE. They will be available to address this issue on an Idaho basis.

Marguerite McLaughlin asked what conditions caused Northern Idaho to be so impacted by field burning. Robert Wilkosz explained smoke management is affected by geography, weather patterns, metrologic conditions, and the number of people conducting field burning.

Nick Purdy stated it was his understanding the Board had the duty and authority to supervise and administer a system to safeguard air quality. The discussion has focused on the health aspects, but air quality is also based on the quality of life, the enjoyment of your property, and protection of your property values. He felt scientific means should be used to determine what level is protective of those rights. The Board should add those parameters and set protective levels. Mr. Purdy stated he supported the proposed rule as a step in the right direction, but was not satisfied with it. He believed the Board should put the state on notice that it will start considering the quality of life allowed by the air quality. Chairman Chisholm asked if the stringency requirement would allow such action. Kate Kelly explained that there are federal standards in place, but they have not determined how they will implement them. Chairman Chisholm asked Doug Conde to advise the Board on the stringency issue once the EPA has acted.

- **MOTION**: Paul Agidius moved the Board adopt as temporary and pending rules, the Rules for the Control of Air Pollution in Idaho, as presented in the final proposal under Docket No. 58-0101-0101, with the temporary rules becoming effective November 9, 2001.
  SECOND: Dr. Joan Cloonan
  VOICE VOTE: Motion passed by unanimous vote.

Director Steve Allred stated if the Board wanted DEQ to revisit this issue, it would be appropriate to request it at this time. Kate Kelly clarified that the proactive management of air quality is not addressed in this rule, so it would probably not be beneficial to go back into rulemaking on this particular rule which deals specifically with emergency episodes. Chairman Chisholm suggested it might be more productive to wait and see what action is taken by the Idaho Legislature to determine the appropriate rulemaking.

Nick Purdy agreed with the recommendation, but felt the current data supported a much lower level, perhaps of 25, to protect the quality of life and public health. He felt the Board should become proactive on the issue by passing a motion or taking the necessary actions to direct DEQ to reconsider the level of protection. Chairman Chisholm recommended the Board ask Kate Kelly and Doug Conde to develop a proposal that addresses the concerns expressed by Mr. Purdy. The proposal should also address the scope of authority and stringency issue.

Marti Calabretta commented her years as a legislator gave her some perspective into the politics of this issue. She hoped Mr. Eiguren would be able to develop a strategy that would only affect Northern Idaho, and only affect grass burning and not forest products. She felt if the Board wants to be proactive, it should have discussions with the Department of Agriculture and the agricultural community.

Director Allred invited the Board to attend the legislative hearing on the rule to give them a better understanding of the view of the legislature on the matter.

Marguerite McLaughlin asked how the rule would affect the tribes. Lisa Kronberg explained the tribes are treated as separate states and are therefore under the jurisdiction of the federal government. If the tribes are found to be contributing to levels that exceed national ambient air quality standards, action can be taken.

AGENDA ITEM NO. 8: **RULES FOR THE CONTROL OF AIR POLLUTION IN IDAHO, DOCKET NO. 58-0101-0104 (PENDING RULE)**

Kate Kelly reported DEQ is in the process of revising the open burning regulations. These rules will not include field burning or prescribed burning, but simply open burning of debris and other things. The rules should be ready for the Board's consideration next spring.

The current rule before the Board creates a fee structure for the Permit to Construct (PTC) and Tier II Operating Permit programs. The fees will partially support the costs to DEQ for processing applications for PTCs and Tier II operating permits and registrations for permits by rule, allowing the agency to better meet the needs of the regulated community. The fees are needed due to economic growth in Idaho, which resulted in a rise in the air quality permitting needs of the regulated community. In the past, general funds and EPA grants supported these programs; however, these sources no longer provide adequate funding. The fee schedules are structured to provide an incentive for emission reduction as required by state law. The fee will not be a "per-ton" fee, but will be charged according to the range of emissions. DEQ received public comments concerning the proposed rule and has revised the initial rule in response to the comments. DEQ proposes the effective date for the rule be delayed until July 1, 2002 to allow a fair time for the regulated community to prepare for the fiscal impact. DEQ is also currently investigating how the fees will be applied to applications that are received, but are in backlog and may not be processed until after July 1.

