



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**

**JANUARY 26, 2001**

The Board of Environmental Quality convened at 8:00 a.m. at:

Idaho Department of Environmental Quality  
1410 North Hilton, Conference Rooms A&B  
Boise, Idaho

**ROLL CALL**

**BOARD MEMBERS PRESENT:**

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

**BOARD MEMBERS ABSENT:**

Dr. J. Randy MacMillan, 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  
Paula Gradwohl, Paralegal/Rules Coordinator  
Susan Burke, Compliance Specialist, Water Quality Program  
Jess Byrne, Staff Resource Officer  
Rick Ford, Facilities Management  
Orville Green, Administrator State Air Quality Program  
Larry Koenig, Administrator, State Planning & Special Projects  
Lisa Kronberg, Deputy Attorney General, DEQ  
David Mabe, Administrator, Water Quality Division  
Marjorie MartzEmerson, Air Quality Permit Program Manager  
Mike McGown, Air Quality Analyst, Air Quality Program  
Mike McIntyre, Surface Water Program Manager  
Steve West, Regional Administrator, Boise Regional Office

**OTHERS PRESENT:**

Gayle Batt, Idaho Water Users Association (IWUA)  
Clair Bowman, Compass  
Timothy Callanan, Hawley Troxell  
Beth Elroy, Monsanto  
Lori Gardiner, Idaho Conservation League  
Jane Gorsuch, Intermountain Forest Assn.  
Dallas Gudgell, Idaho Conservation League  
Tom Lyons, Gordon Paving Co.  
Hugh O'Riorden, Givens Pursley  
Brent Olmstead, Idaho Assoc. of Commerce & Industry  
Suzanne Schaefer, Gallatin Group  
Grant Simonds, Outfitters & Guides  
Rob Sterling, Micron Technology

**AGENDA ITEM NO. 1:           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 received.

**AGENDA ITEM NO. 2:           ADOPTION OF THE MINUTES OF THE NOVEMBER 9, 2000 BOARD MEETING**

Don Chisholm requested a change to the draft minutes on page 7. The motion should be corrected to show that Don Chisholm abstained from voting.

➤ **MOTION:** Dr. Joan Cloonan moved the minutes of the November 9, 2000 Board meeting be adopted as corrected.

**SECOND:** Marti Calabretta

**VOICE VOTE:** Motion passed. 6 ayes; 0 nays; 1 absent (Dr. Randy MacMillian)

**AGENDA ITEM NO. 3:           RULES FOR THE CONTROL OF AIR POLLUTION IN IDAHO, DOCKET NO. 58-0101-0003, PENDING RULE**

Mike McGown, Air Quality Analyst for the State Air Quality Program, presented the Rules for the Control of Air Pollution in Idaho, Docket No. 58-0101-9903. The purpose of this rule is to implement an integral part of the settlement terms of the *Idaho Clean Air Force, et al. V. EPA, et al.* lawsuit. The rule was derived through settlement negotiations among the participants in the lawsuit, including DEQ, the Community Planning Organization of Southwest Idaho (COMPASS), the Idaho Clean Air Force and EPA. Under the settlement agreement, DEQ is preparing a PM10 Maintenance Plan for Ada County that will be completed by September 30, 2002. Written comment was accepted and a public hearing was held in Boise on December 5, 2000. Revisions were made to the initial rule as a result of the comments.

Mr. McGown explained that failure to adopt this rule would likely result in a PM-10 non-attainment classification for northern Ada County. A non-attainment classification would halt highway expansion and impose the same permit requirements for new major industrial source construction and modifications proposed in this rule change. Non-attainment would also impact DEQ's ability to implement airshed management in the Treasure Valley. If adopted, the rule will stay in place only until DEQ completes and EPA approves an Ada County PM-10 Maintenance Plan and the area's attainment status is declared (about three years from now). DEQ will ask the Board to repeal the rules at that time. Nick Purdy asked for a schedule and periodic updates on the progress of the plan. Mike McGown will report back to the Board. They are currently in the process of finalizing the detailed work plan with the contractor and the community.

➤ **MOTION:** Dr. Joan Cloonan moved the Board adopt, as pending rules, the Rules for the Control of Air Pollution in Idaho as presented in the final proposal under Docket No. 58-0101-0003.

**SECOND:** Paul Agidius.

**VOTE:** Motion passed. 6 ayes; 0 nays; 1 absent (Randy MacMillan)

**AGENDA ITEM NO. 4:                    RULES FOR THE CONTROL OF AIR POLLUTION IN IDAHO,  
DOCKET NO. 58-0101-9905, PENDING RULE**

Marjorie MartzEmerson, Air Quality Permit Program Manager, presented a brief summary of the rule, the public comments and hearing. The rule is an amendment to an existing rule for registering and paying fees for Title V facilities. The rule is proposed by the Idaho Association of Commerce and Industry (IACI) and it changes the fee structure from a flat \$30 per ton of emitted, regulated air pollutants to a three-part structure that includes an annual registration fee, a fee per ton of pollution with a cap, and a fee for services such as renewal of the permit and modifications. The fee structure will decrease fees for large emitters at the top of the spectrum and increase fees for small emitters at the bottom of the spectrum. This is a generalization, because of the caps and the way they are set in the rule, it will vary depending on where a company fits within the graduated system. Total fees for facilities emitting less than 200 tons per year may increase. No fees per ton would be paid on emissions greater than the highest 3,333 ton per year cap, thereby reducing total fees for facilities that emit greater than 3,333 tons per year of actual pollutants.

