IDAHO BOARD OF ENVIRONMENTAL QUALITY

MINUTES

November 9, 2011

The Board of Environmental Quality convened on November 9, 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
Dr. John R. “Randy” MacMillan, Member
Kermit Kiebert, Member
John McCready, Member
Kevin Boling, Member

BOARD MEMBERS ABSENT
None

DEPARTMENT OF ENVIRONMENTAL QUALITY STAFF PRESENT
Toni Hardesty, Director
Douglas Conde, Senior Deputy Attorney General, DEQ
Harriett Hensley, Deputy Attorney General
Paula Wilson, Rules Coordinator
Rosie Alonzo, Management Assistant, Assistant to the Board
Barry Burnell, Administrator, Water Quality Division
Martin Bauer, Administrator, Air Quality Division
Orville Green, Administrator, Waste Management & Remediation Division
Lisa Carlson, Deputy Attorney General – DEQ
Jess Byrne, Intergovernmental Affairs Coordinator
John Brueck, Hazardous Waste Regulation and Policy Coordinator
David Luft, Regional Airshed Manager
Bruce Wicherski, Voluntary Cleanup Program Analyst
Susan Hamlin, Deputy Attorney General – DEQ
Keith Donahue, State Response Program Manager
Jonathan Pettit, Vehicle I/M Coordinator
OTHERS PRESENT:
Charles Johnson, Canyon County citizen
Kathy Alder, Canyon County
Monica Reeves, Canyon County
David Ferdinand, Canyon County
Steve Rule, Canyon County
Sam Laugheed, Canyon County
Ray Amaya, KBOI Radio
Mary Krenzle, KBOI-TV
Mike Backe, Olympus Technical Services, Inc. (OTS)
Suzanne Budge, SBS Associates LLC

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

CALL TO ORDER AND ROLL CALL

Chairman Nick Purdy called the meeting of the Idaho Board of Environmental Quality (Board) to order at 8:30. Roll call was taken with all members present. He introduced the newest member of the Board, Mr. Kevin Boling, and asked him to say a few words about himself.

AGENDA ITEM NO. 1: DIRECTOR’S REPORT

Director Toni Hardesty presented her report before the Board. She reported that the Legislative session begins January 9, 2012. DEQ will be working with the Governor’s Office to schedule board member confirmation hearings in conjunction with the February board meeting.

DEQ does not plan on submitting legislation this session. During the first three weeks of the Legislative session, DEQ will focus on presenting rules that the Board has approved this year.

As for the budget request, the big priority for DEQ is finding funding for the Beneficial Use Reconnaissance Program without tapping into the general fund. DEQ will be requesting additional spending authority for the remaining ARRA projects funds and the Hecla settlement dollars toward remediation of the Bunker Hill site.

DEQ is wrapping up the crop residue burning program for this year. To-date for this season, there has been 64,727 acres burned statewide. Approximately, 40,000 of those acres have been in southern Idaho. This year’s season started late because of a wet spring. However, burning was able to continue late into the fall making numbers on par with prior years. One issue DEQ and the Crop Residue Advisory Committee are exploring relates to growers not being able to burn anytime 75% of the National Ambient Air Quality Standard for ozone is reached. DEQ is currently prohibited from allowing burning when this is the case, which results in less available burn days. DEQ’s technical staff is preparing information to evaluate potential changes that will hopefully resolve this issue.

Director Hardesty asked for any questions from Board members. There were none.
AGENDA ITEM NO. 2: **ADOPTION OF MEETING MINUTES**

Minutes of June 29, 2011.
Minutes of October 12, 2011

➢ **MOTION:** Dr. Randy MacMillan moved that the Board adopt the June 29, 2011 minutes as prepared.
➢ **SECOND:** Mr. Kermit Kiebert
➢ **VOICE VOTE:** Motion carried unanimously.

➢ **MOTION:** Mr. Kermit Kiebert moved that the Board adopt the October 12, 2011 minutes as prepared.
➢ **SECOND:** Mr. John McCready
➢ **VOICE VOTE:** Motion carried unanimously.

Chairman Purdy opened the floor for the public to address the Board on topics not specifically on the agenda. No items were presented.

Due to the Contested Case Hearing being listed on the agenda for 9:00 a.m., The Board jumped to agenda items No. 11 and 12.

**AGENDA ITEM NO. 11: **SET 2012 BOARD MEETING SCHEDULE**

The Board scheduled meetings for 2012 on the following dates: February 16, May 3, October 10 and 11, and November 14 and 15.