Dr. Joan Cloonan suggested the regulatory timeframe be used to determine whether fees are charged. Ms. Kelly indicated they had considered that option. However, the rules allow a 90-day timeframe for processing Tier II applications, and that does not reflect reality. It almost always takes longer than 90 days to process these applications. Legal issues and fairness will be considered to determine the appropriate date, and guidelines will be created.

Dr. Joan Cloonan asked for clarification on the issue of fees for Tier II applications that are filed specifically with the intent of being rolled up into a Title V permit. She questioned whether fees would have to be paid for both applications. Kate Kelly stated she was not familiar with specific situations, but noted the fee structure being proposed is a funding mechanism for permitting costs to DEQ that are not allowed to be charged to Title V. Title V of the Clean Air Act is very prescriptive regarding what can and cannot be charged to Title V. If a situation requires a facility to get a permit, even if it is a Title V facility and the permit is not under the Clean Air Act and the guidance that implements it, and it is not allowed to be charged to Title V, then the agency intends to charge a processing fee for that application. This would apply to a PTC or a Tier II.

Dick Rush, IACI, stated that while they are not officially opposing the rules, they do have some concerns. IACI recognizes the need for a funding source for the permits, but is concerned about how the backlog situation and effective date will be handled. The facilities who have filed for the permits have done so thinking there would not be a fee, and there is a fairness issue. Mr. Rush felt notifying the affected facilities would help to a certain degree, but it is still an issue of concern. He also discussed the accountability issue. If fees have to be paid, it is hoped the process will speed up and the backlog will be cleared. IACI suggested financial incentives be used to encourage timely processing of the applications. They would also support a method of dealing with the retroactive issue based on the timeframes for issuing permits set out by law. In their comments on the rulemaking, IACI also asked that both an accounting and performance

review be performed periodically to ensure the funds are being used appropriately and that there is good performance. During the Board's work session, Director Allred explained the processes being used by DEQ to track expenses, ensure accountability, and judge performance. Mr. Rush accepted an invitation to visit the Department and personally review those processes.

- **MOTION**: Dr. Randy MacMillan moved the Board adopt the Rules for the Control of Air Pollution in Idaho, as presented in the final proposal under Docket No. 58-0101-0104, with an effective date of July 1, 2002.
  SECOND: Dr. Joan Cloonan
  VOICE VOTE: Motion passed: 4 ayes, 2 nays (Calabretta, McLaughlin).

AGENDA ITEM NO. 9 **WATER QUALITY STANDARDS, DOCKET NO. 58-0102-0101 (TEMPORARY/PENDING RULE)**

Chris Mebane, DEQ Water Quality Standards Manager, explained there are three water quality dockets before the Board for consideration and they are interrelated. This first docket proposes use changes and criteria to protect those uses for several tributaries to the Lower Boise River and Bucktail Creek in the Salmon River basin. DEQ is requesting this docket be adopted as a temporary rule so it will be immediately effective and can be submitted to EPA for approval concurrent with TMDLs that are due for the Lower Boise River, and for Superfund actions in the Blackbird Mine. Mr. Mebane reviewed the changes proposed by the rule. A public hearing was held and comments were received. The initial rule was revised as a result of the comments.

The initial rule proposed removing recreational uses from Five and Ten Mile Creeks based on the fact that those uses were not allowed and could be dangerous. However, EPA commented that although it may be dangerous or illegal, it does not fit the allowed reasons for removing uses when the water quality is sufficient for recreation. DEQ has now proposed they be designated that the water quality be sufficient for recreation, even though it may never actually occur. Discussions in the work session led to the design of language that may address some of the concerns of the stakeholders. It points out that while the water quality is supposed to be sufficient to allow recreational uses, the recreational designation in no way confers any property right, right of access, or any sort of endorsement by the state that it is a safe activity.

Paul Agidius pointed out that Idaho Code § 36-1601 defines a navigable stream as *"any stream, which in its natural state drained normal high water, will float cut timber having a diameter in excess of six inches."* The code also includes additional aspects that define a navigable stream. Therefore, if it is a navigable stream, the public has the right to walk down the center of the waterway, regardless who owns the stream or water right. This seems to further increase the chance that someone could be in the stream for secondary recreation, and it is legal. Designating a natural, navigable stream as an irrigation channel does not mean you can keep people out.

