



State of Idaho  
DEPARTMENT OF ENVIRONMENTAL QUALITY  
BOARD OF ENVIRONMENTAL QUALITY

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**IDAHO BOARD OF ENVIRONMENTAL QUALITY**

**MINUTES**

**October 20, 2004**

The Board of Environmental Quality convened on October 20, 2004 at 8:30 a.m. at:

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

**ROLL CALL**

**BOARD MEMBERS PRESENT**

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

**BOARD MEMBERS ABSENT**

Marguerite McLaughlin, Member

**DEPARTMENT OF ENVIRONMENTAL QUALITY STAFF PRESENT**

Toni Hardesty, Director  
Martin Bauer, Administrator, Air Quality Division  
John Brueck, Hazardous Waste Regulation and Policy Coordinator  
Barry Burnell, Administrator, Water Quality Division  
Jess Byrne, Interagency Affairs  
Debra Cline, Management Assistant to the Board  
Doug Conde, Deputy Attorney General, DEQ  
Don Essig, Water Quality Standards Manager  
Orville Green, Administrator, Waste & Remediation Division  
Jerri Henry, Chemical Rules Manager, Drinking Water Program  
Richard Huddleston, Waste Water Program Manager  
Mark Mason, Waste Water Engineer  
Paula Wilson, Rules Coordinator

## **OTHERS PRESENT:**

Beth Baird, Boise City  
Gayle Batt, Idaho Water Users Association  
Jack Lyman, Idaho Mining Association  
Alan Prouty, J. R. Simplot Company  
Hugh O'Riordan, Givens Pursley  
Dick Rush, Idaho Association of Commerce & Industry  
Suzanne Schaefer, SBS Associates

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

## **PUBLIC COMMENT PERIOD**

No comments were received.

### **AGENDA ITEM NO. 1:           ADOPTION OF AUGUST 5, 2004 BOARD MINUTES**

- **MOTION:** Dr. Joan Cloonan moved the Board approve the August 5, 2004 minutes as presented.  
**SECOND:** Craig Harlen  
**VOICE VOTE:** Motion carried. 6 ayes; 0 nay; 1 absent (McLaughlin).

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

Director Toni Hardesty provided updates on the following issues:

- DEQ is conducting legislative forums throughout the state. Local legislators and candidates are invited to discuss environmental issues in the area. DEQ staff provide information on local projects and respond to questions from legislators. The response has been very good. Discussions included Treasure Valley airshed issues, timeliness on planning and spec review, TMDL progress, and managing growth and development on 303d listed streams.
- DEQ submitted its preliminary budget request for FY 06. It includes a general fund position for the Lake Management Plan. In order to get the Coeur d'Alene Lake delisted, a joint Lake Management Plan must be signed by the Tribes, DEQ, and the counties. DEQ has requested funding for a Lake Management Plan coordinator to work solely on getting the plan completed.
- The Joint Legislative Environmental Common Sense Committee (ECSC) has appointed a subcommittee to consider and make recommendations on NPDES primacy. The subcommittee has recommended two positions be funded for DEQ for a limited time to evaluate the primacy issue and respond to questions from stakeholders regarding cost, funding options, consultation, stringency, and rules. Other positions being requested are an executive director and clerical position for the Coeur d'Alene Basin Commission (funded by

the federal government) and a position for monitoring the Rathdrum Aquifer (funded by the Burlington Northern Santa Fe Railroad).

- DEQ provided mediation conflict training to all TMDL writers. The training will help staff work through contentious issues that may develop in the TMDL process.
- DEQ will offer a Use Attainability Analysis (UAA) workshop on November 30 – December 1, 2004. DEQ hopes to better identify what it takes to develop a UAA that will be successful in gaining EPA approval. EPA will participate in the workshop. The interested public is also invited.
- Due to water shortage issues, there is an increasing interest in managed aquifer recharge. Large-scale recharge projects can be considered when excess surface water is available. DEQ rules require such managed recharge projects to submit a groundwater monitoring plan for approval to ensure the project is not causing groundwater problems. DEQ has put draft guidelines out for public comment to let the public know what would be required in a monitoring plan. The guidelines are being amended to clarify that they are intended to be used specifically for large scale managed recharge.
- DEQ has adopted the Anti-idling Program. The program encourages people to turn off their engines and not idle their vehicles. The program will target school buses and school zones where children are being dropped off and picked up.
- In November 2004, E 85 fuel will be available to the public in Boise. This clean burning fuel is a combination of 85% ethanol and gasoline. DEQ coordinated with the Farm Bureau, Idaho Department of Water Resources, and the Department of Transportation to bring this pilot project to the area.

