



State of Idaho
DEPARTMENT OF ENVIRONMENTAL QUALITY
BOARD OF ENVIRONMENTAL QUALITY

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Toni Hardesty, Director

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IDAHO BOARD OF ENVIRONMENTAL QUALITY

MINUTES

June 29, 2011

The Board of Environmental Quality convened on June 29, 2011, at 8:30 A.M.
at:

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

BOARD MEMBERS PRESENT

Nick Purdy, Chair
Carol Mascareñas, Vice-Chair
Dr. Joan Cloonan, Secretary
Craig Harlen, Member
John McCreedy, Member
Dr. John R. "Randy" MacMillan, Member

BOARD MEMBERS ABSENT

Kermit Kiebert, Member

LEGAL COUNSEL

Douglas M. Conde
Harriet A. Hensley

DEPARTMENT OF ENVIRONMENTAL QUALITY STAFF PRESENT

Toni Hardesty, Director
Douglas Conde, Senior Deputy Attorney General, DEQ
Paula Wilson, Rules Coordinator
Rosie Alonzo, Management Assistant, Assistant to the Board
Barry Burnell, Administrator, Water Quality Division
Martin Bauer, Administrator, Air Quality Division
Don Essig, Water Quality Standards Coordinator
Lisa Carlson, Deputy Attorney General – DEQ
Jess Byrne, Intergovernmental Affairs Coordinator
Ed Hagan, Ground Water Program Manager
Jessica Atlakson, Ground Water Hydrogeologist
Amy Williams, Source Water Program Analyst
Katherine Elliott, Source Water Protection Implementation Coordinator
Michael McCurdy, Remediation Manager

BOARD ASSISTANT

Rosie Alonzo
(208) 373-0240

OTHERS PRESENT:

Jack Lyman, Idaho Mining Association (IMA)
Brian Sheldon, Idaho Department of Water Resources (IDWR)
Keri Huston, Idaho Rural Water Association (IRWA)
Melinda Harper, Idaho Rural Water Association (IRWA)
Pat Barclay, Idaho Council Industry & Environment (ICIE)
John Monks, Monks Hydro (MHGS)
Brenda Tominaga, Idaho Ground Water Assoc. (IGWA) & Idaho Rural Water Assoc. (IRWA)
Craig Anderson, Murry, Smith & Associates, Inc. (MSA)
Sean Ellis, Capital Press
Brent Walton, Our Children's Trust
Bob Naerebout, Idaho Dairymen's Association
Brian Oakey, Idaho State Department of Agriculture (ISDA)
Ken McClure, Givens Pursley
Mike Backe, Olympus Technical Services, Inc
David Bleu, Idaho Power Company
Jon Bowling, Idaho Power Company
John Simpson, BRS
Wyatt Prescott, ICA
Brent Olmstead, Milk Producers of Idaho
David Tarkalson, United States Department of Agriculture, Agriculture Research Services
Dave Bjorneberg, United States Department of Agriculture, Agriculture Research Services
Claudia Haynes, Canyon County Alliance for Responsible Growth (CCARG)
Robbin Finch, City of Boise
Paul Woods, City of Boise
Sarah McCormack, Idaho Water Users Association (IWUA)
Sam Routson, Idahoan Foods
Kevin Beaton, Stoel Rives
Hugh O'Riordan, Idaho Dairymen's Association
Marv Pattern, Idaho State Department of Agriculture (ISDA)
Steve Dobbin, Citizens of Owyhee County Organized Association (COCOA)
Vala Metz, U.S. Attorneys

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

CALL TO ORDER

Chairman Nick Purdy called the meeting to order at 8:30. He started off by giving recognition to Board Member Craig Harlen, whose term is ending. Mr. Harlen does not plan to seek reappointment. A letter from Governor Butch Otter was read and presented to him, thanking him for his service to the state of Idaho.

Chairman Purdy opened the floor for the public to address the Board on topics not specifically identified on the agenda. Mr. Jack Lyman, Executive Vice President of Idaho Mining Association, took the opportunity to speak in favor of Mr. Harlen's service with the Board.

Chairman Purdy asked if there were further comments from the public. There were none.

AGENDA ITEM NO. 1: DIRECTOR'S REPORT

Director Hardesty gave some brief updates:

7th Annual Idaho Wastewater Reuse Conference – DEQ recently held this conference on May 24 and 25. It was very well attended and DEQ received positive feedback. DEQ is planning an 8th annual conference next spring and will notify the Board of those dates.

Beneficial Use Reconnaissance Program (BURP) – This program is up and running. Training is currently underway and employees will begin field work after the 4th of July.

Crop Residue Burning Advisory Committee – This committee helps guide DEQ staff and the agency on decisions relating to the crop residue burning program. There are some vacancies on the committee. DEQ is currently going through the process of evaluating applicants and soon will be appointing new members.

Hecla Settlement – Hecla is the last significant party on the Coeur d'Alene Basin Superfund site to settle. A Consent Decree is out and subject to a 30-day public comment period. Assuming no significant changes occur from the public comment period, DEQ expects Judge Lodge to approve the Consent Decree by the end of the summer. The monetary terms of the settlement will require Hecla to pay \$263.4 million over a three (3) year period. Roughly, \$197 million will be used for ongoing cleanup and related operations and management in the Coeur d'Alene basin. DEQ is working with the Environmental Protection Agency (EPA) to determine DEQ's role in the clean-up and how we will move forward. The remaining twenty-five percent or \$65 million will be reserved for restoration of natural resources in the basin. DEQ and Idaho Department of Fish and Game are in discussion with other natural resource trustees, to fully participate and develop restoration plans and implementation for the remainder of that money. DEQ continues to work with Hecla and EPA to coordinate not only the cleanup, but future mining opportunities.

Pollution Prevention – DEQ is now accepting applicants for recognition of environmental friendly business during this fall's Pollution Prevention Week. Any business can nominate themselves or any other business as a Pollution Prevention Champion. Applications are on-line and are due July 15.

Director Hardesty stood for and responded to questions from Board members.