Angela Schaer, attorney with the law firm of Moffatt, Thomas, Barrett, Rock & Fields, addressed the Board on behalf of her client, Pioneer Irrigation District (Pioneer). Pioneer is very strong in its view that recreation is inappropriate, if not completely dangerous in these drains and in all canals and irrigation laterals. She commented she would defer the question of navigable stream definition to Dan Steenson or Bryce Farris because they did the research on use attainability analysis and are more familiar with the physical characteristics. She discussed easements in irrigation facilities and emphasized that:

- In the case of *Rehwalt vs. American Falls Reservoir District*, the court clearly said, "We disagree with the conclusion of the district court that the easement owner's duty to maintain requires that he maintain and repair the easement for the benefit of the servient landowner. Certainly, the easement owner can exclude the servient landowner altogether when it is necessary for the protection of the easement, and he cannot be expected to maintain the easement for the landowner's benefit."
- In the case of *Reynolds Irrigation District vs. Sproat*, the court cited an earlier case, *Coulson vs. Aberdeen Springfield Canal Company* and said that while the servient landowners had no right to make use of the easement in any way that would interfere with the dominant estate, if the ditch could be capable of being used by the servient landowners without injury or interference to the canal company's use of the ditch, it could be.

Ms. Schaer believed these decisions show that the purpose of these canals and drains is conveyance of irrigation water. Pioneer is opposed to a recreational use designation and feels it is not appropriate in any way in these streams. The additional language discussed by Chris Mebane was reviewed by Ms. Schaer and Scott Campbell, head legal counsel for Pioneer Irrigation District. They support the language, but feel it does not go far enough and believe the recreational designation needs to be removed.

Don Chisholm asked if Pioneer was concerned solely with safety, or if they wanted the recreational designations removed to escape some of the water quality regulations the designation would bring. The Board sees it as two different issues and feels its regulations will not prevent people from entering and using these structures for recreational purposes. Only physically barring access can prevent that.

Angela Schaer asserted that Pioneer was not trying to escape water quality regulations in any form. They have actively participated in the effluent training workshops on the Lower Boise River and were very active in the Snake River Hells Canyon TMDL process. Pioneer recognizes there are water quality regulations and does not wish to avoid those that make sense. She emphasized that Pioneer's concern with public safety was not an effort to avoid water quality regulations. Although state regulations would not prevent people from using the drains for recreational use, implying in any way that recreation is somehow appropriate will cause problems. The additional language presented will be in the rules; but most people will know that it is designated for secondary contact recreational use but will not see the language.

Pioneer is also concerned about the narrative criteria regarding keeping the streams free of algae just for cosmetic purposes. They do intend to comply with water quality regulations where these drains dump into the Boise River. Ms. Schaer reiterated that Pioneer did not want to avoid regulations, they simply want regulations and designations that are appropriate, make sense, and protect the public health, safety and welfare.

Dr. Randy MacMillan asked if the water bodies in question were private property or state owned. Angela Schaer stated the facilities are owned by the Bureau of Reclamation with easements to the irrigation districts. Director Allred asked if there were easements from the property owner to the Bureau of Reclamation, or from the property owner to the irrigation district. Dan Steenson explained that Five and Ten Mile Drain were constructed between 1915 to 1920 by the Bureau of Reclamation under separate contracts with Nampa-Meridian Irrigation District (Nampa-Meridian) and Pioneer. They were retainment contracts that stated the Bureau

agreed to construct the facilities for the districts for a certain sum. The contracts contained no reservation by the Bureau of easements. There has been some uncertainty as to the ownership of those easements--whether the Bureau or the districts own them. To resolve the uncertainty a title transfer was done last year between the Bureau and the districts. The Bureau transferred all its right, title and interest to its property rights in these facilities to Nampa-Meridian for the portion of the facilities that lie within Nampa-Meridian. Those interests included some pre-titled lands, some granted easements, and the Bureau's claim of easements under the 1890 Canal Act. Therefore, for Nampa-Meridian, there is no question that the ownership of the easements belongs to the irrigation district. There is no case law in this jurisdiction that addresses the question of whether the owner of the easement can prevent access to the interior banks of the canal itself.