**AGENDA ITEM NO. 12: **LOCAL REPORTS AND ITEMS BOARD MEMBERS MAY WISH TO PRESENT**

Chairman Purdy gave the opportunity for items the Board members would like to present on any issues not listed on the agenda.

- Mr. Doug Conde, Deputy Attorney General for DEQ, had a follow-up from the last meeting regarding the criteria for hiring hearing officers and getting the Board a list of questions before interviewing that individual. He explained that the questions will be dependent on the resume received and the person the Board will be interviewing. As such, the Attorney General’s Office will review the potential candidates and make recommendations. They will also provide the Board with a list of questions relevant to that individual. In addition, the Board may have their own questions.

The basic criterion DEQ has always put in the advertisement for hiring Hearing Officers has been: 1) licensed to practice law in Idaho for five years, 2) experience in administrative procedure and administrative law, and 3) environmental law background is preferred. The Board agreed to this approach.
Ms. Carol Mascareñas inquired about the FMC clean-up status. Director Hardesty mentioned that EPA had recently put out a Proposed Plan for Interim Amendment to the Record of Decision (ROD), and the public comment period had been extended by EPA. She also stated that the Shoshone-Bannock Tribes have expressed some opposition to the clean-up plan.

Mr. John McCreedy asked to be excused at 3:45 today to attend to a prior commitment. He mentioned that he will not be able to attend tomorrow’s Board meeting.

Chairman Purdy inquired about the turn-over of staff at DEQ’s Twin Falls Regional Office. Director Hardesty informed the Board that DEQ holds exit interviews when an employee leaves the agency. The majority of those who have left have ranked their enjoyment of being employed at DEQ very high. However, for those who have left the agency for other jobs, it has been for an average salary increase of 36%. In the private sector, some employees are paid 50% more than what DEQ pays, and with federal agencies, it is in the low 30% more. This has been a significant challenge with other state agencies and cabinet members have raised the issue with Governor Otter. The Governor will be considering a CEC this year. She stated that with the salaries DEQ offers, it is very difficult to recruit people with the same level of expertise as those that DEQ is losing.

AGENDA ITEM NO. 3: CONTEST CASE HEARING

(CANYON COUNTY v. DEQ, DOCKET NO. 0101-11-02
ORAL ARGUMENT ON RECOMMENDED ORDER GRANTING SUMMARY JUDGMENT FOR RESPONDENT, IDAHO DEPARTMENT OF ENVIRONMENTAL QUALITY)

Note: A verbatim transcript of this hearing was prepared by a court reporter and is attached to these minutes as part of the record.

Chairman Purdy explained the Board will hear oral argument from the Petitioner, Canyon County and from the respondent, Idaho Department of Environmental Quality (“DEQ”). He gave a summary of the procedural stance of this case to date. Ms. Harriet Hensley, Deputy Attorney General, reminded the Board that each party will have 30 minutes to make their presentation, which includes rebuttal time. Canyon County will be first to present oral argument.

Mr. Sam Laugheed, Chief Civil Deputy of Prosecuting Attorney Office, introduced himself as representing Canyon County’s Board of County Commissioners. He proceeded with his oral argument for Canyon County.

Ms. Lisa Carlson, Deputy Attorney General, introduced herself as representing DEQ in this matter. She stated DEQ fully supports the Recommended Order granting Summary Judgment to DEQ issued by the hearing officer on August 19, 2011. She presented DEQ’s oral argument. At the conclusion of her presentation, she stated DEQ respectfully requests that the Board enter a final order as recommended the by hearing officer. Ms. Carlson stood for questions from the Board.
There was one question from Mr. McCreedy. There were no other questions from the Board. Chairman Purdy gave Mr. Laugheed five minutes for rebuttal.

Chairman Purdy asked if DEQ wanted to respond to the Petitioner’s rebuttal. Ms. Carlson said on behalf of DEQ there was no rebuttal, other than to say DEQ answered the three questions that were presented.

Chairman Purdy gave opportunity for the Board to ask questions.

- **MOTION:** Dr. Joan Cloonan moved that the Idaho Board of Environmental Quality go into executive session as authorized by Idaho Code Section 67-2345(f) to communicate with legal counsel.
- **SECOND:** Dr. Randy MacMillan
  - **ROLL CALL VOTE:** John McCreedy, aye; Dr. Randy MacMillan, aye; Carol Mascareñas, aye; Chairman Purdy, aye; Dr. Joan Cloonan, aye; Kermit Kiebert, aye; and, Kevin Boling, aye. Motion carried unanimously.