Chairman Purdy asked about the administration of the Hecla settlement money. Director Hardesty commented that the primary remediation money goes to EPA. A portion goes to Idaho where DEQ administers the institutional controls program and the siting of repositories, and a significant portion is administered by the Natural Resource Trustees collectively for restoration projects.

Mr. Harlen commented on the Idaho Wastewater Reuse Conference stating that the operators up north were very pleased and thought it was a worthwhile conference.

AGENDA ITEM NO. 2: ADOPTION OF MEETING MINUTES

Minutes of April 25, 2011.

➤ **MOTION:** Dr. Randy MacMillan moved the Board adopt the April 25, 2011 minutes as prepared.

SECOND: Ms. Carol Mascareñas

VOICE VOTE: Motion carried unanimously.

**AGENDA ITEM NO. 3: WATER QUALITY STANDARDS, DOCKET NO. 58-0102-1101
(TEMPORARY RULE)**

(RULEMAKING TO REVISE TWO SECTIONS ADDRESSING TEMPERATURE: 1) THE THERMAL TREATMENT REQUIREMENTS WHICH LIMIT THE RISE IN WATER TEMPERATURE DUE TO WASTEWATER TREATMENT PLANTS, AND 2) SITE-SPECIFIC CRITERIA FOR WATER TEMPERATURE TO PROTECT SALMONID SPAWNING)

Barry Burnell, Water Quality Division Administrator, introduced himself and Don Essig, Water Quality Standards Coordinator. Mr. Burnell gave a synopsis of the temporary rule. He said while working with EPA on draft permits for waste water treatment dischargers, DEQ recognized its water quality standards were out of step with EPA's recommendations in a couple of areas. As a result, DEQ determined that changes to the standards were necessary. These changes related to the thermal treatment requirements which limit the rise in temperature due to wastewater treatment plants, and site-specific criteria for water temperature to protect salmonid spawning. EPA uses these standards when issuing their NPDES permits. As NPDES permits are coming up for renewal, these changes are needed. Mr. Burnell asked Mr. Essig to take the Board through the specific changes to the standards.

Mr. Essig first explained that the question of specificity relating to when spawning occurs stems from an adverse court decision in the state of Oregon which caused DEQ to pullback from a statewide change in temperature criteria to protect salmonid spawning and instead propose only a site-specific change to the criteria. For the specific application before the Board, he explained DEQ is adding 3 subsections to the site-specific criteria in section 278 of the water quality standards. This section deals with water bodies within the Lower Boise hydrologic unit which is from Lucky Peak Reservoir down to the confluence with the Snake and water draining therein. The proposed changes to spawning criteria affect three water bodies currently designated for protection of salmonid spawning - one segment of Indian Creek and two segments of the Boise River.

The first change (subsection 05) addresses Indian Creek spawning. In consultation with Jeff Dillon, a fisheries biologist from the Department of Fish and Game, DEQ concluded that brown trout and rainbow trout are the species of concern in Indian Creek. DEQ was able to eliminate whitefish, according to Mr. Dillon's expert opinion, because they were not spawning in Indian Creek. The timeframe for spawning in Indian Creek is October 15 through June 30.

The second change (subsection 06) addresses spawning in two segments of the Boise River. In the Boise River there are three species: brown trout, mountain white fish and rainbow trout. The

time frame for spawning in the Boise River is November 1 to May 30. This comes from an analysis of water temperature data provided by the City of Boise and a report from Idaho Fish and Game that says fish populations in the Boise River have improved over the past 20 years.

The third change (subsection 07) addresses site-specific changes to point source thermal treatment requirements. These requirements are a part of DEQ's current rules in Section 401 that provide a limitation on an increase in temperature that a discharge can cause. Even though these requirements have been in the books for years, these requirements have never been put into a NPDES permit. The City of Boise wastewater treatment plant NPDES draft permit renewals would be the first. Through the permit renewal process it became evident that meeting the one and two degree treatment requirements would impose enormous costs for cooling effluent through the winter with little or no demonstrable environmental benefit. After conferring with EPA, DEQ decided to remove its limitations on increase in water temperature. DEQ is proposing these site-specific changes for all water within the Lower Boise HUC so as not to delay EPA approval due to Endangered Species Act (ESA) consultation.

DEQ is also moving forward with changes in Section 401 that remove the one and two degree thermal treatment requirements statewide. By adopting both a site-specific removal of the treatment requirements and also, in a separate action removing it statewide, EPA can approve the site specific removal of the treatment requirements for water within the Lower Boise HUC quickly enough to affect the City of Boise's permits, while they take more time on consultation on the broader application across the state. Mr. Essig and Mr. Burnell stood for questions from the Board.

Dr. MacMillan asked if it was possible, as the state progresses through the rest of the revision and rules in Section 401 that the language being struck today might come back before the Board. Mr. Essig replied that if EPA determines the state's Administrative Rules aren't consistent with the Clean Water Act, it would be incumbent upon DEQ to come back and clean that up. Mr. Burnell added, if EPA consults with the services and finds that 401 C and D don't have an ESA influence or impact, they could very well approve the deletion and then be done. Only if they disapprove it would DEQ come back with a revision to the site specific subsection 07. This will be determined based on actions of the EPA.

Dr. MacMillan asked if EPA's concern is limited to ESA species and not with other cold water species or biological systems. Mr. Essig said EPA's concern is not necessarily just with ESA species and explained where other cold water species considerations are made, particularly for spawning requirements.

Ms. Mascareñas asked a question regarding the description that talks about the origin of the thermal treatment requirements. She inquired if there is a basis for the number? Mr. Essig responded that it is based on a measureable change in water temperature and allows for some discharge of heat where water is naturally warmer than the actual criteria. Mr. Burnell added that this is where natural conditions are exceeding current salmonid spawning criteria. This allows for a small incremental increase in warming of that natural condition.