Nick Purdy asked if the Board had the option to designate the waters for aquatic use only and eliminate the recreational use. Chris Mebane explained EPA regulations define six ways where recreational use is not attainable. None of those six conditions fit this situation. Physical danger is not a reason for not having water quality sufficient for recreation. If a county or city's jurisdiction said it was illegal to use it and it was physically blocked off, then the condition of "human caused conditions prevent attainable use" would apply. However, as things are now, none of the six conditions applies. Recreational use has not been found to be inconsistent with the use by the irrigation company for the operation and maintenance of the canal. Don Chisholm commented he believed the law was stronger in its requirement, and stated that the use must unreasonably interfere in a significant way with the use of the easement before it is a prohibited use.

Director Allred pointed out these waters are already designated for cold water biota and recreational use. This rule does not add anything. DEQ simply attempted to say that cold water biota and recreational use designations do not make sense on these drains. In order to downgrade those designations we must have EPA's approval. To gain approval DEQ must prepare an analysis sufficient to convince EPA that recreation is not possible and none takes place. If DEQ is not successful in proving that, EPA then has the opportunity to classify it themselves. The problem is, recreation is taking place in these drains. Hunters and other recreators are frequently seen in the area and often cross the streams, and EPA is aware of this. If irrigation districts had title and could physically restrict access to the drains, perhaps a case could be made. It is not a question of whether these drains should be used for recreation. DEQ must be certain the case for removal of the designations is justified (by EPA regulations), or face the risk of a federal designation.

Dan Steenson did not believe that a risk of a federal designation existed. Since the water bodies are already designated, if the proposal failed, the use designation would simply stay the way it is now. Regarding access, Nampa-Meridian believes an irrigation district holding an easement does have the right, and it is a trespass if someone who does not have the permission of the servient estate owner is recreating in the easement. This applies to all members of the public. In that context, both the easement owner and the servient estate owner have the right to restrict access to all members of the public.

Mr. Steenson asserted Nampa-Meridian is within the ambit of its rights to prohibit recreational use. The standards that allow removal of recreational use designations for human caused conditions contain unclear language. The language, *" . . . human caused conditions prevent attainment or dams, diversions, and other types of hydrologic modifications preclude the attainment of the use"* is at question. It is unclear whether "prevent or preclude" includes illegal

access that is prohibited and violates the rights of the servient estate owner and easement owner. It sounds like EPA is willing to consider the possibility that if it is illegal and violates someone else's rights, it meets the standard. The standards also state that "*each state must identify appropriate water uses to be achieved and protected.*" Mr. Steenson stressed recreation is clearly not an appropriate or valuable use to the public since there is such a well-documented history of severely adverse consequences from human contact with these facilities. Mr. Steenson submitted the *Five Mile Drain and Ten Mile Drain Recreational Use Analysis* as documentation and asked it be made part of the record (Attachment 5) .

Chairman Chisholm pointed out that case law exists where a trespasser or burglar entered private property and sued the owner because of injury due to a dangerous condition. He believed this was a similar issue and felt it was the responsibility of the Board to regulate the water quality to protect public health, even though it may be through unlawful access. He observed that if the irrigation districts are only concerned with the term recreational use, it is a semantic difference that can be resolved. Dan Steenson emphasized that the proposed rule leaves the criteria protective of human health for bacteria in place. Additionally, the standards state that manmade waterways shall be protected for the purpose for which they were created. Irrigation district employees must come in contact with the water to maintain the waterways, so the bacteria criteria was specifically retained.

Doug Conde noted there are many water bodies that aren't otherwise designated and they fall within the scope of the provision discussed by Mr. Steenson. The provision states ". . .that unless otherwise designated for uses" and if it's a manmade waterway it will be protected for the purpose for which it was created. However, the water body under discussion was already designated for other uses, and was originally a natural drainage that was modified for irrigation purposes. Therefore, the provision does not apply. Mr. Steenson commented he would stipulate this water body meets the definition of a manmade waterway. He felt it was well established by the extensive record they submitted. There were millions of tons of dirt moved to construct these facilities in 1915. The streambeds were originally dry except for unusual flood events in the watershed. By any commonsense approach, these are manmade facilities, and Nampa-Meridian believes that definition would hold up in court.

Nick Purdy felt the matter should be tabled and referred back to the Department for further negotiations. In the briefing materials sent to the Board only a week ago, DEQ was proposing the recreational use designation be removed. This last minute change has caused a setback that makes it appropriate to table the matter. Doug Conde noted it was common to make such changes to the initial proposal as a result of information received during the public comment period. Mr. Purdy asked if the change was made after the negotiations. Dave Mabe explained the original proposal was published as it was presented. At that point, DEQ believed the irrigation districts could control access and legally had the right to control all access to the facilities. DEQ continued to research the matter during the public comment period. As a result of investigations, it was discovered that was not the case in all areas. The comment period ended September 24, 2001. After analyzing the issue and responding to comments, a change was made.