**AGENDA ITEM NO. 3:                    STATUS REPORT ON WATER QUALITY STANDARDS AND WASTEWATER TREATMENT REQUIREMENTS, DOCKET NO. 58-0102-0302**

Barry Burnell, Administrator of the Water Quality Division, announced the rule was not ready to be presented for adoption at this time. DEQ has been conducting negotiated rulemaking on this docket for about a year.

Don Essig, Water Quality Standards Manager, reported that thirteen meetings have been conducted to work on issues such as developing implementation guidance for a novel fish tissue criterion for mercury, and updating a number of other toxics criteria for other metals. The public comment period closed on September 20, 2004, and comments were received from 25 individuals or organizations; over 100 pages in all. Mr. Essig reviewed and categorized the comments and is preparing the responses. He discussed the significant comments and stated the rule would be presented for consideration at the November 18, 2004, Board meeting.

Dr. Joan Cloonan asked if the response to comments would be available to the public or those who submitted comments, and if they would be able to see what the final rule will look like before it comes to the Board for adoption. Doug Conde stated the legal requirements are met if DEQ provides notice and opportunity for the public to comment and the changes are within the scope of the notice and are responsive to comments made by the public. The documents

(comments, response to comments, and final rule) are public documents and are available to the public upon request.

Don Chisholm asked if the documents were available on the Internet. Barry Burnell said the documents were not posted on the Internet. Mr. Chisholm thought it would improve the process if the response to comments and final rule were posted to the DEQ Web site. This would allow those who submitted comments to review the response and the revisions to the proposed rule prior to adoption by the Board.

Director Hardesty supported the idea. She noted the timing of when the documents are posted may vary depending on rulemaking deadlines and meeting dates, particularly during the October and November meetings. Dr. Joan Cloonan supported posting the response to comments on the DEQ web site and did not feel the timing would be an issue as long as those who had commented had an opportunity to review the response sometime before the day of the meeting.

Barry Burnell asked if the Board wanted both the response to comments and the final rule posted to the Internet. The Board requested DEQ begin posting both the response to comments and the revised proposed rule on its Web site prior to the rule being presented at a Board meeting.

Don Essig explained how DEQ gathered information to determine toxicity at low hardness levels. DEQ contracted with a consultant to gather all available data since 1992 and additional information was received from mining companies and their consultants. The data is published, peer reviewed data for the most part.

**AGENDA ITEM NO. 4:            IDAHO RULES FOR PUBLIC DRINKING WATER SYSTEMS DOCKET NO. 58-0108-0403 (PENDING RULE)**

Jerri Henry, Chemical Rules Manager for the DEQ Drinking Water Program, presented this docket to incorporate by reference the federal arsenic standards. The rule will also address some procedural issues to clarify compliance and require new source monitoring. In order for DEQ to retain primacy of the Drinking Water Program, these rules must be in place by January 22, 2005. The current standard of 50 parts per billion (ppb), which has been in place since 1976, will change to 10 ppb. The standard was originally proposed at 5 ppb, but later raised to 10 ppb. The effective date for the standard is January 22, 2006. The arsenic standard is needed to protect public health and is expected to reduce deaths from bladder and lung cancer.

Ms. Henry explained DEQ has worked extensively with the public drinking water systems to notify and prepare them for the change. Public hearings were held to notify the public, even though the rule could not be revised through the comment process. The standard will be in effect and will be enforced regardless of what action is taken by Idaho. Adoption of this rule will simply allow DEQ to administer and enforce the standard instead of EPA.