Chairman Purdy questioned why there was an immediate need for the rule and why the Board would adopt it without the EPA approval. Mr. Essig said that DEQ has two draft permits right now for the City of Boise (Lander Street facility and West Boise facility) and the 401

certification deadlines are quickly approaching. EPA had originally written those permits based on the rules without the changes and put in thermal effluent limits that would require a great deal of chilling the effluent in those two facilities through the winter in order to meet that one or two degree temperature limitation as a treatment requirement. They have since put in conditional alternate limits assuming we are moving forward with this rulemaking. The timing is critical. Mr. Burnell added the final permits are targeted to be issued for the two wastewater treatment plants on the Boise River at the end of this year or first of next year. The timing is important for when the draft permits go out for public comment. The basis for temperature requirements is in the permit, and through the temporary rule, will at least have some foundation in DEQ's Water Quality Standards.

Mr. Burnell continued by explaining that DEQ had to adopt standards first and then submit them to EPA for approval. He said that based on interaction, discussion, and negotiation with EPA, it is highly probable that EPA will approve what is being presented today. As far as the standard goes, 13 degrees C is based on EPA's regionally recommended temperature criteria that they developed and finalized in 2003.

Dr. MacMillan asked if the state can allow for mixing zones for temperature. Mr. Burnell and Mr. Essig both responded yes. There were no further questions from the Board.

Chairman Purdy asked if there were any public comments.

Mr. Paul Woods, Environmental Division Manager for the City of Boise Public Works Department, introduced himself and Robyn Finch, City of Boise Water Quality Manager. Mr. Woods briefly testified in support of the proposed rule and thanked DEQ staff for all their work on this particular subject. He stated that this temporary rule is extremely important to the City of Boise. The absence of this rule would mean the choices available to the City would be extremely expensive. The City would have to install energy intensive chillers and cool their wastewater in the winter time, which a lot of people would have a tough time trying to understand as rate payers. The city supports the rule.

Mr. Craig Anderson of Murray, Smith & Associates and speaking also for the City of Nampa, said they were in support of the rule, as well. He expressed appreciation to DEQ staff for their willingness to work with the city and others. He wanted to reiterate Mr. Paul Wood's comments that the old rule would severely limit the options available to the City of Nampa and also impact the cost effectiveness.

Chairman Purdy asked if there were further comments from the public on this temporary rule. There were none.

- **MOTION:** Mr. Craig Harlen moved the Board adopt this Temporary Rule for Water Quality Standards Docket 58-0102-1101 – Version Two (2), with the effective date of June 30, 2011.
- **SECOND:** Dr. Randy MacMillan
- VOICE VOTE:** Motion carried unanimously.

AGENDA ITEM NO. 4: RULES FOR THE CONTROL OF AIR POLLUTION IN IDAHO, DOCKET NO. 58-0101-1003 (PENDING RULE)
(STREAMLINE IDAHO'S RULES FOR CONTROL OF KRAFT PULP MILLS)

Martin Bauer, Air Quality Division Administrator, presented a streamlining rule for Kraft Pulp Mills. Mr. Bauer explained a kraft pulp mill takes wood and turns it into pulp and then into paper. This rule affects only one source in Idaho – the Clearwater facility in Lewiston. Existing Kraft Pulp Mill rules were promulgated back in 1972. Since then, federal rules and regulations have been promulgated making existing state rules obsolete and confusing. This rule is basically a clean-up rule which deletes obsolete state pulp and paper rules.

For many years in Section 58.0101.0107, DEQ has incorporated by reference the federal rules. However, by doing so, there is one boiler at Potlatch that is not covered by the federal rules. Sections 815, 816, and 817 insert new language in the rule which covers Clearwater's one boiler that is not federally regulated and it exempts anything that is regulated by the federal rules.

Section 818 is a definition of excess emissions which provides clarity needed between DEQ and Clearwater when defining what excess emissions are and when reporting requirements in sections 130 through 136 apply.

DEQ testified that this was a negotiated rule making and it included DEQ and representatives from Clearwater. There is no anticipated additional cost to the regulated community, since this is merely lining up the state rules with the federal rule. This rule does not regulate an activity not regulated by the federal government, nor is it broader in scope or more stringent than the federal regulation. Mr. Bauer stood for questions from Board members.

Mr. Craig Harlen asked if the adoption of this rule changes any of the operating criteria for the Clearwater facility as they are presently operating. Mr. Bauer replied it will not. The rule will clear up confusion on which rules apply. It will not change how they operate.

Dr. Randy McMillan inquired about the notice of rulemaking for this proposed rule. It identifies the final proposal before the board being October 2011 rather than today. He wondered if it was a problem. Ms. Paula Wilson explained that it was not.

Chairman Purdy asked how this rule would appear online if approved. Mr. Bauer responded that the state rules will read exactly as seen on pages 79-82. Most lines are struck. The new rule will contain only 815 through 818. Under IDAPA 58-0101-0107, DEQ has the incorporation by reference, so an individual will have to go to the Code of Federal Regulations to see exactly what they are.

Chairman Purdy asked if Clearwater supported the rule change. Mr. Bauer said they do and their intention was to testify but he wasn't sure if they made it.

Chairman Purdy asked if there was public comment.

Mr. Kevin Beaton, attorney, spoke on behalf of Clearwater Paper. He said Clearwater Paper fully supported the rule changes. He said DEQ worked closely with Clearwater on this issue. He also expressed Clearwater Paper's appreciation of the rule changes and the efforts of Mr.

Bauer and his staff, and that they would also appreciate the Board's consideration in adopting these rule changes.

Mr. Harlen asked Mr. Beaton if the proposed rule changes alter in any way the operation of the facilities at Clearwater. Mr. Beaton replied that it was his understanding that they would not.

Chairman Purdy invited further comments from the public on this pending rule. There were none.

- **MOTION:** Dr. Joan Cloonan moved the Board adopt this Pending Rule for the Control of Air Pollution in Idaho Docket 58-0101-1003, with the rules becoming final and effective on the adjournment sine die, of the second regular session in the 61st Idaho Legislature, if approved by the Idaho Legislature
- **SECOND:** Mr. Craig Harlen
- VOICE VOTE:** Motion carried unanimously.