Seven industrial sources (two of which were large associations representing the general contractors and the dry cleaners) attended the public hearing that was held in Boise on January 16, 2001. All seven sources opposed the rule citing the following major points:

- IACI was allowed to introduce a proposal after the end of the negotiated rulemaking; rules should be drafted, reviewed, and agreement reached within the rulemaking process, not in separate meetings;
- IACI did not represent their viewpoints or solicit their participation
- Fees should reward reduction in emissions and encourage pollution control
- Fee structure should provide new businesses considering location in Idaho a positive environment that encourages pollution prevention and reduces environmental impact
- Fees should be paid on pollutants emitted and the cost per ton should be equitable
- A few large businesses should not be allowed to determine the fee structure
- Deferred sources should have a voice in the fee structure.

Eight sets of written comments were received; five supporting the rule, three opposing it.

The major points were:

- Fee per use of the resource, fee per tons emitted should be equitable among sources
- Some who oppose proposed fee structure would agree to small permit modification fee to help offset some of the costs
- Large emitters should not impose their fees on smaller emitters
- Fund stability is important to all, but opposite poles on what creates a stable fund
- Fee equity is important to all, but opposite positions on what creates an equitable distribution of fees among sources
- IACI should not be allowed to submit a proposal developed outside of the negotiated rulemaking
- IACI proposal should be adopted as drafted
- IACI proposal should be adopted as modified by comments
- DEQ has failed to provide detailed cost analysis, issue Tier 1 permits, and use Title V monies appropriately
- DEQ expenditures should be restricted by rule to presumptive minimum
- DEQ has misrepresented the IACI proposal
- The fee fund is over funded
- The fee fund is under funded and should not spend reserves
- The applicability of Title V to synthetic minor sources is still confusing
- The proposed rule is not consistent with the governor's GEMStar pollution prevention program
- The fee structure should reflect the environmental impact of the pollutants emitted
- The proposed rule be rejected and negotiated rulemaking restarted to develop a consensus for next year

Ms. MartzEmerson commented she feared they would never see full agreement on how the fee structure should look. Three primary amendments were requested to the proposed rule. The first defines the fee for service for modifying a permit is tied to the definitions that are in the rules. DEQ concurs with this amendment and that change was incorporated into the rule. The second amendment calls for a two-year sunset provision. DEQ did not include a sunset provision in the rule being presented for adoption, but provided for review and evaluation every two years instead. The third amendment requested a presumptive minimum expenditure limit. This amendment was not added to the rule. She believed there is now agreement this does not represent what has been done within the rule itself.

Ms. MartzEmerson stated DEQ is not making a recommendation on the proposed rule. She clarified the Board's options regarding the fee structure were to: 1) adopt the rule as drafted; 2) adopt the rule as amended; 3) defer to the existing rule at \$30 per ton; or 4) adopt the rule as presented at the previous meeting, which was a presumptive minimum flat fee of \$34.85 per ton.

Charts showing the fund balance and projections were distributed and discussed. One chart showed the projected fund balance without the one million in back interest. If DEQ receives the back interest, they can easily operate for two years with any of the proposals before the Board, including the existing rule. If the one million in back interest is not received, DEQ

can operate for approximately one year under any of the proposals before the stability of the fund becomes very questionable.

Chairman Chisholm asked if the rulemaking was being driven by the larger IACI members who would receive a savings in fees. Marjorie MartzEmerson believed that was an accurate assumption. She added that DEQ initiated negotiated rulemaking in 1999 because of fiscal projections. In this fiscal year, the appropriation is 2.4 million dollars, and the collections are 1.3 million dollars. Rulemaking was started so that expenditures and collections would match so we would have a long-term fund. As IACI and industry became involved in the rulemaking, some expressed concern about the existing fee structure. The driving force or focus then turned from a balanced fund to a change in the fee structure. The rule presented to the Board at the last meeting was simply a default to presumptive minimum. As written, the rule was tied to the EPA presumptive minimum, and each year as it increases with cost of living increases, the DEQ presumptive minimum would automatically increase with the EPA presumptive minimum. So if expenditures are kept at a minimum, the fund would always be balanced. A fee structure such as the one proposed by IACI, must clearly be adjusted periodically.

Don Chisholm asked if the federal regulations dictate how the presumptive minimum is to be collected. Lisa Kronberg explained the law does specify that the state program has to collect the presumptive minimum per ton from each ton of air pollution; but allows states some discretion as to how they collect the amount. Marjorie MartzEmerson added that states vary widely in how they collect the fees. She also noted the calculations are based on the pollutants they include in their current fee structure. The Clean Air Act includes many other hazardous pollutants. DEQ currently does not collect on all regulated pollutants because they do not have the data. As they get better at their emission inventory collection, they will have more data to look at and that will affect the calculations of the presumptive minimum.