DEQ conducted training sessions for the American Waterworks Association and Idaho Rural Water, and workshops are planned for next year. It was originally estimated that about 130 community and non-community water systems, mostly in Southern Idaho from the Twin Falls area to Boise, would be impacted by the change. However, recent studies indicate a much lower number may be impacted. The capital cost for a drinking water system to comply with the new standard is estimated to range from \$100,000 to \$1.1 million. Research is currently taking place to develop new technology to deal with the problem.

Ms. Henry noted that because this rule is adopted by reference, it is no more or less stringent than the federal rule.

Board members discussed the different funding sources available to drinking water systems to help them meet the new standard.

- **MOTION:** Nick Purdy moved the Board adopt the Idaho Rules for Public Drinking Water Systems, Docket No. 58-0108-0403, as pending and temporary rules with the temporary rules becoming effective January 22, 2005.  
**SECOND:** Paul Agidius  
**VOICE VOTE:** Motion carried. 6 ayes; 0 nays; 1 absent (McLaughlin).

**AGENDA ITEM NO. 5:                    WASTEWATER-LAND APPLICATION PERMIT RULES, DOCKET NO. 58-0117-0301 (PENDING RULE)**

Mark Mason, Wastewater Engineer for the DEQ Wastewater Program, explained this rule will add a new class of more highly treated wastewater to the rules. This new class of wastewater can be used for more purposes including aquifer recharge, residential irrigation, toilet flushing, water features, etc. He explained that this new class does not relate to agricultural recharge. There is separate guidance for agricultural aquifer recharge. This proposed rule deals with recharge of municipal effluent.

Negotiated rulemaking was conducted with the stakeholders and revisions were made to the initial rule as a result of comments. The proposed rule will not increase fees for the regulated community and no new requirements will be placed on permit holders. The new class will affect only those who wish to use their wastewater for the new purposes that were previously not allowed.

Mr. Mason explained a number of issues in more detail including how the Wastewater-Land Application Guidance Handbook was recently updated with the involvement of many stakeholders from around the state. The handbook was reorganized to make it more user friendly, and it is now available on the DEQ Web site. Review of the guidance document will be an ongoing process with a review committee that will meet on a regular basis. Participation on the committee will be open to the public and anyone who wants to comment on the guidance can participate.

This rule will regulate an activity that is not regulated by the federal government. The EPA has guidelines on reuse, but no rules. DEQ has gone through the process to comply with Idaho Code § 39-107D regarding stringency.

Barry Burnell presented a suggested change to Section 300.05.k. of the proposed rule to clarify the intent and use of the guidance:

The Idaho Guidance for Land Application of Municipal and Industrial Wastewater is intended to provide assistance to permit applicants in obtaining a wastewater land application permit.

He also suggested a change to Section 200.09 to read:

This document, and subsequent revisions of this document, provides assistance for permitting and operating land application facilities.

Don Chisholm asked what measures would be taken to prevent accidental or intended use of the treated wastewater for uses that are not allowed under the rule. Mark Mason said the rules set out proper procedures and distribution systems to prevent accidental use. While intended misuse cannot be prevented, the requirements would make it more difficult.

Dr. Joan Cloonan asked for clarification that the new class of wastewater, even though it is under the land application rules, is applicable to other uses of wastewater, not just land application of Class A wastewater. Mark Mason confirmed that uses other than land application (e.g. toilet flushing, water features, residential irrigation, aquifer recharge, etc.) were allowed in the rules. Most of them still involve applying wastewater to land, even though the land is not part of the treatment system. The additional uses were included in the rules because it seemed more expedient than creating a whole new program for whatever few other uses there may be.

Craig Harlen asked if the regulated community, the ECSC, and the interested public were involved with and aware of the rulemaking process and public outreach that has taken place with the proposed rule. Toni Hardesty responded that DEQ discussed the rulemaking during each of the legislative forums conducted throughout the state. There was no concern expressed other than the confusion between the municipal wastewater recharge and the aquifer recharge guidelines for surface irrigation waters. DEQ met with the Interim Legislative Committee to explain the difference between the two. Recognizing Idaho's drought situation, they were generally supportive of allowing facilities the option to treat their wastewater to a higher standard so the water could be reused.

Mark Mason said the regulated community was actively involved in the rulemaking from the beginning and has had numerous opportunities to comment. He believed the public and the regulated community were well informed about the rule, but noted that a presentation was not done specifically for the ECSC.