AGENDA ITEM NO. 5: PETITION FOR INITIATION OF RULEMAKING, DOCKET NO. 0101-11-03
(FOR THE ADOPTION OF A RULE TO STRICTLY LIMIT AND REGULATE FOSSIL FUEL CARBON DIOXIDE EMISSIONS, AND TO ESTABLISH AN EFFECTIVE EMISSIONS REDUCTION STRATEGY THAT WILL ACHIEVE AN ATMOSPHERIC CONCENTRATION NO GREATER THAN 350 PPM OF CARBON DIOXIDE BY 2100)

Chairman Purdy started the petition for initiation of rulemaking discussion by asking Mr. Doug Conde, Senior Deputy Attorney General for DEQ, to explain the procedure for petitions for rulemaking. He also asked if this particular petition rises to that standard, and how to deal with it.

Mr. Conde explained that the Idaho Administrative Procedures Act and DEQ's rules provide for the petition process. It allows people to petition the board for adoption of a rule. The law requires that the Board either direct DEQ to move forward with the rulemaking or deny the petition at this board meeting.

Mr. Conde continued explaining that if the Board denies the petition, it must be done in writing, explaining the reasons for the denial. The Board must then alert the public and the petitioner of their right to appeal. Mr. Conde noted that there was one petition in the past where the Board decided to hear additional information and testimony. The Board delayed their final decision until a subsequent Board meeting. The only reason the Board was able to do that was because the petitioner agreed to the delay.

Chairman Purdy asked whether the Board should use a public hearing type process or if only the petitioner is allowed to testify. Mr. Conde responded by saying, if there is somebody present representing the petitioner, the Board will take testimony from that person. Any member of the public who wishes to testify can also do so. The Board can ask DEQ to give information related to the petition. It is an open process and an open meeting for members of the public involved to the extent that the Board allows.

Mr. Harlen asked Mr. Conde to review the criteria for judicial review in the case of an appeal. Mr. Conde explained that the Board's decision on this petition will be judged by a court

according to the Administrative Procedures Act (APA), if it is appealed. He went on to say that this is a matter entrusted to the Board's discretion. The court will look at this and see whether it meets the APA standards, such as; did the Board make this decision under lawful procedure, did it make their decision within the authority entrusted to the Board, and was the decision of the Board arbitrary or capricious. On the arbitrary or capricious standard, the court will look to see whether the Board has a reasonable rational basis for the decision made; whether the Board looked at the relevant facts represented, and, if the Board has ignored the relevant facts or the decision appears to have no rational basis.

Chairman Purdy asked if there was anybody from DEQ prepared to make a presentation. Director Hardesty responded by saying that DEQ has prepared some background information that might be helpful to the Board and is available to present it and answer questions.

Chairman Purdy asked the petitioner to introduce himself.

Mr. Brent Walton introduced himself as an attorney, representing the petitioner. He explained Kids vs. Global Warming was founded by Alec Loorz, a 15 year old sophomore at El Camino High School in Ventura, California. His group is dedicated to creating options for the youth to learn about the science of and solutions to climate change and then to take action to reduce dependence on fossil fuels and to influence the ruling generation to make good decisions now. Kids vs. Global Warming is assisted in this petition by Our Children's Trust.

Mr. Walton said Our Children's Trust had a PowerPoint presentation, unfortunately there were technical difficulties and he is not able to show the presentation. Mr. Walton said he would forward it to Ms. Wilson and asked that it be made part of the record. Mr. Walton continued to read from a few of the slides.

Mr. Walton stated that the Kids vs. Global Warming petition asks the Board to undertake a rulemaking to craft and adopt a climate action plan to help reduce greenhouse gas emissions. He said that the plan needs to be sufficient to meet the goals of sustainability and to preserve the public trust, such that if similar plans were adopted by other jurisdictions in the United States and internationally, in concert, they would allow the climate system on which we depend to be restored to its healthy state. He stated unless that is done, essential biological and hydrological services that are essential to civilization and nature alike will be fundamentally disrupted and perhaps irretrievably broken.

Mr. Walton's presentation touched on stabilizing concentrations of carbon dioxide (CO₂) in the atmosphere to 350 ppm, which means emissions in this state and elsewhere in the developed world must be systematically reduced by approximately 6% per year.

Mr. Walton asked that the scientific paper *The Case for Young People and Nature: A Path to a Healthy Natural Prosperous Future*, which was appended to the petition, be made part of the record. He mentioned that through this Board, Public Trust imposes legal obligation on the state of Idaho to affirmatively preserve and protect the interest of the trust beneficiaries in an atmosphere whose composition produces an overall energy balance that provides for an inhabitable climate system.

In summary, Mr. Walton reiterated the following four points:

- warming of the climate system is driven by greenhouse gas pollution;
- Idaho state government has a fiduciary trust obligation to protect the earth's climate by reduction in atmospheric concentrations of CO₂ to approximately the 350 ppm level;
- CO₂ concentrations must decline at the average of 6% a year to result in zero carbon emissions by 2050; and
- the petition outlines a range of possible actions that can be taken. The petitioners do not request that the Board take any particular set of actions, only to devise and implement an enforceable climate action plan to ensure that the state is achieving its measure of proportional responsibility to ensure climate sustainability and to require regular accounting and reporting to assess success in achieving and meeting these goals.

Mr. Walton stood for questions from the Board.

Chairman Purdy asked Mr. Walton if there was a concerted effort to petition other states and what decisions have been made in other states. Mr. Walton said effectively this petition is being presented in all 50 states and to the federal government. He said he was not aware of any actual decisions

Ms. Mascareñas inquired if the petitioner reviewed what has already been done in this state. Mr. Walton said he did not personally review anything, however, his client did some research and review, but he could not give a detailed explanation.

Dr. Cloonan said Mr. Walton outlined a number of different directions to proceed and asked if they needed only to be a command and control type of reduction. She asked what other options are being looked at by the petitioner. Mr. Walton responded that they do not have a particular set of commands or controls; just something that would ensure that the ultimate goal is met – that being the reduction of CO₂ emissions.