Orville Green noted that DEQ originally included carbon monoxide as one of the pollutants in collecting fees. This resulted in a collection of more than the presumptive minimum. Through negotiated rulemaking with IACI, carbon monoxide was dropped from the list of hazardous pollutants and fees were collected on actual emissions rather than permitted emissions. It was recognized at that time that this would reduce the fund and renegotiations would be needed again in the future.

Chairman Don Chisholm asked where Idaho stood compared to other states in the enforcement of the Clean Air Act. Marjorie MartzEmerson stated in her opinion Idaho was behind the curve in the Title V Program from both the standpoint of issuing permits and administering the program. This is partially a result of the program going back and forth between the federal and state government. DEQ still does not have full delegation for all parts of the air program. Steve Allred noted that previous EPA audits had been very critical of Idaho, particularly regarding its enforcement program. He stated the production in the Title V Program has improved substantially in the last two years and praised Marjorie MartzEmerson for her reorganization of the permit process to make it more logical. The program is making great strides but is challenged by the rapid rate of development in Idaho.

Chairman Chisholm felt it would send a mixed message to reduce fees, as least for some, then in a short time have to raise them again by 25% to 50%. Director Steve Allred stated DEQ agreed to publish the rule IACI submitted with two understandings: 1) there is a commitment on the part of IACI that the program will meet presumptive minimum, and the fees will go where they need to go to do that; and 2) the fund will maintain a minimum balance of one-half million dollars so the day-to-day demands of the fund can be met. He understood it would be a major issue when they attempt to increase the fees by 40% to 50%, but it is important for everyone to realize that if this rule goes forward, there will be substantial fee increases in the near future. He also stated it was his understanding that IACI recognized future increases would be needed, and was committed to working with DEQ through the process to achieve the presumptive minimum rate of availability of funds. Director Allred discussed how the presumptive minimum is determined and how the law dictates the fees are to be used.

Nick Purdy asked how many permits had been issued by the Title V Program. Marjorie MartzEmerson responded that ten Title V permits had been issued (out of an estimated total of 54), three have completed final EPA review and are pending final approval (compliance issues found during inspections need to be resolved), two more permits are currently in the 45-day EPA review period, three are in the public comment process, and two more are ready to go to public comment. About six are very close to the public comment process, but are being delayed due to compliance issues. In addition, over 110 permits (Tier II, or other types of permits) have been issued which removed facilities from the Title V Program. Nick Purdy stated his concern that the program and the proposed rule (by placing a cap on fees and reducing fees for large polluters) seemed to provide no incentive for reducing pollution. He felt the program should be designed to encourage facilities to reduce their pollutants. For example, the presumptive minimum would be charged, and as funds build up in the program, refunds would be made to those who reduced pollution emissions as a reward.

Ms. MartzEmerson explained the positive environmental affects of moving the 110 facilities from the Title V Program. In order to exit the program, facilities had to reduce or place limits on the amount of pollution they emitted. They either installed control technology or operated differently to keep their emissions below the Title V threshold. A method to provide incentive for those left in the Title V Program still needs to be developed. Lisa Kronberg pointed out the law specifically requires the fee schedule to be structured to provide an incentive for emission reduction. There is an incentive for emission reduction within the tiers, but it stops at the cap.

Brent Olmstead, IACI, addressed characterizations as to the intent behind IACI's motivation in presenting this rule. He stated he found the comments to be interesting at least, and offensive also. IACI went into the rulemaking at the invitation of DEQ. Their motivation in preparing the rule is that Title V is a requirement in federal law—they have to have the permits. They would prefer the state run the program rather than the federal government, even though some of their members would have a financial advantage at the federal level. He pointed out that EPA caps the fees when they run the program. The law may say there should be motivation for industry to cut pollution, but they also have a cap in their program. He stated there are many reasons for a company to cut pollution, and fees are way down the list. Primary reasons include public image, cost of production, research and development, and threat of citizen suits. In Idaho, the prime motivation is the desire to be a corporate good neighbor. These are the reasons IACI

participated in the process. The proposed rule is an outgrowth of a negotiated rulemaking. At the rulemaking, DEQ asked them to come up with a proposal. The rule before the Board is the last proposal to come out of the negotiated rulemaking. It is a consensus effort of 49 permitted entities. He pointed out that the presumptive minimum has not been raised by the program for the last four years, and the presumptive minimum was not spent in the last fiscal year. Still, EPA has not come in and tried to take over the program. Based on that past history, IACI feels the rule would be fine with EPA.

Brent Olmstead responded to comments by Steve Allred regarding agreements with IACI on this rule. He confirmed that IACI would come back and renegotiate and work towards getting to the presumptive minimum. He further agreed there should be a minimum balance of \$500,000 in the account. IACI will also lobby on behalf of DEQ to receive the one million dollars in back interest due the account and to receive extra money for the permit to construct program. Mr. Olmstead stated DEQ agreed to support the rule, and he felt IACI had upheld their end of the bargain. He pointed out that the groups who commented against the fee structure were deferred sources who would not be in the Title V program for five years. IACI has agreed to renegotiate the rule within the next two years, and the deferred sources can participate in the negotiated rulemaking. There is also a chance that those groups could get a general permit which would take them out of the Title V program.