Dr. Joan Cloonan commented that Mr. Mason had been very willing to meet with any group that came forward and was very responsive to their comments. She suggested information be included in DEQ's IC § 39-107D stringency statement to justify the BOD and TSS levels set out in the rule. She thought the question could arise as to why DEQ chose those standards. Mr. Mason indicated the levels were selected after reviewing the standards of other states and discussing their level of comfort with the standards they selected.

Dick Rush, Idaho Association of Commerce and Industry, thanked Barry Burnell and Mark Mason for working hard throughout the negotiated rulemaking process to respond to IACI's questions. Mr. Rush testified that IACI supports portions of the rule, but has objections to other parts (Attachment 1). The main issue IACI is concerned with is the repeated references to the guidance document. He appreciated the changes discussed earlier, but still had concerns about the rule. IACI also appreciated the formation of the review committee and looks forward to being an active participant on the review committee for the Wastewater-Land Application Guidance Handbook. They have requested for a number of years that a work group be formed to deal with land application issues.

IACI believes that because the guidance document is referenced in the rules, it appears that DEQ is giving the guidance the force of a rule without meeting the legislative mandated requirements of a rule such as the stringency statutes and the law requiring the use of best available peer-reviewed data. Mr. Rush reviewed IACI's response to comments to reiterate their concern for the numerous places where the rule refers to guidance. IACI members fear that the references to guidance mean that somehow the guidance has been elevated to be something more than a tool to use. They also believe the response to comments process is not an adequate vehicle to address the serious issue of adopting guidance by reference. It is particularly troublesome when the guidance is not final and is still under review. They also believe the draft guidance appears to contain some substantive changes to existing guidance, and additional internal DEQ documents have been included. The response to comments have not been easily made available to the public, or even those who submitted comments.

Mr. Rush pointed out that because the guidance document referred to in the rules impact all land applicators, not just municipalities, there may be some kind of procedural irregularity because the descriptive summary of the rulemaking was focused towards municipalities. It indicated that the purpose of the rulemaking was to add an additional class of treated waste water, providing definitions and requirements. This was so misleading that when the negotiated rulemaking started, IACI questioned whether they should participate.

IACI requested the Board postpone adoption of the rules until a work group established by DEQ can complete their review of the guidance document and the appropriateness of referencing it in the rules. IACI also suggested DEQ make their response to comments available to the public. Mr. Rush felt the changes suggested by Barry Burnell were on the right track, but felt they should be discussed further.

Dick Rush also discussed the Idaho good science bill, Idaho Code § 39-107D. He stressed the law requires that if a proposed rule regulates an activity not regulated by the federal government, it must utilize the best available peer reviewed science. The law also requires DEQ to provide some specific information. Mr. Rush felt DEQ's response to these statutory requirements seemed to be lacking in detail and in some cases does not seem to contain the information requested. A good portion of the information is in the form of memos from the DEQ toxicologist stating that the rules are protective of human health. Mr. Rush commented that a lot of things can be protective of human health, but the purpose was to use science so that business, industry, and cities can still operate and be protective, and if standards are too high or too protective that makes it is very difficult to conduct certain types of economic activity. He pointed out this rule is one of the first with this requirement the legislature will review. He recommended DEQ carefully review its information to avoid the kind of response the stringency issue caused.

Mr. Rush also offered comments on the general use of guidance by DEQ. IACI has long supported the use of rules over agency guidance or policy because they believe that incorporating guidance by reference or simply referencing it in rules gives it the clout of rules. Guidance should simply provide a guide to an agency on possible approaches for different situations; but unfortunately, too often it seems that agency staff in the field tend to consider guidance as a rule and not consider other options.

IACI does not disapprove of all guidance. Guidance documents can be very useful and work very well, such as those used by the forest products industry. Federal regulators incorporate their

guidance requirements into permits, and in some cases IACI feels that DEQ staff also incorporates guidance language into DEQ permits. Even though it (the guidance) is not enforceable, it ends up in the permits and the permit becomes enforceable. Mr. Rush cited specific examples.