The meeting was closed to the public for the Board to go into executive session at 10:20 a.m. The Board consulted with its legal counsel, Harriet Hensley and Doug Conde, regarding this case. No action was taken during the executive session. The executive session adjourned at 10:36 a.m. and the meeting was reopened to the public at 10:47 a.m.

Each of the members commented individually, with the exception of Chairman Purdy and Mr. Kiebert, to their conclusion of the oral argument and their personal research of the facts provided.

- **MOTION:** Dr. Randy MacMillan moved that the Idaho Board of Environmental Quality reaffirm the hearing officer’s order base on all the augments and the evidences heard today.
- **SECOND:** Dr. Joan Cloonan
  - **ROLL CALL VOTE:** Chairman Purdy, aye; Dr. Joan Cloonan, aye; Carol Mascareñas, aye; Dr. Randy MacMillan, aye; Kermit Kiebert, aye; John McCreedy, aye; and, Kevin Boling, aye. Motion carried unanimously.

**AGENDA ITEM NO. 4:** **RULES AND STANDARDS FOR HAZARDOUS WASTE, DOCKET NO. 58-0105-1101 (PENDING RULE)**

(UPDATE OF FEDERAL REGULATIONS INCORPORATED BY REFERENCE)

Mr. Orville Green, Waste Management and Remediation Division Administrator introduced himself and Mr. John Brueck, Hazardous Waste Regulation and Policy Coordinator. He proceeded to present this rule which is an adoption of the federal Hazardous Waste Regulations promulgated July 1, 2010-June 30, 2011, authorizing DEQ to operate the RCRA program required by IC §39-4404. A notice was published in the Administrative Bulletin. No objections were filed, and no comments received. There is no added cost to the regulated community. There were no controversial issues in this
rulemaking and the proposed rule is not broader in scope nor is it more stringent than federal regulations and does not regulate an activity that is not regulated by EPA.

During this time, two federal regulations were published in the federal register that DEQ is adopting and neither will have a significant effect in Idaho. One of these rules involved removing saccharin and its salts from the hazardous waste list. The other had technical corrections to the Academic Labs Rule which weren’t substantive in their application to Idaho. Mr. Green, along with Mr. John Brueck, stood for questions from the Board. There were none.

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

➤ **MOTION:** Dr. Joan Cloonan moved the Board adopt as pending rules the Rules and Standards for Hazardous Waste as presented in the final proposal under Docket No. 58-0105-1101, with the pending rules becoming final and effective upon the adjournment sine die of the Second Regular Session of the Sixty-first Idaho Legislature if approved by the Legislature.

➤ **SECOND:** Dr. Randy MacMillan

**VOICE VOTE:** Motion carried unanimously.

**AGENDA ITEM NO. 5:** RULES REGULATING THE DISPOSAL OF RADIOACTIVE MATERIAL NOT REGULATED UNDER THE ATOMIC ENERGY ACT OF 1954, AS AMENDED, DOCKET NO. 58-0110-1101 (PENDING RULE) *(RULEMAKING TO REVISE CERTAIN DEFINITIONS AS NECESSARY FOR CONSISTENCY WITH HOUSE BILL 93)*

Mr. Orville Green, Waste and Remediation Division Administrator, continued with the next pending rule which complies with HB 93, approved by the Idaho Legislature and signed by Governor Otter earlier this year. It addresses the new definition of byproduct material contained in the Federal Energy Policy Act of 2005 and clarifies that certain materials now included in this new definition could continue to be disposed of at a commercial hazardous waste disposal facility located in Idaho. It also includes some technical corrections.

Mr. Green explained that there was no public hearing requested and no written comments were received from the public for this rule. There are no increased costs for the regulating community. This rule regulates an activity that is not regulated by the Federal Government, but it is consistent with the legislative directive codified at 39-4403 in the Idaho Code, which was to preclude radiological material from going in any other type of facility than a commercial hazardous waste facility – the most environmentally protective of all types of landfills in Idaho. Mr. Green and Mr. Brueck stood for questions from the Board.

Mr. McCreedy inquired if DEQ had an estimate of the quantity of materials disposed of in the only licensed facility in Idaho, and how much of that is medical waste. Mr. Brueck said that the US Ecology estimated 20,000 tons of waste is disposed of at the facility per year. DEQ did not have the amount that would be medical waste; however, it is all below the Nuclear Regulatory Commission (NRC) concerns.
Dr. MacMillan questioned if DEQ has a means to inform the public on the disposal of watches that have radium 226. Mr. Green replied that DEQ does not have anything that specifically addresses radium. This is a topic that can be added to DEQ’s website. Mr. Brueck explained there is a general exemption for watches that may have some radio activity in our Radioactive Material Rules, under Section 20.04. Mr. Green commented that DEQ does promote utilizing household hazardous waste collection days.