IACI feels this is a good rule package, despite their disdain for the state accounting system because they cannot see where the money is spent. Part of the reason for the process is to bring accountability to the program so they know what the performance measures are, how they are being done, and where the money is going. Director Allred has assured that the new accounting system will address these problems, and that is why they have agreed to renegotiate the rule in such a short timeframe. The additional accounting information will be available at the next rulemaking and that will enable them to create a fee structure that funds the program, is fair across all segments of industry, and keeps the program at the state level. Mr. Olmstead urged the Board to accept the rule package and send it to the legislature for approval.

Don Chisholm asked how IACI projected the income for the Title V account. Brent Olmstead stated IACI projected the income coming into the account would remain level over the next two to three years and would then begin to increase due to renewals and new sources coming into the state. They believe the fee for service section, which will include PTCs and modifications, will generate a considerable amount of money.

Chairman Chisholm asked what IACI thought about the level of performance of the program and its protection of the Clean Air Act values. Mr. Olmstead believed the state program was behind the national average. There is frustration from some IACI members who have paid a lot of money over the years and still do not have a Title V permit in place. There have been some very positive things in the program. Industry is more aware of what is required and the work group formed by DEQ to deal with general conditions has made it much easier for industry to deal with their applications. They are very encouraged with the number of permits that have been issued in the past few months and the schedule for those anticipated in the next 18 months. Director Chisholm asked about the enforcement and monitoring side of the program. IACI prefers to view it as compliance. They have a very strong disagreement with the EPA on the role of the agency. They believe for the agency to be a good public servant, they should not strictly

do enforcement actions, but should help industry become compliant with the rules and regulations. This better serves the state and the environment in the long run. They agree there should be a strong enforcement component in every program to provide extra motivation to be a good corporate neighbor.

Marti Calabretta asked IACI to clarify whether they supported the revised rule as it is presently before the Board, or the initial proposal. Brent Olmstead stated he understood and agreed that the cap on spending from the account had been removed from the initial proposal. The IACI members feel the sunset provision is important to provide a strong incentive for everyone to come back with a new rulemaking. However, he felt confident the parties would keep the agreement to go back into negotiated rulemaking and that a new rule would be in place in two or three years. Therefore, he encouraged the Board to support the revised rule package currently before them.

Ms. Calabretta discussed the considerable confusion among legislators and others about funding and delays on small permits that are not part of the Title V program. She asked if IACI had any proposals on how they could be helpful in the time left in the legislative session to both clear the misconceptions and educate the decision makers so funds could be made available for the small permits program. Brent Olmstead stated part of IACI's agreement with the Director was that they would lobby for funding for the permits to construct (PTC) program, and they have been doing that. IACI recently provided the Joint Finance & Appropriations Committee (JFAC) with a flow chart showing the two separate air programs and explaining what each does. They also stressed that the Title V funds, by law, are to be used solely for Title V. IACI has also been pushing for JFAC to provide up to \$750,000 in new money to handle the backlog in the PTC program, and they will continue to work to get that funding. Marti Calabretta felt it was unclear as to how the Board could help to resolve the confusion. Brent Olmstead suggested the Board make phone calls to its legislators as part of an educational effort.

Director Steve Allred asked if there was a general understanding by IACI's members that if the proposed rule is adopted, industry will be facing substantial increases in two or three years. Brent Olmstead stated there is an understanding that the rules will have to be renegotiated and there could be an increase in fees. Their projections do not estimate as high an increase as DEQ's. He believed everyone understood that all things go to the table. They would like to explore all options including looking at how other states run their programs. They also would be willing to discuss charging on other compounds if needed.

Rob Sterling, Environmental Manager for Micron Technology and Chairperson for the IACI Environmental Committee, suggested the Board consider a different forum, other than its work session, to review technical issues and allow open debate with stakeholders and DEQ staff in a less formal atmosphere. He reviewed IACI's policy on jurisdiction over environmental issues. IACI fully supports the Title V program and believes it should have adequate funds. They also believe it is in IACI's best interest for the program to be administered by the state. They take these things into consideration when they evaluate any discussion on fees. He stated it was a point of consensus that DEQ should spend no more than the presumptive minimum until there is a better understanding of the costs. Better cost data is needed in order to move forward productively. He felt we should review several years of accounting system data with the new system and then revisit the rule.

Dr. Joan Cloonan stated she intended to abstain from voting on this agenda item because it may appear to be a conflict of interest. She is employed by the Simplot Company, and also chaired the IACI Environmental Committee at the time the rulemaking was initiated on this docket. She emphasized that when it appeared the fee structure needed to be changed, DEQ came to IACI and initiated full negotiated rulemaking. Since IACI's members are those most affected by Title V, they were the main participants in the negotiations. DEQ was very clear that provided they could get the money they needed, it was up to industry to come up with a fee structure or mechanism. The presumptive minimum was always the target. It was also very clear that should the mechanism devised by IACI not meet the needs of the program, they would be back in negotiated rulemaking to change it. Dr. Cloonan commented this was a monumental effort on the part of IACI. They have pulled together the numbers to develop what appears to be a more stable system that does not change the fees coming, it just readjusts them, spreading the cost more.