Dick Rush discussed the Idaho Legislature's current attitude towards the use of guidance and some legislators' concern that DEQ is using guidance as a means to get around the requirement to have rules approved by the legislature. He felt that due to this sensitivity to the use of guidance, the legislature may consider a bill next year to set procedures for the development of guidance by DEQ. IACI believes it would be beneficial for DEQ and the Board to develop some approved procedures on guidance prior to the upcoming legislative session. He complimented DEQ for putting the guidance out for public comment and felt that was a good start and a good example of procedures the agency might want to consider formalizing.

Mr. Rush concluded by again requesting the Wastewater-Land Application Permit Rules be postponed until the issue of the 300 page guidance handbook can be resolved. IACI recommended the Board and DEQ undertake a review of their procedures for developing and using guidance.

Don Chisholm asked if IACI had specific objections to the rule, other than improvement of the guidance process, and if its passage would benefit some of its members. Dick Rush responded that IACI was very focused on the guidance issue in their comments and did not have negative comments on the additional class of wastewater. He agreed there was benefit in the rule. It sounds like a reasonable idea and may be useful to some companies, but IACI did not specifically weigh in on that issue. In their public comments, IACI suggested DEQ remove the references to the guidance.

Nick Purdy questioned whether it was in the best interest of the stakeholders to hold up adoption of the rule while the guidance handbook is reviewed and revised. He asked if there was a way IACI would support allowing the rule to move ahead while the guidance handbook, which is already in use, is revisited. Dick Rush responded that IACI's suggestion to allow the rule to move ahead was to remove the references to the guidance handbook. He noted that although the guidance handbook is in place and in use, it is not referenced. He thought Barry Burnell's suggested change to clarify the use of guidance was helpful and would be a good standard for all such references. He emphasized that IACI's main concern was that DEQ staff who approve permits also realize that this is just guidance and it is not enforceable. It may be a good thing to do, but it may not always be the only thing to do. If this issue could be resolved, IACI would have no negative comments about the rule itself.

Doug Conde explained there was no requirement to reference the guidance in the rules. If the references are removed, DEQ can continue to use the guidance document. The references were put in the rule to ensure the regulated community knew the document existed, knew how to obtain the document, and understood that DEQ was going to use the document. If IACI would prefer to have the references removed, there is no reason DEQ needs them to be in the rule. Mr. Conde believed the issue of whether DEQ is using guidance as a rule would not be addressed by removing the references; it would not have a substantive impact one way or another.

Paul Agidius agreed with Mr. Rush's comments that guidance is not law and should not be applied as law, but believed it would be very helpful to have the guidance document referenced in the rule and clearly identified that it is not law.

Dr. Joan Cloonan supported adding the changes suggested by Barry Burnell to clarify how the guidance would be used.

Don Chisholm pointed out there was a general statement in the APA stating that guidance does not have the force of law. He felt it was unnecessary to keep repeating it in the rules; however he thought it would be useful to have such language in the application form. He suggested the Board find a way to strike the references to the guidance from the rule and address the other concerns so the rule could be adopted.

Dr. Cloonan asked for clarification that the discussion was limited to references to the Wastewater-Land Application Guidance Handbook and did not include references to other types of guidance, such as the Ten State Standards. Dick Rush confirmed that IACI's comments were concerned only with the references to the Wastewater-Land Application Guidance Handbook.

Paul Agidius supported the revised language proposed by Barry Burnell, and thought it would be inconsistent to strike references only to this guidance in this rule. He questioned why it would create a problem to refer to this guidance document and not any others.

Dr. Cloonan believed all guidance documents were always open to change due to their technical nature. She seen no harm in simply referring to the fact that there is a guidance document and where it is available.

Dick Rush commented that the issue was broader than just this rule and reiterated his recommendation that DEQ review its procedures for developing and using guidance.

Craig Harlen supported the revised language and felt that putting these changes in the rule would also serve to provide direction to DEQ and the Director that the Board intends the guidance document to be applied as guidance and not as law.