Don Chisholm asked what other regulated characteristics would be removed by the proposed change. Dave Mabe felt the most important change would be in the aquatic life use designations. By changing from cold water biota to modified, it will relieve the burden of the

agency and the facility operators to complete a TMDL. If the change to modified is not made, a TMDL will be due by December 2001 along with the other Boise River TMDLs.

Director Allred asked if the irrigation districts would prefer the rule be adopted as it is currently proposed, or be tabled, leaving the cold water biota and the recreational use designations in place. Don Chisholm observed it might be better to adopt the rule as presented and continue to work on solutions for the secondary recreational use designation. Dan Steenson stated the district supported the change of the cold water biota designation and vowed to work vigorously on the recreational use issue after the Board meeting.

Laura Baxter testified against the secondary recreational use designation. In 1992, Ms. Baxter's 2 ½ year old daughter drowned in an irrigation canal that runs through the city of Twin Falls. The canal was in her neighborhood, and the morning of the accident many children were tubing and floating in the canal. Ms. Baxter has been a very vocal proponent of canal water safety since that time. Much has been accomplished in Twin Falls. There is now a city ordinance making it illegal to recreate in the canal system. There are certain features of canals that make them very dangerous for recreational use. The banks tend to be straight up and down, sometimes as high as ten feet and the water can be very swift. It must be made clear to the public that it is totally inappropriate to recreate in the canal systems in any way. Ms. Baxter felt applying a recreational use designation to these waters implied they were fit for recreation and could in fact be used for recreation.

Director Allred asked if the word recreation could be replaced with language such as "human contact" or "secondary human contact"? Doug Conde believed it would be acceptable if it could be proven this language would have equivalent water quality protection. Chairman Chisholm suggested the Board adopt the rule with the additional clarifying language and request that DEQ begin rulemaking to develop a new use designation with alternative language that provides equivalent water quality protection.

Dr. Joan Cloonan asked if there were other areas in the state where this problem existed. Chris Mebane confirmed there were similar situations with drains that had recreational use designations.

- **MOTION**: Dr. Joan Cloonan moved the Board adopt, as temporary and pending rules, the Water Quality Standards and Wastewater Treatment as presented in the final proposal under Docket No. 58-0102-0101, with the following amendment: in section 278.03, add to the stream list "Fifteen Mile Creek SW-7." The temporary rule effective date shall be November 9, 2001.
  SECOND: Paul Agidius
  VOICE VOTE: Motion passed by unanimous vote

- **MOTION**: Dr. Joan Cloonan moved the Board adopt, as a temporary and pending rule, under Docket No. 58-0102-0101, the following amendment to Section 100 of the Idaho Water Quality Standards. The temporary rule's effective date shall be November 9, 2001.

  100. SURFACE WATER USE DESIGNATIONS. Water bodies are designated in Idaho to protect water quality for existing or designated uses. The designated use of a water body does not imply any rights to access or ability to conduct any activity related to the use designation; nor does it imply that any activity is safe. For example, a designation of primary or secondary contact

recreation may occur in areas where it is unsafe to enter the water due to water flows, depth, or other hazardous conditions. Another example is that aquatic life uses may be designated in areas that are closed to fishing or access is not allowed by property owners.

SECOND: Dr. Randy MacMillan
VOICE VOTE: Motion passed by unanimous vote

- **MOTION**: Nick Purdy moved the Board direct DEQ to initiate rulemaking to create a new use designation with equivalent water quality protection as the secondary recreational use designation and using different language such as "human contact."
  SECOND: Dr. Randy MacMillan
  VOICE VOTE: Motion passed by unanimous vote

AGENDA ITEM NO. 10 **WATER QUALITY STANDARDS, DOCKET NO. 58-0102-0102 (PENDING RULE)**

Chris Mebane presented a proposal to adopt use designations and site-specific criteria for metals for the South Fork of the Coeur d'Alene River (SFCDA) upstream of Wallace. Public comments were received. The Hecla Mining Company expressed concerned with the cold water aquatic use designation. They felt a modified use designation would be more appropriate. However, in order for such a designation to be made, a Use Attainability Analysis must be performed. Until one has not been performed, the only alternative is a cold water aquatic use designation. Hecla also supported the lead and zinc site-specific criteria but did not favor adoption of the cadmium criteria, which is lower than the current Idaho cadmium criteria. The proposed level is higher than the EPA recommended criteria because species that drive the EPA level do not exist in these waters. DEQ feels it is an intermediate level between the EPA level and current conditions.