Don Chisholm stated that discussions among the Board indicated that it was ready to approve IACI's proposal with the changes that were circulated in yesterday's meeting (removing the cap on the presumptive minimum spending, and adding the definitions for modifications). Chairman Chisholm then opened the floor to further testimony. Beth Elroy, Monsanto, indicated that due to the Chair's remarks, she had no testimony at this time.

Jane Gorsuch, Intermountain Forest Association, testified she was pleased that some of the changes recommended in the public comment period were made. Two of the three issues raised by IFA were addressed. The third issue requested the rules expire after two years and then be reviewed and renegotiated. IFA understands DEQ's concerns in having a set date in the rules, however they believe it would provide a fire wall and set a timeframe for review and development of a new rule. IFA requested this change because they are interested in the new accounting data that will be available in two years, reviewing whether this structure creates a stable account, and determining whether some of the reductions that were promised actually happen. IFA membership ranges from small to large emitters. Under the proposed rule, fees will increase for some and decrease for some. They feel it is very important to have a review of the rule. IFA will trust the Board and DEQ to review and renegotiate the rule with all interested parties in a two-year timeframe.

Tom Lyons, Gordon Paving Company, expressed concern over how the proposed rules would affect small companies and the precedent being set. Small companies often do not have the staff to monitor the Administrative Rules Bulletin, and are not usually aware of rule makings. At the request of large companies, CO was previously removed from the fee structure. The proposed rule, again, preferences large emitters. Mr. Lyons was concerned that future rule makings would continue to give preference to large emitters and shift the costs over to small companies who have fewer resources to pay. According to his calculations, the proposed rule would set fees at \$8 or \$8.50 per ton of emissions for the largest emitter because of the cap, and a company that falls under the 200 ton category would start at \$42 per ton at best. Companies under 100 tons would pay \$55 per ton of emissions; and one of their companies would pay \$500 per ton. Mr. Lyons stated he did not see the equitability in what was being suggested. The existing rule is simple and more fair – if you emit, you pay for the emissions; if you don't emit, you don't pay for the emissions. The price of the emissions should be set accordingly so those that emit and need more complicated permits pay the price. Gordon Paving Company has spent

hundreds of thousands of dollars to install the best available control technologies at their facilities so they are small emitters, and yet there is no compensation for that in this rule.

Mr. Lyons reiterated his concern that this rule seems to be following a pattern of favoring IACI and large industry that have the firepower. He understood their need to control costs, but strongly disagreed with this process of shifting the burden unequitably to the small emitters. He urged the Board to consider these concerns before making a final decision.

Don Chisholm observed that one reason the negotiated rulemaking process may have been skewed was because the small emitters who are deferred from the program did not have the incentive to be at the table to negotiate something that would not affect them for several years. He welcomed Mr. Lyons to initiate rulemaking to change the fee schedule before his company's deferral expires. It appears likely that DEQ will initiate rulemaking before that time due to its fiscal needs. He commented that when they have greater numbers, he believed the Board would respond to small business. Mr. Lyons feared that small businesses might not be able to organize as efficient or powerful a lobby as IACI.

➤ **MOTION:** Paul Agidius moved the Board adopt, as pending rules, the Rules for the Control of Air Pollution in Idaho as presented in the final proposal under Docket No. 58-0101-9905.

**SECOND:** Marguerite McLaughlin

**DISCUSSION:** Nick Purdy stated he would vote in favor of the rule, but was not pleased with it. He felt the rule was not fair or equitable and does not encourage reductions in emissions. Mr. Purdy urged DEQ to start working on a new restructured rule, with those goals in mind, to be completed over the next two years.

Chairman Chisholm felt the Board would be more comfortable with additional technical training on the rule to determine what the program's needs are in terms of monitoring and enforcement. The Board wants the program to operate correctly and in the best interest of all the people of Idaho and with adequate funding. He believed the financial information that would be provided with the new accounting system was important and needs to be provided to ensure the program is being run efficiently and that people are not being overcharged. All those things will be taken into account when the Board looks at the rule again.

Marguerite McLaughlin stressed that her second did not mean she was fully satisfied with the rule. She was concerned with having to review the rule every two years, and felt there should be a real effort to review the fee structure to ensure the small emitters are treated fairly. There should be a negotiated process that serves everyone. Paul Agidius agreed with Senator McLaughlin's comments. He felt the rules would need to be changed when they come back to the Board. The deferred sources will need to be considered. At this point in time; however, this seems like a good interim step.

Marti Calabretta believed this process has shown that the complexity of the rules and the program require the Board to be involved at earlier stages in the process. The confusion about funding for PTCs is interlocked in the Board's action and the program, and funding must be found for that side of the issue.