➤ **MOTION:** Paul Agidius moved the Board adopt the Wastewater-Land Application Permit Rules as presented in the final proposal under Docket No. 58-0117-0301 with the following exceptions:

Section 300.05.k. be amended to incorporate the following wording:

The Idaho Guidance for Land Application of Municipal and Industrial Wastewater is intended to provide assistance to permit applicants in obtaining a wastewater land application permit; and

Section 200.09 to read: This document, and subsequent revisions of this document, provides assistance for permitting and operating land application facilities.

**SECOND:** Craig Harlen

**VOICE VOTE:** Motion carried. 6 ayes; 0 nays; 1 absent (McLaughlin).

Chairman MacMillan noted for the record that the Board received and reviewed the written comments of Mr. Forde Johnson, Chairman of the Idaho Petroleum Clean Water Act Trust Fund Board of Trustees, stating their concern regarding the use of guidance documents (Attachment 2).

Nick Purdy suggested the Board revisit the guidance issue with IACI to ensure their support of the rule when it goes before the legislature for approval.

**AGENDA ITEM NO. 6:                   RULES FOR THE CONTROL OF AIR POLLUTION IN IDAHO,  
DOCKET NO. 58-0101-0304, (PENDING RULE) (NEW SOURCE  
REVIEW)**

Martin Bauer, Administrator, DEQ Air Quality Division, presented this rule to incorporate recent changes by EPA to the New Source Review programs. Adoption of the changes is mandated by EPA. The rule includes changes in New Source Review applicability requirements for modifications to allow flexibility and permit streamlining. It does not change the Prevention of Significant Deterioration (PSD) Program, it just changes the applicability conditions of the program.

The rule was previously approved by the Board as a temporary rule in February 2004 and is currently effective. After adoption of the temporary rule, DEQ discovered minor errors (typographical error at Section 225 and change at Section 205.02.f. to clarify that it is EPA's administrator). DEQ requested the Board amend the temporary rule for consistency with the pending rule. All public comments received were in support of the rule. The rule is not any more or less stringent than the federal rule.

- **MOTION:** Nick Purdy moved the Board adopt the Rules for the Control of Air Pollution in Idaho as presented in the final proposal under Docket No. 58-0101-0304. He further moved that the Board amend the February 2004 temporary rule as presented in the final proposal with the amendments becoming effective December 1, 2004
- SECOND:** Dr. Joan Cloonan
- VOICE VOTE:** Motion carried. 6 ayes; 0 nays; 1 absent (McLaughlin).

**AGENDA ITEM NO. 7:                   RULES OF ADMINISTRATIVE PROCEDURE BEFORE THE BOARD OF  
ENVIRONMENTAL QUALITY, DOCKET NO. 58-0123-0401,  
(PENDING RULE) (HWMA PERMIT APPEALS)**

Orville Green, Administrator, DEQ Waste Management and Remediation Division, presented this rule to remove the exclusion of Hazardous Waste Management Act (HWMA) appeals from the definition of “contested case” so that those procedures will be consistent with the Administrative Procedure Act. This rule change will streamline the procedures of DEQ by eliminating the alternative procedures, and making the rules and procedures for all permit appeals consistent within DEQ.

The rule was adopted as a temporary rule in May 2004 and is currently effective. Negotiated rulemaking was conducted; however no members of the public attended and no comments were received. There were no objections filed by the germane subcommittees of the Idaho Legislature. There should be no increased costs to the regulated community from this rule because it simply provides consistency with the HWMA permit appeals and the other contested case rules. The rule is not more stringent or broader in scope than federal regulations, and does not regulate an activity that is not regulated by the federal government.

➤ **MOTION:** Don Chisholm moved the Board adopt the Rules of Administrative Procedure before the Board of Environmental Quality as presented in the final proposal under Docket No. 58-0123-0401.

**SECOND:** Dr. Joan Cloonan

**VOICE VOTE:** Motion carried. 6 ayes; 0 nays; 1 absent (McLaughlin).

**AGENDA ITEM NO. 8: RULES AND STANDARDS FOR HAZARDOUS WASTE, DOCKET NO. 58-0105-0401, (PENDING RULE) (HWMA PERMIT APPEALS)**

Orville Green explained this rule is related to the previous rule and is needed to complete the process to move the HWMA permit appeals under the Board's contested case process and make it consistent with other permit appeals. The rule will remove the incorporation by reference of 40 CFR 124.19 which previously set out the procedures for administrative hearings and appeals regarding hazardous waste permits.