Dr. Cloonan touched on the Public Trust that Mr. Walton mentioned in terms of environmental controls and protection, and asked what the Board's obligation is to respond to a specific allegation. She noted that this issue is being considered at a federal level, also. Mr. Walton responded he was not sure what specifically was being asked regarding legal obligation and DEQ attorneys could perhaps best answer the question. He reiterated that if a person is a fiduciary, you have a trust obligation and need to do what is in the best interest of whom you owe that obligation.

Chairman Purdy told Mr. Walton that he understood him to say his ultimate goal is zero carbon emissions by 2050. He went on to ask, what happens when there is wildfire? Mr. Walton responded by saying that the ultimate goal is to help stem and curtail Idaho's proportionate responsibility to meet a 6% reduction so that by 2050 the atmospheric concentration can get back to 350 ppm. He said if he said zero, he misspoke and he apologized.

Mr. Harlen asked Mr. Walton if his clients have done any studies or calculations that would show the impact of Idaho reducing its CO₂ emissions by 6% and if it is his contention, that if nothing else, we need to set an example. Mr. Walton was not aware of any such studies but said he would look into it. He said it is time to start setting a better example.

Dr. MacMillan asked Mr. Conde for his response to the Public Trust question. Mr. Conde explained that the Public Trust Doctrine comes out of the Equal Footing Doctrine, and the Public Trust Doctrine is focused on the right of the state to control water. In the state of Idaho, Idaho Code Section 58-1203 provides that the Public Trust Doctrine has no application to anything other than navigable waters.

Mr. Conde continued by saying the next step for the Board is to see if they have the authority to adopt the rule that has been requested. Initially, the Board has to look at the Environmental Protection Health Act to see whether it is within the scope of the Board's rule making authority. Because this petition involves something that is also regulated by the federal government, the Board needs to look at whether the Clean Air Act preempts the Board and the state of Idaho from taking this action. As the petition noted, the Clean Air Act allows you to be more stringent than the federal government. However, in Idaho for DEQ to be more stringent, the Board has to have specific statutory authority to do so.

Mr. Conde proceeded with saying, once the Board has made it through all those hurdles and has the authority to take the action, then the question is does it meet the standard of the APA for the decision that you reach.

Mr. Conde reiterated that Idaho Code is pretty clear that the Public Trust in Idaho has no application beyond navigable waters. That leaves the Board the discretion to go forward with the rulemaking or deny the petition. If the Board denies, then it must meet the APA standard as stated before.

Dr. MacMillan remarked to Mr. Walton that the EPA is trying to regulate carbon dioxide emissions. He asked him if there have been any studies specific to Idaho's emission reductions, particularly regarding the feasibility of starting by 2012. Mr. Walton said according to the best science available, 2012 is when people really need to start acting. He said there are all kinds of technologies being developed and there are the practical changes that can happen. Everybody needs to step up and take their proportionate share of responsibility. It is up to the scientists to figure what is that proportionate share.

Dr. Cloonan asked if Mr. Conde could clarify what the Board can do in terms of stringency. It was her understanding that if the Board promulgated a rule which had a standard or emission limitation or control technology requirement more stringent than the federal law; it would not become effective until specifically approved by statute. So it is not a limitation on what the Board can do, rather it is a limitation on the effectiveness of whatever is done. Mr. Conde said that was correct. The other process requirement is from 39-107 D, that if the Board adopts a rule that is more stringent and it is a science-based rule, certain standards must be met. This means the best scientific information available must be used. So there are substantive and a procedural requirement, and then it is not effective until specific statutory authority is given by the legislature.

Director Hardesty then introduced two DEQ presenters who provided background information on Idaho emissions—Mr. Jess Byrne regarding what DEQ is doing and Mr. Martin Bauer addressing what the EPA is doing.

Mr. Byrne referenced two handouts. He said the first handout has a pie chart that provides information on what Idaho's greenhouse gas emissions are, where they come from, and how Idaho compares to the rest of the country. The handout also pares down the emissions from Idaho's total gross emissions down to just those that this petition actually talks about, which are emissions from fossil fuel sources.

Mr. Byrne explained that most of the information presented comes from an emissions inventory that was completed in 2008 for Idaho using emissions data from 2005. He said that the data is still very relevant to 2011 because Idaho's emissions have not significantly increased over that time. Nationally, emissions have actually decreased primarily due to the economic downturn. Specifically, Mr. Byrne said that the United States greenhouse emissions in 2005 were 7,213.5 million metric tons of CO₂ equivalent (CO₂e), while they were 6,633.2 million metric tons CO₂ equivalent in 2009.

Dr. MacMillan asked Mr. Byrne if he could explain CO₂ equivalent. Mr. Byrne said CO₂ equivalent is just a common measuring term of different greenhouse gases that have different global warming potential. The greenhouse gases that DEQ looked at were: carbon dioxide, nitric oxide, methane and three different fluorinated gases.

Mr. Byrne went on to explain Idaho's gross emissions. Idaho had 37.2 million metric tons of CO₂ equivalent, that is .5% of the US emissions for that year. This ranks Idaho 47th nationally in greenhouse gas emissions. That ranking is primarily due to Idaho's low population, and the fact that the state is not a heavy industrial state. Idaho also does not have any coal fired generations sources for electricity. The pie chart was broken out to show the various sources of CO₂ emissions.

Mr. Byrne continued by explaining that the emissions from fossil fuel sources, which this petition addresses, were 22 million metric tons of CO₂e. He said if you subtract the emissions that Idaho imports, the total in-state fossil fuel emissions are 17.3 million metric tons. That is 46% of Idaho's total greenhouse emissions. The majority of these emissions come from transportation, with residential, commercial, and industrial fuel use following. Mr. Byrne stood for questions.

Mr. Harlen remarked that he was fascinated by the fact that the US emissions dropped by 8% between 2005 and 2009. He asked what the world emissions did during that time period. Mr. Byrne said he was not certain of that number, however, the US used to be the number one source of greenhouse gas emissions in the world, but now China has moved to number one.

Dr. MacMillan asked if Idaho produces approximately .5% of the total US emissions, what percent is it of global emissions. Mr. Byrne said a very small fraction of a percent.