**VOICE VOTE:** Motion passed. 5 ayes; 0 nays; 1 absent (Dr. MacMillan); 1 abstain (Dr. Cloonan)

**AGENDA ITEM NO. 5:            APPROVAL OF HEARING OFFICER LIST**

Paula Gradwohl, Paralegal and Administrative Rules Coordinator, presented the Hearing Officer List for the Board's approval. The list contains attorneys who have previously been approved by the Board of Health and Welfare, as well as two new attorneys, Margaret B. Hinman and Stephanie Jaymes Bonney. The list will serve as a resource for the department when they need to appoint a hearing officer for a contested case or a public hearing on rules. In order to be considered as a hearing officer, attorneys submit a resume to the department and it is brought to the Board for its consideration and approval.

Doug Conde, Deputy Attorney General for DEQ, suggested the Board closely review the resume of Stephanie Jaymes Bonney. She has been an attorney for only one year. Mr. Conde was concerned that attorneys appearing before the Board on contested cases might question her limited experience. He stated he would prefer to have a more experienced attorney controlling the course of a contested case, making rulings on evidentiary issues, and reaching decisions on proceedings. He noted that attorneys are usually assigned cases on a rotation basis.

Director Steve Allred suggested criteria be established for choosing attorneys as hearing officers. He also asked if a system existed for monitoring and rating the performance of hearing officers. Doug Conde said department staff monitor input on hearing officers' performance on matters such as making timely decisions. They have had no problems with the attorneys currently on the list. He agreed it would be valuable to have a defined criteria to make a more informed recommendation to the Board.

Don Chisholm also felt it was important to set standards. He asked if there was a "right of disqualification" in the rules if the hearing officer selected by the rotation process lacked the experience for a specific issue, or had a conflict. Doug Conde stated there is a procedure to disqualify a hearing officer in the Administrative Procedures Act and the Contested Case Rules. The procedure allows one chance to disqualify a hearing officer for general reasons, as well as a conflict of interest provision.

Marti Calabretta asked if there was an annual announcement or other procedure for letting attorneys know that they could apply to become hearing officers. Paula Gradwohl stated there was no process in place. The Department of Health and Welfare used advertisements in the past on an as needed basis. She noted it would be helpful to have more hearing officers located in the Boise area. She also explained that when a hearing officer is selected for a matter, they are asked to sign a statement declaring they have no conflict of interest in the matter.

➤ **MOTION:** Dr. Joan Cloonan moved the Board approve the Hearing Officer List as presented except for Stephanie Jaymes Bonney.

**SECOND:** Marguerite McLaughlin

**VOICE VOTE:** Motion passed. 6 ayes; 0 nay; 1 absent (Dr. Randy MacMillan)

Don Chisholm requested the department send a letter to Ms. Bonney thanking her for her application and notifying her that the Board deferred her approval until she has more experience.

**AGENDA ITEM NO. 6:                    RULES REGULATING SWINE AND POULTRY FACILITIES,  
DOCKET NO. 58-0109-0001, PENDING RULE**

Susan Burke, Compliance Specialist for the Water Quality Program, explained this docket contains amendments to the Swine and Poultry Facilities rule. These amendments are the result of legislation passed last year requiring the department to add new requirements regarding financial assurance mechanisms for remediation and closure of those facilities. The Board adopted the temporary rule in October 1999. No public comments were received on the rules.

Chairman Don Chisholm stated the Board was concerned that some of the assurances may expire without being renewed, causing a gap in coverage. David Mabe, Administrator of the State Water Quality Program, recommended the Board take no action on this docket and leave it as a pending rule. He further recommended the rule be placed on the Board's June meeting agenda to allow staff time to fully investigate and prepare recommendations on the four assurance mechanisms and how to deal with the transitional issues in the rules. The temporary rule would stay in place until the Board adopts the pending rule.

- **MOTION:** Marguerite McLaughlin moved the Board table the Rules Regulating Swine and Poultry Facilities, Docket No. 58-0109-0001 until the Board's June 2001 meeting.
- SECOND:** Marti Calabretta
- VOICE VOTE:** Motion passed. 6 ayes; 0 nay; 1 absent (Dr. Randy MacMillan)

**AGENDA ITEM NO. 7:                    STATUS REPORT ON RULES OF ADMINISTRATIVE PROCEDURE  
BEFORE THE BOARD OF ENVIRONMENTAL QUALITY,  
DOCKET NO. 58-0123-0001, PENDING RULE**

Doug Conde reported the public comment period on the rules was extended until the end of February 2001. The notice was published in the January Administrative Rules Bulletin. Mr. Conde is also doing research to clarify what the Administrative Procedures Act envisions the role of the presiding officer in a hearing to be, and how decisions get appealed to district court. Staff is working on the rules to address IACI's concerns. Proposed changes have been provided to IACI's attorney for review. Copies of the proposed changes will also be provided to interested Board members (Dr. Cloonan, Mr. Agidius, and Mr. Chisholm). IACI opposes the idea of having the Board or one of its members always act in the capacity of a presiding officer. The intent was to ensure the Board always had a representative present so they could judge first hand the credibility of witnesses and the testimony presented. IACI opposes this and feels this should be discretionary rather than mandatory. This would allow the Board to determine on a case-by-case basis whether or not they wanted to be involved in the hearing. Mr. Conde proposed a conference call be scheduled with the interested parties after all changes are reviewed. Chairman Chisholm asked that future information be distributed to all Board members.