➤ **MOTION:** Dr. Joan Cloonan moved the Board adopt the Rules and Standards for Hazardous Waste as presented in the final proposal under Docket No. 58-0105-0401.

**SECOND:** Paul Agidius

**VOICE VOTE:** Motion carried. 6 ayes; 0 nays; 1 absent (McLaughlin).

**AGENDA ITEM NO. 9: RULES AND STANDARDS FOR HAZARDOUS WASTE, DOCKET NO. 58-0105-0402, (PENDING RULE) (ANNUAL UPDATE OF FEDERAL REGULATIONS INCORPORATED BY REFERENCE)**

Orville Green stated this rule constitutes the annual update of the federal regulations that DEQ incorporates by reference into the Idaho Hazardous Waste Management Program. Idaho Code requires DEQ to retain primacy of the program. The annual updates are needed to maintain consistency with U.S. EPA regulations and retain primacy. Mr. Green reviewed the three changes included in the update regarding:

- Recycled used oil management standards (primarily those that contain PCBs).
- Mixture of used oil with conditionally exempt small quantity generator waste.
- Amendment for surface coating operations for automobiles and light duty trucks (addresses treatment, storage, and disposal facilities in Idaho)

➤ **MOTION:** Craig Harlen moved the Board adopt the Rules and Standards for Hazardous Waste as presented in the final proposal under Docket No. 58-0105-0402.

**SECOND:** Don Chisholm

**VOICE VOTE:** Motion carried. 6 ayes; 0 nays; 1 absent (McLaughlin).

**AGENDA ITEM NO. 10: CONTESTED CASE AND RULE DOCKET STATUS REPORT**

Paula Wilson briefly reviewed the status of pending contested cases and rule making efforts.

- a. Proposed Revision of Contested Case Provisions in the Environmental Protection and Health Act (EPA)

Doug Conde reported his findings on research he conducted into a possible change in the EPA to make appeals of certain types of agency actions record reviews. At the request of the Board,

he prepared draft legislation (Attachment 3). The proposed changes are intended to streamline the contested case process and make it more efficient.

Board members had mixed feelings about the proposed revisions and discussed sending the matter to the IACI and the ECSC for comment before going forward. Craig Harlen felt there was not a significant need for the proposed revisions and did not support referring it to the ECSC.

Don Chisholm commented the Board has received very little feedback about how it is doing from the public, regulated community, and legislature. He wondered if it would be helpful to set up a feedback process where this type of question could be presented for comment so the Board could better serve the public. Paul Agidius supported the idea of having a general feedback process so the Board could receive input from the public, but felt the specific question of how the public perceived the appeal process should be asked. Dr. Joan Cloonan commented the regulated community and groups such as IACI have been heavily involved in the rewrite of the EPHA over the years and are very affected by the contested case process. She thought the question of how the appeal process is working should be discussed with the regulated community and perhaps the germane legislative committees.

Don Chisholm suggested a comment section be created on the Board's Web page to invite public comment and feedback on how the Board is functioning. Toni Hardesty responded that one of the goals of the newly designed DEQ Web site was to make the Board information more prominent. The current DEQ Web site has a comment and feedback link to invite comments on DEQ service, but nothing specific to the Board. **A similar link can be created on the Board's Web page.**

**Chairman MacMillan summarized it was the sense of the Board that DEQ gather input from the stakeholders such as IACI, the ECSC, and the germane legislative committees regarding how the current contested case appeal process functions and if there is interest or support in making the proposed revisions.**

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

Chairman MacMillan thanked Paul Agidius for his outstanding leadership as Board chairman and presented him with a gift and a certificate of recognition signed by Governor Dirk Kempthorne and Director Toni Hardesty.

Dr. Joan Cloonan discussed a meeting she attended with the Valley County Commissioners in Cascade, Idaho on October 4, 2004. Local developers expressed concern about DEQ's nutrient pathogen analysis and its applicability to Valley County. They also questioned DEQ's and the health district's use of guidance and requirements that hold up projects and require more information, mainly regarding small community septic systems. Mike McGown, DEQ Boise Region Administrator, also attended the meeting and has discussed the matter with Dr. Cloonan and Director Toni Hardesty. Dr. Cloonan believed better communications would be a big part of the solution.