Chairman Purdy inquired about the disposal of new mercury light bulbs. Mr. Green responded household hazardous waste is exempt. Recycling of these items is a voluntary effort. DEQ has an educational program in our outreach group that addresses mercury and its disposal. Businesses are subject to hazardous waste rules for the disposal of florescent lights containing mercury. They can manage the disposal either under Subtitle C or the universal waste rule, but businesses do have to properly dispose of mercury products according to RCRA.

Mr. Kiebert asked if the AREVA plant in the Idaho Falls area, which reconstitutes rods, will cause additional rules and regulations by the department. Mr. Green said the AREVA facility is subject to the State’s hazardous waste laws, but it is primarily regulated by the NRC. AREVA produces enriched uranium. One of their waste products is depleted uranium hexafluoride which is a form of uranium. The NRC regulations require that to be de-converted and put into a form that is suitable for disposal. If AREVA has impacts to the water and air, or other things that generate routine hazardous waste because of equipment maintenance, they are required to follow DEQ’s RCRA rules.

Chairman Purdy asked if there was public comment. There were none.

➤ **MOTION:** Dr. Joan Cloonan moved the Board adopt as pending rules the Rules Regulating the Disposal of Radioactive Material Not Regulated under the Atomic Energy Act of 1954 as amended under Docket No. 58-0110-1101, with the pending rules becoming final and effective upon the adjournment sine die of the Second Regular Session of the Sixty-first Idaho Legislature if approved by the Legislature.

➤ **SECOND:** Dr. Randy MacMillan

**VOICE VOTE:** Motion carried unanimously.

**AGENDA ITEM NO. 6:** **STANDARDS AND PROCEDURES FOR APPLICATION OF RISK BASED CORRECTIVE ACTION AT PETROLEUM RELEASE SITES, DOCKET NO. 58-0124-1101 (PENDING RULE)**

*(RULEMAKING INITIATED TO UPDATE PORTIONS OF THE RULE THAT ARE PERTINENT TO EVALUATION OF PETROLEUM RELEASE SITES IN ORDER TO PROMOTE CONSISTENT CORRECTIVE ACTION DECISION-MAKING.)*

Mr. Orville Green, Waste and Remediation Division Administrator, introduced Mr. Bruce Wichterski, Voluntary Cleanup Program Analyst. Mr. Green described this rulemaking as an update to the standards and procedures for application of risk based corrective action at petroleum release sites. He further explained that this corrects the chemical toxicity values, updates screening levels established for soil and groundwater, adds screening levels for soil vapor measurements, and incorporates the use of soil vapor into the risk evaluation process.
Rulemaking was in the August Administrative Bulletin; no public hearing was requested or held. The legislative committees filed no objections. One negotiated rulemaking session was held and one written comment was received. There is no anticipated increase in cost to the regulated community and may actually reduce expenditures.

Mr. Green explained that by its nature, risk can be controversial. DEQ’ guidance provides a practical alternative to evaluate risks of the soil vapor screening levels. Another possible controversial issue addressed in the guidance is the ability to detect low values in the soil. DEQ staff collaborated with the regulated community on this guidance process. DEQ also revised its Petroleum Risk Evaluation Manual. Mr. Green recommended adoption of this rule. He and Mr. Wicherski stood for questions the Board.

Dr. MacMillan asked about the changes in values, assuming there are sites in Idaho that are under or have some corrective action due right now and assuming the rules go into effect, will those existing sites have to do anything different. Mr. Green replied that DEQ will not apply these rules retroactively. There is nothing that precludes a facility who would take advantage of the new screening levels. The rule does clarify the standard screening levels.

Ms. Mascareñas asked for a clarification. Based upon the old level, if somebody already has a corrective action in place and perhaps their contaminate of concern is one that has increased, can they resubmit screening values or some documentation that provides them relief to cleanup at the higher level. Mr. Green responded that what DEQ requires in a clean-up plan is a standard based on the toxicological values and other things. The facility can propose alternatives that DEQ can evaluate. Though the numbers have changed, the science dictates that the level of protection hasn’t changed. DEQ’s understanding of the impacts of these chemicals is better than it was ten years ago.