Chairman Purdy asked about forest fires. Mr. Byrne said 2005 was a high forest fire year. Emissions vary from year to year. The two sources from forestry are fires and forest decay.

Chairman Purdy asked if anyone had done a cost benefit analysis for this proposed rule. He wanted to know what it will cost Idaho. Mr. Bauer responded by saying the petition is pretty broad and is asking that each and every source of greenhouse gases within the state be inventoried annually. He explained that DEQ recently finished a State Implementation Plan for

the Treasure Valley, which involves a very detailed emission inventory. The cost was \$358,000 just for the three counties in the Treasure Valley. Assuming that the number of pollutants and the sources are somewhat similar, including the rest of the 44 counties, we estimate the cost would be three to five times greater. The FTEs for the Treasure Valley inventory were five full-time employees. The cost would be estimated at over \$1 million dollars for the low end of the scale just to do the emission inventory. In addition, the petition is asking the state to implement and track the 6% reduction. The total cost is estimated at a minimum of \$1.7 million to start with 15 FTEs.

Chairman Purdy remarked that the reductions could also cost millions of dollars to industry alone.

Ms. Mascareñas inquired about The Climate Registry that she saw listed on DEQ's website.

Mr. Byrne continued with his presentation on relevant state -level greenhouse gas activity in Idaho which included information about the Registry. He first explained Governor Otter's 2007 Executive Order that directed DEQ to work with state agencies to implement plans to reduce the state's greenhouse gas emissions, develop an emissions inventory, provide recommendations as necessary, and serve as a central point of coordination for the state. He then explained that steps had been taken to reduce emissions by making the state motor pool more fuel efficient. He said, specifically, that the Governor issued an Executive Order establishing a list of vehicles ranked on fuel efficiency that state agencies could purchase.

Mr. Byrne went on to say that there is also an Idaho Carbon Sequestration Advisory Committee which looks at opportunities for agriculture and forestry to participate in carbon market for financial gain. He said there is also the Idaho Strategic Energy Alliance (ISEA) established for activities relating to energy in the state of Idaho. The Legislature developed an Idaho Energy Plan in 2007 and the ISEA was put together to try to implement some of the goals of the energy plan and to identify more actionable items. One of the task forces in that group is called the Carbon Issues Task Force and they have written a report that addresses carbon issues in the state of Idaho.

As for the Climate Registry, the state of Idaho is a member on its Board of Directors. The Registry is a North American voluntary reporting structure where industry, businesses, states, and other entities can calculate and report their emissions using certain protocols. Mr. Byrne noted that it has been a challenge to get industry to report to a voluntary registry when they are anticipating mandatory reporting requirements from EPA.

Mr. Bauer then took over to discuss the federal requirements. He explained a handout relating to the EPA mandatory greenhouse gas reporting rule. He explained that this rule came into effect in October of 2009 requiring sources greater than 25,000 metric tons to report to a comprehensive nationwide emissions database. An estimated 85% - 90% of the total US greenhouse gas emissions from approximately 10,000 facilities are covered by the final rule.

Mr. Bauer also reminded the Board that they previously had approved DEQ's incorporation by reference which included the greenhouse gas permitting that EPA requires. He explained that DEQ is currently under a Federal Implementation Plan (FIP) to incorporate all of these rules into

permits in Idaho and that DEQ will soon be submitting a change to their State Implementation Plan (SIP) in place of that FIP.

Chairman Purdy asked if there are any other rules that EPA is proposing that Idaho would have to adopt by reference that will bring about reduction of greenhouse gases. Mr. Bauer responded by saying that every emission reduction rule implemented gets some co-benefit, be it reduced emissions from a stationary source for carbon monoxide, particulate matter, nitrogen dioxide, or sulfur dioxide. However, he didn't believe EPA had anything else on the horizon currently that is directly related to greenhouse gas emissions and their reductions other than this major federal rule.

Director Hardesty mentioned they did pass new CAFE (Corporate Average Fuel Economy) standards and the fuel efficiency standards for transportation that will directly impact auto manufactures.

Dr. Cloonan referred back to the major sources of emissions and inquired if the Board has any authority over transportation or residential or commercial fuel. Ms. Lisa Carlson, Deputy Attorney General, responded first to the transportation issue. She said, with new federal standards in place, it's not likely the state would have the authority to require more stringent controls on vehicles. Then the question would be if the state can require people to take alternative transportation. As part of Idaho's PM10 non-attainment plan, DEQ works with COMPASS and Idaho Transportation Department on changes to reduce emissions and miles traveled. However, it would be a very difficult legal argument whether the Board could require these reductions. Residential reductions would be the same difficult step to take.

Mr. Conde stated that even if Idaho could regulate and mandate reduction in vehicle miles traveled, it's questionable whether they could even achieve the reduction that the petitioners requested.

Mr. Walton said simply because you cannot mandate something, does not mean you cannot encourage a result to occur. He gave examples such as encouraging future purchases of electric cars to reduce the transportation issue, solar panels helping on the residential side, and new windows in government buildings. He said these are all ways to meet what the petitioner is requesting.

Mr. Conde mentioned that rules which set up programs that are not completely mandatory do exist.

Dr. Cloonan commented that she agreed that this request is not easily covered by a command-and-control type rule. She also pointed out efforts that are already underway throughout the state.

Chairman Purdy opened the floor for any additional public comments on this proposed rule.

Ms. Pat Barclay, Executive Director of Idaho Council on Industry and Environment (ICIE), introduced herself. She mentioned this is an issue of top priority for ICIE and that in their study, they have found there is a difference of scientific opinion on climate change, and cases limiting emissions being thrown out of court. Although there are very good credentials on both sides of

the debate, scientists are not anywhere near consensus with this issue. She stated that during testimony relating to a Cap and Trade program, it was testified that though a reduction in greenhouse gas emissions might be measured by instruments, it wouldn't be noticeable to people.

She commented that it is a nice effort bringing in children to back this petition, but suggested these groups would better served by planting trees after a forest fire. She said that we all agree there is some data showing climate change, but the data isn't clear that it is all human caused. She recommends that this rule making is not worth the cost.

Ms. Barclay stood for questions. There were no questions or comments from the Board.