Extensive comments were also received from the Lands Council stating they believed the types of studies relied upon to set the criteria were not adequate. They believe other science exists that would yield more appropriate criteria.

The EPA has been extensively involved in this process and endorses the site-specific criteria as proposed.

- **MOTION**: Paul Agidius moved the Board adopt the Water Quality Standards and Wastewater Treatment Requirements as presented in the final proposal under Docket No. 58-0102-0102.
  SECOND: Marguerite McLaughlin
  VOICE VOTE: Motion passed by unanimous vote

AGENDA ITEM NO. 11 **WATER QUALITY STANDARDS, DOCKET NO. 58-0102-0103 (PENDING RULE)**

Chris Mebane explained this rule addresses statewide considerations for metals criteria; aquatic life use designations; revisions to ammonia criteria; minor changes regarding temperature, natural background, and variance procedures; time limits for schedules of compliance for point source discharges; and minor corrections or inconsistencies remaining from previous rulemaking. A hearing was held and public comments were received. Mr. Mebane

noted that Marti Calabretta had expressed concern that there were some streams and areas in the SFCDA where it is unlikely these criteria could be attained for decades or even centuries and wondered if a lower designation might be more appropriate. Mr. Mebane agreed and explained the engineering studies containing this information were not complete at the time these rules were prepared. There is a federal regulation applying these cold water aquatic life uses in the SFCDA. DEQ's proposal would be identical if this rule is adopted and the federal designation can then be removed. DEQ could then modify the use as appropriate.

Chris Mebane discussed the proposed changes in detail and responded to questions regarding temperature standards and nutrient criteria.

- **MOTION**: Dr. Randy MacMillan moved the Board adopt the Water Quality Standards and Wastewater Treatment Requirements as presented in the final proposal under Docket No. 58-0102-0103.
  SECOND: Nick Purdy
  VOICE VOTE: Motion passed by unanimous vote

AGENDA ITEM NO. 12: SOLID WASTE MANAGEMENT RULES, DOCKET NO. 58-0106-0101 AND 0102 (PENDING RULE)

Dean Ehlert, State Waste and Remediation Program, made a recommendation, based on the suggestion of Senator Hal Bunderson, that the rules be referred to the Joint Legislative Environmental Common Sense Committee for review and recommendation. The rule can then be presented at the February Board meeting for consideration. The Committee will receive the latest version with the suggested changes from the work session. Marguerite McLaughlin asked if the changes regarding review by Fish & Wildlife and Fish & Game were included. Dean Ehlert confirmed the requirement for documentation had been removed and the rule now provides that an owner and operator shall insure that a facility does not violate the Endangered Species Act. Chairman Chisholm asked if the changes requested by Jack Lyman, Idaho Mining Association, had been incorporated. Mr. Ehlert stated the changes have not been made. He seen no problem with making the changes as requested, but first needed to review the federal regulations to confirm compliance.

Dr. Randy MacMillan asked if the rules addressed veterinary waste as well as medical waste. Dean Ehlert did not believe it was currently in the rule, but will bring the matter up with the Environmental Common Sense Committee.

- **MOTION**: Dr. Joan Cloonan moved the Board extend the comment period on rule Docket No. 58-0106-0101 and refer the rule to the Environmental Common Sense Committee for review and recommendations. The rules will be brought back to the Board at its February 6 & 7, 2002 meeting, with the understanding that there may be a need to republish the rule.
  SECOND: Marguerite McLaughlin
  VOTE: Motion passed by unanimous vote

AGENDA ITEM NO. 10 LOCAL REPORTS AND ITEMS BOARD MEMBERS MAY WISH TO PRESENT

No reports received.

The meeting adjourned at 4:30 p.m.

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Donald J. Chisholm, Chairman

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Marti Calabretta, Secretary

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Debra L. Cline, Administrative Assistant and Recorder

ATTACHMENTS

- All attachments referenced in these minutes are permanent attachments to the minutes on file at the Idaho Department of Environmental Quality.