Mr. McCreedy asked if the regulated community expressed support for this rulemaking. Mr. Green said DEQ has their support. While DEQ only had one negotiated rulemaking session, there have been discussions since 2009 with strong participation from the stakeholders on guidance. The regulated community is interested in knowing when they are done and having DEQ provide a very clear path forward.

Dr. Cloonan inquired if DEQ has a separate manual to address the releases of hazardous or toxic materials and is it an issue. Mr. Green replied that it was an issue. Presently, DEQ has an outdated 2004 Risk Evaluation Manual (REM) that addresses non petroleum. There is high interest in an update and DEQ intends to work on it.

Chairman Purdy asked if there was public comment.

Ms. Suzanne Budge, who represents the Idaho Petroleum Marketers and Convenience Store Association, commented that the industry has worked with Mr. Green and his staff for many years on the initial program for underground storage tanks. This includes the rules and guidance. She mentioned her members are very pleased with the opportunity DEQ provides throughout this process and they are in support of this guidance document.

Chairman Purdy asked for any further public comment. There were none.
MOTION: Mr. John McCready moved the Board adopt as pending rules the Standards and Procedures for Application of Risk Based Corrective Action at Petroleum Release Sites as presented in the final proposal under Docket 58-0124-1101, with the pending rules becoming final and effective upon the adjournment sine die of the Second Regular Session of the 61st Idaho Legislature, if approved by the Idaho Legislature.

SECOND: Dr. Joan Cloonan

VOICE VOTE: Motion carried unanimously.

There was a short discussion on the start time of Thursday’s meeting. Dr. Cloonan would not be available until close to 9:30. Mr. McCready reminded us of a conflict he had and would not be attending Thursday’s meeting. Mr. Conde said there was no problem with starting later, but we could not start a meeting earlier than the time which was posted. The Board all agreed with a 9:30 AM start time. Ms. Wilson offered to email those who commented on the two dockets, letting them know of the later start time. Also, with time left in the day, Ms. Wilson offered to give her status report. Chairman Purdy agreed.

AGENDA ITEM NO. 10: 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.

THE MEETING ADJOURNED AT 11:52 A.M.

November 10 2011

BOARD MEMBERS PRESENT
Nick Purdy, Chair
Carol Mascareñas, Vice-Chair
Dr. Joan Cloonan, Secretary
Dr. John R. “Randy” MacMillan, Member
Kermit Kiebert, Member
Kevin Boling, Member

BOARD MEMBERS ABSENT
John McCready, Member

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
Jess Byrne, Intergovernmental Affairs Coordinator
Don Essig, Water Quality Standards Coordinator
Mary Ann Nelson, Water Quality Standards Scientist

IDAHO BOARD OF ENVIRONMENTAL QUALITY
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**OTHERS PRESENT:**
Brenda Tominaga, Idaho Rural Water Association  
Lynn Tominaga, UPA  
Jim Chandler, Idaho Power Company  
Chris Randolph, Idaho Power Company  
Sean Carington, Formation Environment  
Sarah Higer, Idaho Water; Barker, Rosholt and Simpson LLP  
Dave Miles, City of Meridian  
Craig Anderson, MSA  
Ralph Myers, Idaho Power Company  
Paul Woods, City of Boise  
Robbin Finch, City of Boise  
Jim Tucker, Idaho Power Company  
Michael Morse, US Fish and Wildlife Service

**CALL TO ORDER AND ROLL CALL**

Chairman Purdy called the meeting to order at 9:30 a.m., with all Board members present at roll call except Mr. John McCreedy who was excused and Dr. Joan Cloonan. (Note: Dr. Cloonan arrived within a minute after roll call.)

When asked, there was no public comment for items not listed on the agenda, so Chairman Purdy proceeded with agenda.

**AGENDA ITEM NO. 7: WATER QUALITY STANDARDS, DOCKET NO. 58-0102-1101 (PENDING 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.)

Mr. Barry Burnell, Water Quality Division Administrator, started with the presentation on the Water Quality Standards, Docket No. 58-0102-1101. This is a rulemaking that was started at the suggestion of EPA, Region 10 and supported by the National Pollution Discharge Elimination System (NPDES) dischargers in our State, for the purpose that the point source thermal treatment requirements and salmonid spawning temperature criteria could be modified before some older standards were used in NPDES discharge permits.

Mr. Burnell described the process and participants of this particular pending rule to date. On October 27, EPA approved the site-specific salmonid spawning temperature criteria for the lower Boise River, making those portions effective for our Clean Water Act purposes. No changes were made to the temporary rule.