Mr. Sam Routson introduced himself as representing Idahoan Foods and as having a personal interest in this petition. He urged the Board to reject the petition. He believes that the petitioners' case is inappropriately made before the Board and the Public Trust Doctrine cannot be used in this case. He feels the testimony of DEQ staff indicate they are active in meeting all state and federal regulations dealing with environmental quality. Based on the fact that the petition does not allege any failing on current law, rules, or code, and that the Board does not have the purview or authority to accept the petition under the theory that it is advanced, they have the responsibility to deny the petition.

Mr. Routson stood for questions. There were no questions or comments from the Board.

Chairman Purdy asked if there were other public comments concerning this petition. There were none.

Chairman Purdy asked what the Boards' pleasure was. Dr. MacMillan started off saying his perspective was the petition should be denied. It was not for lack of sensitivity to the issue of global climate change, but the perplexity of what has to be done. The Board has some fiduciary responsibilities in terms of environment quality, but it also has to look at the economic impacts to the citizens of this state. Idaho already has programs dealing with greenhouse gas emissions, and Idaho produces .5 % of the total US emissions. From a global perspective, there are unified efforts to reduce greenhouse gas emissions. It seems unreasonable for Idaho to embark on stringent programs to further reduce greenhouse gases from Idaho. He recommended that the Board deny the petition.

Mr. Harlen agreed with Dr. MacMillan's recommendation to deny the petition and added two specific reasons. First, the very narrow definition of public trust in the state of Idaho which is limited to navigable waterways, and second, the limitation by law from being more stringent than federal regulations.

Dr. Cloonan read a section of the Environmental Protection and Health Act in Idaho Code 39-102A (6): "The legislature further intends that environmental quality programs be promulgated and managed such that the benefits of pollution control measures have a reasonable relationship to the public health cost, private property rights, environmental, economic and energy impacts in such measures, provided that this section does not require the preparation of any economic environmental or other statement." She stated that was legislative intent. The state is moving

forward on several paths to address climate change and energy issues. She believes it cannot be done in a single rule from this Board, nor is it appropriate to promulgate such rules.

Chairman Purdy said he wanted to make sure the letter from IACI got entered into the record. Ms. Wilson said she had given copies to each of the Board members and the letter is in her official record.

Mr. Conde asked the Board to consider going into executive session with legal counsel to discuss legal ramifications and to craft a decision. He reminded them that a written order must be issued today.

➤ **MOTION:** Dr. Cloonan motioned pursuant to Idaho Code Section 67-2345(1) (F) that the Board go into executive session.

➤ **SECOND:** Dr. MacMillan

Roll call vote was taken with a unanimous vote for the Board of Environmental Quality to adjourn in executive session.

After the executive session, the Board of Environmental Quality meeting reconvened. Chairman Purdy asked Mr. Bauer and Mr. Byrne to come to the table for further questions from the Board members. Dr. Cloonan started with asking if the Board were to try by some regulatory process to reduce carbon emissions by six percent per year, would the reduction, if reasonable, come from transportation or industry or where? Would it be costly and is it feasible through a regulatory process?

Mr. Bauer referred back to the pie graphs showing 17.3 million metric CO₂ equivalent tons from Idaho fossil fuel sources. The petition is requesting six percent decrease of fossil fuel in Idaho which is 1.03 million metric tons. Transportation is the biggest part and DEQ is not likely able to regulate transportation. That leaves residential, commercial, and industrial sources. Regulating residential would be time consuming, costly, and probably highly controversial. Looking only at commercial and industrial which is 4.4 metric tons you would be looking at about a 25% reduction just for the first year. In addition, if DEQ were to decrease 6% of the industrial sources, DEQ would be looking at sources now regulated by EPA – the major sources that the Board just passed the rules on. He asked Ms. Carlson (Deputy AG) to add to his comments.

Ms. Carlson mentioned that 39-118 (b) of the EPHA discusses the stringency issue in relation to the Federal Clean Air Act. That statute says when there is a specific emission standard, emission limitation or control technology that the federal government has implemented, if the state wants something more stringent it must be approved by statute. This petition asks for a specific ambient concentration to be met of 350 parts per million. There is not a specific federal standard, therefore the standard alone is not what is more stringent; the emission limitation is not more stringent; but, what could potentially be more stringent is the control technology requirement. Because under the new federal laws in the tailoring rule that this Board enacted for major sources and modifications to major sources with greenhouse gas emissions, sources need to install a BACT (Best Available Control Technology.) If DEQ takes that small subset of industrial sources and require them to reduce by 6%, and the federal government requires them to install a BACT, it is pretty good guess that DEQ is going to have to require reductions lower than that specific control technology provides. There is a very good chance that DEQ would be

more stringent on a specific control technology requirement than the federal government and the Legislature would have to approve it by statute.

Chairman Purdy asked if it is possible to get to the 350 ppm the petitioner is asking for and what impact Idaho can have. Mr. Bauer responded that the 350 ppm is actually an ambient concentration that would be in the atmosphere. A monitor is needed to measure it and DEQ does not measure carbon dioxide in Idaho. Mr. Byrne told the Board that the global atmospheric level of carbon dioxide for 2010 was 388 ppm, and the last time the global level has been below 350 ppm was 1987.

Mr. Harlen asked Mr. Bauer if he could estimate the cost of the monitoring piece that is being requested to achieve the 6% reduction, because it was mentioned DEQ would need 15 full time employees just for monitoring once efficiencies of scale and operation were realized. Mr. Bauer said he could try to make an estimate. He estimates DEQ could come down to about 9 FTEs once they have hit maintenance. But for other sources DEQ would potentially need new expertise and he did not know what that would cost.

Ms. Mascareñas wanted a clarification on the estimated cost of \$640K. Mr. Bauer said on the low end, DEQ could start with \$1.07 million for implementation. Once a maintenance mode is hit through efficiencies, it could potentially go down to \$640K.