Don Chisholm briefly discussed the function of the Board versus the function of the director on these issues. He asked Doug Conde to review the following proposed language for clarification of authority: "The Board shall have the power to affirm, reverse, or modify a decision of the agency, but the Board shall defer to the findings which interpret or apply scientific data unless the Board finds that clear and convincing evidence establishes the agencies'

interpretation or application of scientific data to be erroneous.” Chairman Chisholm felt this would set a higher burden of proof when the lay members of the Board are judging scientific issues.

Director Steve Allred discussed problems the department continues to have attracting and retaining qualified employees due to the inability to provide competitive salaries. The department’s turn-over rate continues to be very high (11%) and causes a huge loss in training and productivity. Recent changes in job classifications to bring them more in line with the private sector have resulted in a 50% reduction in hiring and replacement time, but salary is still the main problem. Occasionally the department is lucky enough to attract highly qualified and experienced individuals who are at a place in their careers where they can afford to take the huge pay cut necessary to work for state government. Such an individual will soon be hired to head up the department’s new Quality Assurance Program.

Don Chisholm discussed an upcoming environmental law seminar being conducted by the Environmental & Natural Resources Section of the Idaho State Bar. “Environmental Law Update, Into the New Millennium Under a New Administration.” Will be held in Pocatello, Idaho on March 16, 2001. He invited other Board members to attend and encouraged the ongoing education and development of members through such seminars and workshops. Director Allred agreed and felt that the more the Board members are exposed to what is going on elsewhere, the more they will be able to fulfill their responsibilities. The department will watch for seminars, workshops, and meetings that might be of interest to the Board and bring them to its attention.

**AGENDA ITEM NO. 8:            OUTSTANDING RESOURCE WATER NOMINATIONS – APPROVAL OF FINAL REPORTS AND RECOMMENDATIONS TO THE LEGISLATURE**

David Mabe presented two reports for the Board’s approval: *The Monitoring Plan for Outstanding Resource Waters*, and *The Outstanding Resource Water Report to the Idaho Legislature and the Proposed Outstanding Resource Water Best Management Practices for the Middle Fork of the Salmon and Selway Rivers*. These reports conclude the agency package for consideration, and if approved by the Board will be delivered to the Idaho Legislature for their consideration. Mr. Mabe noted this is a little different approach than used in the past. Staff has prepared the Best Management Practices and tried to answer as many of the questions as possible about what the designation means. Proposed legislation has also been prepared to make the designations. If the Board approves the reports, they will be presented to the germane committee chairs and make arrangements to have the legislation printed and presentations made before the committees. Board member participation or attendance would be welcomed. If the legislation is printed, members will be notified of hearing dates.

Chairman Chisholm opened the floor to comments or testimony. Dallas Gudgell, Idaho Conservation League, stated support for the nomination of the Selway and Middle Fork Salmon Rivers as ORWs. The ICL looks forward to supporting the nominations (hopefully, along with the Board) in the legislature. The ICL also favors changes to the ORW process. The fact that several attempts have failed and there are still no ORWs after eleven years seems to indicate a problem with the process. However, ICL has several concerns with the proposed process

changes and probably will not support that legislation. They may address the legislature to ask them to look at some of their concerns with the process change. The ICL recognizes the need for department funding to go along with the research and monitoring that needs to occur. He commended the department for its actions in developing BMPs and a monitoring plan.

Jane Gorsuch, IFA, testified against the designations stating they were not needed because adequate protection already exists in the Wild and Scenic designation and this would only add an additional layer of potential liability. Since there have been no ORW designations in Idaho or any other Pacific Northwest states, they do not know what the potential impact would be under a lawsuit. They have concerns that the designation could be expanded, and that it could trigger the federal TMDL rule. The IFA intends to express their concerns to the legislature.

➤ **MOTION:** Nick Purdy moved the Board accept the two reports, *Monitoring Plan for Outstanding Resource Waters* and *Managing Water Quality Under Proposed ORW Designations for the Middle Fork of the Salmon and Selway Rivers* as presented and direct they be submitted to the Idaho Legislature for consideration.

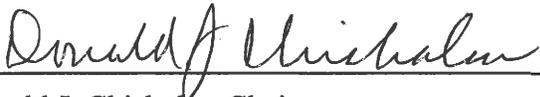
**SECOND:** Dr. Joan Cloonan

**ROLL CALL VOTE:** Motion passed. 4 ayes (Marti Calabretta, Don Chisholm, Dr. Joan Cloonan, Nick Purdy); 2 nay (Paul Agidius, Marguerite McLaughlin); 1 absent (Dr. Randy MacMillan)

Marti Calabretta asked for a status report on the variances for the Northern Idaho rivers that were omitted from the Water Quality Standards and Wastewater Treatment Requirements that were adopted at the last meeting. Dave Mabe reported the department currently does not plan to bring those variances back to the Board until the issues have been resolved regarding the NPDES permits. It could be late next year, or several years before those designations are ready to come back to the Board. Doug Conde noted that there was already a federal designation for cold water biota for the South Fork of the Coeur d'Alene River.