DEQ did receive one written comment from EPA Region 10. There should not be additional cost to the regulated community. The adoption of this rule may make compliance simpler with NPDES permits.
As far as controversial issues or contentious elements of this rule, EPA did approve the site-specific portions. EPA did not take action on the statewide removal of the point source temperature criteria. In EPA’s comments, they proposed DEQ use a method to calculate what an allowable increase in temperature would be from a point source discharge. At that time, DEQ would have to go back and initiate additional rulemaking and further investigate whether that particular approach was appropriate for our State. DEQ has not done that.

This particular standard is not broader in scope or more stringent than the federal regulations and does not regulate an activity not regulated by the federal government. The rule does two things: it removes the numeric limitation on temperature increases due to point source discharges; and, it adopts the site-specific temperature standard for the lower Boise watershed. Mr. Burnell and Mr. Essig stood for questions from the Board.

Chairman Purdy asked if this only applied to lower Boise River, or would it work at Hailey or Bellevue discharging into the Wood River. Mr. Burnell commented that the site-specific portion of the rule would only apply to the Boise River and Indian Creek. It was pointed out that DEQ may allow a mixing zone. The point of compliance is at the edge of the mixing zone. How Section 401.01d of the rule is applied, if this rule is not adopted, then those dischargers will have a temperature requirement in their permit on the water that is discharged. The Big Wood River is a waterbody designated as cold water aquatic life – salmonid spawning, then it would have the cold water aquatic life component. Mr. Essig added that it would be a requirement to measure temperature immediately upstream of the discharge, and a companion measurement below the mixing zone, and that difference has to be less than 1°.

Dr. MacMillan inquired if this change pertains to sewage treatment plants and if it does not apply to fish farms. Mr. Burnell responded the rule not only applies to sewage treatment plants but to point sources of wastewater which would include industrial, commercial, and NPDES permittees that are discharging treated wastewater. If EPA issues a NPDES permit to a fish farm for the discharge of wastewater, this particular rule would apply.

Dr. MacMillan asked for a definition of wastewater. Mr. Burnell replied that wastewater has a broad definition and he did not have his standards with him. It covers the typical domestic wastewater, and includes industrial and commercial wastewater sources. Mr. Essig added that if a facility is subject to a NPDES permit, you have a discharge to surface water, to which this rule would apply.

Mr. Kiebert asked if there is a criterion that is set for mixing zones. Mr. Burnell responded there is a mixing zone section in the water quality standards that describes how they are developed and can be authorized to be included in a NPDES discharge permit.

There were no further questions from the Board. Chairman Purdy gave opportunity for public comment.

Mr. Paul Woods, Environmental Manager for the City of Boise, stated they are in support of the proposed rule. The City of Boise appreciates the work DEQ has done and feels it is an important step in the right direction in helping them and other municipalities in in the valley in complying.
with their NPDES permit. There are other issues that the City of Boise looks forward to working on with DEQ.

Mr. Craig Anderson, with Murray and Associates representing the City of Nampa, reiterated support to this rulemaking in particular for Nampa’s ability to avoid chilling their wastewater in winter.

Mr. Boling asked for a clarification. He understood the statewide criterion is changing the temperature from $1^\circ$ C to $.3^\circ$C in the allowable temperature change in the mixing zone. He asked if he interpreted it correctly. Mr. Burnell said that was incorrect. The $.3$ of a degree increase is the allowed increase in temperature when you are exceeding the standard. This particular rule change is about eliminating the $1^\circ$C allowed increase when the big water body is below the standard. It is a different situation.

➤ **MOTION:** Dr. Randy MacMillan moved the Board adopt as pending rules the Water Quality Standards as presented in the final proposal under Docket 58-0102-1101, with the pending rules becoming final and effective upon the adjournment sine die of the Second Regular Session of the 61st Idaho Legislature, if approved by the Idaho Legislature.

➤ **SECOND:** Dr. Joan Cloonan

**VOICE VOTE:** Motion carried unanimously.

**AGENDA ITEM NO. 8:** **WATER QUALITY STANDARDS, DOCKET NO. 58-0102-1102 (PENDING RULE)**

(RULEMAKING INITIATED TO INCLUDE A SITE-SPECIFIC TEMPERATURE CRITERION FOR THE SNAKE RIVER TO PROTECT FALL SPAWNING OF CHINOOK SALMON FROM THE HELL’S CANYON DAM TO THE SALMON RIVER.)