Dr. Cloonan brought up Ms. Carlson's comment on the stringency being one side of the equation, but said the agency also has other obligations under 39-107 D if it promulgates a rule not covered by the federal government. Ms. Carlson said 39-107 D has both process and substantive requirements if the rule is broader in scope or more stringent than the federal government. If the Board did grant the petition for 6% reductions and 350 ppm ambient standard, DEQ would have to show that they are using the best available peer reviewed science. The petition asks for DEQ to simply accept the information presented as the best available science. DEQ would not be doing the right thing by just accepting one organization's science without looking at opposing sides and bring to the Board what they think is the best scientific information.

Mr. Harlen inquired about cost and if DEQ would have to go outside the agency to get that information. Mr. Bauer said he did not know what that would cost but that DEQ would most likely have to get an outside contractor because right now DEQ does not have the resources.

- **MOTION :** Dr. Joan Cloonan moved that the Board reject the Petition for Initiation of Rulemaking, Docket No. 0101-11-03 for the adoption of a rule to strictly limit and regulate fossil fuel carbon dioxide emissions, and to establish an atmospheric concentration no greater than 350 ppm of carbon dioxide by 2100 for several reasons:
1. The cost of implementing the program out weights small projected benefits.
 2. It asks for impractical standards to achieve through rule making when considering the cost benefit versus our percentage contribution not only as a state, but globally. We are less than .5% of US emissions and to get those reductions through a regulatory process is about impossible.
 3. The Public Trust Doctrine in Idaho doesn't prevent us from going forward but it does not provide mandatory obligation to the state

➤ **SECOND: Mr. Craig Harlen**

Chairman Purdy stated that the motion had been made and seconded to not approve the request of the Petitioner for the adoption of a rule to regulate fossil fuel carbon dioxide emissions. He summarized the motion and asked if there is any discussion on the motion.

Dr. MacMillan commented that the petition asks the state of Idaho to make reductions sufficient to bring the global ambient CO2 level down to 350 ppm by 2100. Given Idaho's very meager contribution to global emissions of CO2, there is just no mechanism by which Idaho can do that. The Board has to deny the petition for several reasons, but if for no other reason, because it is impractical and impossible.

Ms. Mascareñas added that even prior to this petition; Idaho has been proactive in taking a leadership role in emission reductions.

Dr. Cloonan mentioned there is a lot to be achieved by working with Idaho's Legislature and its Energy Plan. It is a prime area for improving the state's emissions through energy issues.

Chairman Purdy said the Board supports the intent of the petition, but there are better methods for obtaining their goals. With no more discussion on this issue, a roll call vote was taken to go with the motion to deny the petition. It passed unanimously. Chairman Purdy thanked the staff and the petitioner for the great job. He directed Mr. Conde to craft an order in writing reflective of the motion for signature.

AGENDA ITEM NO. 6: CONTESTED CASE AND RULE DOCKET STATUS REPORT

Ms. Paula Wilson, Rules Coordinator, reviewed the current contested case and rule docket status report. A reference copy of the promulgation Status Report is attached to the minutes on file.

Ms. Wilson mentioned that it might be helpful in the future to schedule the hearing officers to attend a Board meeting for an interview either in person or by phone to be placed on the approved hearing officer list. Presently she has one application from a hearing officer in Boise. She will have him scheduled for the October meeting.

AGENDA ITEM NO. 7: ISDA'S ROLE IN GROUND WATER QUALITY MONITORING

Chairman Purdy explained that in last Board meeting, the Board heard a report from DEQ staff on Ground Water and Source Water Protection. He said it seemed that the state might be able to work together better in the area of ground water quality monitoring. He welcomed staff from the Department of Agriculture to give their perspective of the role in ground water quality monitoring.

Mr. Brian Oakey, Deputy Director of the Idaho State Department of Agriculture (ISDA), introduced himself and Marv Patten, Bureau Chief of their CAFO/Dairy Bureau. His remarks were in respect to their legal authorities in Title 37, Chapter 4 – the Sanitary Inspection of Dairy Products Act. He explained how ISDA got from doing sanitary inspection of dairy products to

water quality testing, looking for chloroform bacteria, and testing for nitrates on facilities. He mentioned they do not have any regulatory authority to take action against a facility for drinking water quality violations, but they do share all of that information with the DEQ as it is compiled for each individual facility. He answered questions from the Board.

Mr. Patten also addressed the Board, giving specifics to some of their questions.

AGENDA ITEM NO. 8: GROUND WATER DISCUSSION

Chairman Purdy explained the purpose for these discussions on ground water is to get a view on the coordination and efficiencies we can gain by all agencies working together. He restated his concern with the implementation of the ground water quality plan.

Mr. Bob Naerebout, Executive Director of the Idaho Dairymen's Association, introduced himself. He was brief on his presentation and commented on the map of nitrates that the DEQ Ground Water staff presented at the last Board meeting. He felt it was important to identify nitrate hot spots and what is going on in the nitrate situation. He indicated that he believed DEQ was unfairly targeting dairies as the source of the problem and that the dairy industry had data that reached different conclusions than the DEQ data. Mr. Naerebout then turned to presentation over to Mr. Hugh O'Riordan who provided a power point presentation. (See attachment).

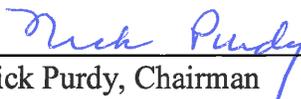
Hugh O'Riordan (Givens Pursley), Mike Backe (Olympus Technical Services, Inc.) presented concerns regarding DEQ's published studies on possible sources of nitrate. David Tarkalson (USDA, ARS), Dave Bjorneberg (USDA, ARS) then presented ideas and information on a proposed groundwater nitrate study. Mr. Monk, Ms. Claudia Haynes, and Irene Dobbins also provided input and comments on their concerns regarding high nitrate areas.

AGENDA ITEM NO. 9: LOCAL REPORTS AND ITEMS BOARD MEMBERS MAY WISH TO PRESENT

Mr. Harlen said farewell and that he had a good time serving on the Board. Everyone wished him well.

There were no other items to present.

THE MEETING ADJOURNED AT 3:25 P.M.



Nick Purdy, Chairman



Joan Cloonan, Secretary

Rosie Alonzo

Rosie Alonzo, Assistant to the Board and Recorder