Director Allred briefly discussed proposed legislation regarding the Coeur d'Alene River, and a mechanical correction bill for the department that will correct language due to the change from division to department.

The meeting adjourned at 11:30a.m.



Donald J. Chisholm, Chairman



Marti Calabretta, Secretary



Debra L. Cline, Administrative Assistant and Recorder



STATE OF IDAHO  
DEPARTMENT OF ENVIRONMENTAL QUALITY  
Board of Environmental Quality

1410 North Hilton, Boise, ID 83706-1255, (208) 373-0502

Dirk Kempthorne, Governor  
C. Stephen Allred, Director

**DECLARATION OF RULEMAKING  
BY THE BOARD OF ENVIRONMENTAL QUALITY  
ADOPTION OF PENDING RULE  
DOCKET NO. 58-0101-0003**

Pursuant to the authority granted to the Board of Environmental Quality in Title 39, Chapter 1, Idaho Code, and under the provisions for pending rule adoption contained in Section 67-5224, Idaho Code, I declare that the Board of Environmental Quality adopted, as pending rules, the Rules for the Control of Air Pollution in Idaho as presented in the attached Final Proposal.

I hereby certify that this action has been taken in compliance with Title 67, Chapter 52, Idaho Code.

1-26-2001  
Date

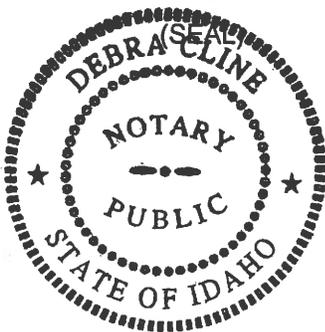
Donald J. Chisholm  
Donald J. Chisholm, Chairman

STATE OF IDAHO            )  
  )  
County of Ada                )        ss.

On this 26<sup>th</sup> of January, 2001, before me, the undersigned, a Notary Public in and for said State, personally appeared Donald J. Chisholm, Chairman, known to me to be the person whose name is subscribed to the within instrument and acknowledged to me that he executed the same.

IN WITNESS WHEREOF, I have set my hand and affixed my official seal the day and year in this certificate first above written.

Debra Cline  
Notary Public for Idaho  
Residing at: Caldwell, ID  
Expires: 7/21/01



RULES FOR THE CONTROL OF AIR POLLUTION IN IDAHO  
PENDING RULE  
DOCKET NO. 58-0101-0003

FINAL PROPOSAL

The initial proposal appeared in the Idaho Administrative Bulletin, Volume 00-11, November 1, 2000, pages 40 through 44. The Department of Environmental Quality recommends that the Board of Environmental Quality take the following action.

IDAPA 58.01.01.204

ADOPT AS INITIALLY PROPOSED

IDAPA 58.01.01.582

ADOPT AS AMENDED



**DECLARATION OF RULEMAKING  
BY THE BOARD OF ENVIRONMENTAL QUALITY  
ADOPTION OF PENDING RULE  
DOCKET NO. 58-0101-9905**

Pursuant to the authority granted to the Board of Environmental Quality in Title 39, Chapter 1, Idaho Code, and under the provisions for pending rule adoption contained in Section 67-5224, Idaho Code, I declare that the Board of Environmental Quality adopted, as pending rules, the Rules for the Control of Air Pollution in Idaho as presented in the attached Final Proposal.

I hereby certify that this action has been taken in compliance with Title 67, Chapter 52, Idaho Code.

1-26-2001  
Date

Donald J. Chisholm  
Donald J. Chisholm, Chairman

STATE OF IDAHO            )  
  )  
County of Ada             )        ss.

On this 26<sup>th</sup> of January, 2001, before me, the undersigned, a Notary Public in and for said State, personally appeared Donald J. Chisholm, Chairman, known to me to be the person whose name is subscribed to the within instrument and acknowledged to me that he executed the same.

IN WITNESS WHEREOF, I have set my hand and affixed my official seal the day and year in this certificate first above written.

Debra Cline  
Notary Public for Idaho  
Residing at: Caldwell, ID  
Expires: 7/21/01



**RULES FOR THE CONTROL OF AIR POLLUTION IN IDAHO  
DEPARTMENT OF ENVIRONMENTAL QUALITY  
PENDING RULE  
DOCKET NO. 58-0101-9905**

**FINAL PROPOSAL**

The initial proposal appeared in the Idaho Administrative Bulletin, Volume 01-1, January 3, 2001, pages 268 through 271. The Department of Environmental Quality recommends that the Board of Environmental Quality take the following action.

**IDAPA 58.01.01.525**

**ADOPT AS INITIALLY PROPOSED**

**IDAPA 58.01.01.527**

**ADOPT AS AMENDED**