Mr. Barry Burnell, Water Quality Division Administrator, along with Mr. Don Essig, proceeded with the next Water Quality Standards, Docket No. 58-0102-1102 – the Snake River site-specific criteria temperature rule docket. This rulemaking was necessary to incorporate additional fall Chinook salmon studies that are being conducted that demonstrate successful spawning at higher water temperatures than specified in the water quality standards. The Snake River fall Chinook salmon population has demonstrated a significant recovery over the last ten years.

A site-specific temperature standard was adopted by the Board in 2004 and approved by the Legislature in 2005. This standard was based on EPA Region 10 temperature guidance at the time. Since that time, National Oceanic and Atmospheric Administration (NOAA) Fisheries and Idaho Power Company have conducted studies on fall Chinook population. Mr. David Geist and other authors have conducted controlled declining temperature research and published the data in 2006 specific to Fall Chinook salmon after the previous standard was adopted. The purpose of this particular rulemaking is to update DEQ’s water quality standards for temperatures in the Snake River, from Hells Canyon to the confluence of the Salmon River, as a revision to the existing site-specific temperature criteria. This proposed change in site-specific temperature criteria is from a weekly maximum temperature of $13^\circ$ C from October 23 to April 15 (the current standard) to a weekly maximum temperature of $14.5^\circ$ C from October 23 to November 6, and, then the weekly maximum temperature of $13^\circ$ from Nov. 6 to April 15.
Mr. Burnell resumed explaining the development and participants of this pending rule to date which included tribal interests, federal agencies, state agencies, Idaho Rivers United, and Idaho Power. There is no cost anticipated to the regulating community. DEQ did receive adverse public comment regarding the raising of the water quality temperature criteria from the 13 degree C to the 14 degrees C for the 14 day time period in the Snake River below Hells Dam to the confluence of the Salmon River from the tribes, EPA, and Idaho Rivers United. Supporting information and comments were received from NOAA-Fisheries and Fish & Wildlife Service.

This proposed rule is not broader in scope or more stringent than the federal regulations and does not regulate an activity not regulated by the federal government. EPA Region 10 does have regional guidance for temperature and that regional guidance does allow for site-specific criteria to be developed and adopted. DEQ feels like the proposal presented and the additional information on the declining temperature research that was submitted is supportive of a site-specific criteria. This change recognizes the existing ability of fall Chinook salmon to spawn and rear below the Hells Canyon complex in the Snake River to the Salmon River. Idaho Power’s presentation will describe in detail the existing status of the fish populations and the additional information that has been prepared since the previous rulemaking. DEQ feels it is an appropriate rule to be adopted to recognize the declining nature of temperature in river systems.

Mr. Burnell pointed out that this standard doesn’t relieve Idaho Power from making adjustment to their facilities or to the watershed to gain compliance with temperature in the Snake River. The facility will still have obligations under the TMDL and the water quality standards to comply with temperature requirements below the facilities. Mr. Burnell stood for any comments or question from the Board, and requested that Idaho Power follow with their presentation.

Dr. MacMillan asked if there is the standard or scientific requirement when making a criteria or water quality standard change. He also asked if EPA made reference to unambiguous science in the Clean Water Act. Mr. Conde responded that federal regulations set a standard for the submittal of water quality criteria. If the State does not adopt one of EPA’s Section 304 recommended criteria, it must be based on sound science rational and this rulemaking meets that criteria. Unambiguous science is not the legal test. Mr. Burnell noted that EPA did use the term of unambiguous science in their letter to Oregon DEQ.

Chairman Purdy asked for a clarification on declining temperatures – it isn’t that the temperatures are declining over a period of years; rather, is it declining because of the seasons. Mr. Burnell responded the declining temperature regime is on an annual basis where the temperatures in the summer will get warm and drop throughout the fall until it gets cold in the winter and then climbs back up in the spring. This particular standard change is for the fall portion where there is declining thermal regime.

Chairman Purdy commented that if the Board adopts this 14.5 °C, it will be up to Idaho Power to meet that temperature through management of the dams or other methods. Mr. Burnell said there are a number of points that should be discussed. Because the Snake River is a shared water body with the State of Oregon, this same proposal was presented to the Oregon’s Environmental Quality Board. Their Board directed ODEQ to undertake a review of this standard at their next tri-annual review. This component is not going to be effective for Clean Water Act purposes, or in this case for Federal Energy purposes, until the Oregon standard is revised as well. EPA
Region 10 will have to approve both standards for it to become effective for Clean Water Act purposes.