Director Hardesty said a letter is being drafted to the county commissioners, legislators, and others who attended the meeting to propose a series of meetings to discuss these issues. Some of

the problems may be resolved by helping developers with pre-application meetings to help them resolve problems up front and refer them to appropriate resources and information.

Craig Harlen commented there seems to be a storm gathering on the issue of guidance and suggested it might be helpful for DEQ to review permits to see what percentage exceed or are outside the guidance. If 100% of permits meet the guidance criteria, then it would appear that guidance is being applied as a rule.

Paul Agidius thought DEQ and perhaps the Board should look at the issue of how guidance is applied as well as how it is developed. He felt it was a policy matter that was more appropriately addressed by DEQ and the Board, than industry.

Dr. Cloonan observed that just as the law requires that rules be developed with good science, it is feasible to think that guidance should also be developed using credible science.

Director Hardesty agreed it would be helpful to develop the data to show how guidance is applied by DEQ. She noted that there is a broad spectrum of guidance ranging from a simple reference to detailed technical guidance. She supported using good science to develop guidance where appropriate, but in some cases it may be "over kill" and would discourage the development of guidance that would be valuable to the regulated community because the process is too onerous.

Don Chisholm believed the best course would be to simply have management discuss the matter with staff in the field to clarify how guidance should be applied. He was concerned that too much emphasis and credence was being given to the matter without looking at the facts of any specific cases to learn the reasons why guidance was or was not followed. Chairman MacMillan agreed and felt it was a matter of implementation and communication with staff to stress that guidance was just guidance, and there should be some flexibility.

Dr. Cloonan cautioned the concerns about guidance may become a legislative issue and might warrant a closer look. Doug Conde noted that at the request of the Board, Harriet Hensley, Deputy Attorney General and Board counsel, has been researching the issue of rule versus guidance. Chairman MacMillan requested legal staff prepare a presentation for the Board reviewing the legal parameters of the issue including the provisions of the APA and the Idaho Supreme Court decisions.

Don Chisholm suggested Director Hardesty draft a letter to staff to let them know the concerns expressed by constituents regarding the use of guidance and reinforcing the proper application of guidance. A copy of the letter could be circulated to germane legislative committees to advise them of the situation.

Doug Conde pointed out that some of the guidance documents used by DEQ were developed on the advice of the Attorney General's Office to ensure rules are being enforced consistently and to avoid claims of arbitrary and capricious actions. The intent of the guidance is to give the regulated community a consistent approach to how DEQ interprets and applies the rules.

Chairman MacMillan asked if the Board wanted to continue to track action items in the Board minutes and review them at the next meeting. The Board concurred that action items should be highlighted and listed in the minutes and placed on the agenda for the next meeting for review.

The meeting adjourned at 3:00 p.m.

/s/

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Dr. John R. MacMillan, Chairman

/s/

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Craig Harlen, Secretary

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Debra L. Cline, Management Assistant and Recorder

### ACTION ITEMS

1. Investigate the question of whether DEQ could balance cost versus environmental concerns when making decisions on permits. (Doug Conde) .....Page 3, August 5, 2004 minutes
2. Update on the actions of the ECSC Servicing Communities: Planning for the Future Subcommittee and Land Use Planning Act issues. (Jon Sandoval)..... Page 7, August 5, 2004
3. Report on recommendations regarding a possible change to the contested case appeal process to make an appeal would be a record review. (Doug Conde).. Page 8, August 5, 2004 minutes
4. Create a “How are we doing?” link on the Board’s Web page for feedback and comments ..12
5. Gather input from the stakeholders such as IACI, the ECSC, and the germane legislative committees regarding how the current contested case appeal process functions and if there is interest or support in revising the EPHA to make contested cases record reviews. (Doug Conde) .....12
6. Presentation reviewing the legal parameters of the guidance versus rule issue including the provisions of the APA and the Idaho Supreme Court decisions (Doug Conde & Harriet Hensley .....13