He continued with respect to the existing facilities and the 401 Certification application that has been presented to DEQ, the current application proposes to use a hypolimnetic pump system to withdraw colder water from the hypolimnion of Brownlee Reservoir to cool the Oxbow Reservoir and the Hells Canyon Reservoir so that the discharge at Hells Canyon Dam would comply with the water quality standard. The current application is for this pump system, which is outside of the scope of this rulemaking, because the site-specific criterion for the Snake River temperature is looking at that two week period of change from 13 degrees to 14.5 and how that three dam complex complies with that is yet to be determined. Mr. Bumell said he provided the Board with information about the current application to the State so they could understand what DEQ is reviewing in its 401 Program for complying with the particular temperature standard.

Dr. MacMillan questioned if the Board were to adopt 14.5 °C for that time period, what impact would such a temperature have on other biota in that stretch of the River and is there scientific evidence that the Snake River fall Chinook are the most sensitive species. Mr. Burnell responded he was not familiar if that has been fully studied, but the foundation is that fall Chinook salmon are considered the most sensitive species and thereby protecting fall Chinooks salmon, we are taking care of other salmonid spawning salmon.

There were no further questions from the Board. Chairman Purdy turned the floor over to Idaho Power for their presentation.

Mr. Jim Tucker, Idaho Power, introduced himself and Mr. Jim Chandler, Idaho Power Fisheries Department. Mr. Tucker started off with introductory remarks of what they will be addressing through their presentation. Accompanying them to answer questions were Mr. Ralph Meyer, Idaho Power Water Quality Division, and Mr. Chris Randolph, Idaho Power Environmental Department. Mr. Chandler proceeded with a PowerPoint presentation giving Idaho Power’s history of this site-specific criteria effort and their proposal; the status of fall Chinook salmon with supporting science; how fall Chinook in Hells Canyon in the Snake River compares regionally to other fall Chinook salmon populations; and addressing comments made in the negotiated rule-making regarding the proposal, along with comments to address the scientific peer-review on this specific issue.

➤ **MOTION:** Dr. Randy MacMillan moved the Board adopt as pending rules the Water Quality Standards as presented in the final proposal under Docket 58-0102-1102, with the pending rules becoming final and effective upon the adjournment sine die of the Second Regular Session of the 61st Idaho Legislature, if approved by the Idaho Legislature.

➤ **SECOND:** Dr. Joan Cloonan

**VOICE VOTE:** Motion carried unanimously.
AGENDA ITEM NO. 9: WATER QUALITY STANDARDS, DOCKET NO. 58-0102-1103 (PENDING RULE)

(RULEMAKING INITIATED TO MAKE THE LANGUAGE ON IMPLEMENTATION OF ANTIDEGRADATION PROCEDURES IN IDAHO’S WATER QUALITY STANDARDS CONSISTENT WITH CHANGES IN STATE LAW BROUGHT ABOUT BY THE 2011 LEGISLATURE’S PASSAGE OF HOUSE BILL 153.)

Mr. Barry Burnell, Water Quality Division Administrator, proceeded to present the last pending rule. He responded to Chairman Purdy’s comment that he was correct in his understanding that this particular rule was approved by the Board in 2010 and sent to the Legislature. Portions of the rule were rejected and were replaced by statute. The purpose of this rulemaking is to be consistent with changes implemented by House Bill 153, as it was enacted by the 2011 Legislature.

Mr. Burnell went on to explain the rejected portions of the Water Quality Standards which occurred by means of House Concurrent Resolution 16. This rulemaking is incorporating the changes that transpired by the passing of House Bill 153.

The first revision is in the definition of degradation, lower water quality is added. It is based on calculations or measurements as it appropriately appears throughout the statute.

The second minor change was in language regarding the presumption of general permits. This change also enhanced the component to conduct an antidegradation review in a manner that has broad applicability.

Another area of change was in the identification of Tier II waters. The revised rule rejected the nutrients and sediment information to shift from a Tier I to a Tier II water. Now we are only looking at pH, dissolved oxygen and temperature as the three pollutant types to shift from a Tier I water to a Tier II water.

The way insignificant activity or discharge was evaluated was also changed. The Legislature opposed one of the tests. The test of insignificance now is whether or not the proposed activity would exceed the 10% of the assimilative capacity of a water body.

This particular rule also includes a portion of House Bill 153 that talks about special resource waters. The statute directs the agency to evaluate special waters in the same fashion as all other waters. Mr. Burnell went on to explain this revision caused several pages of rule changes to strike “SRW” from the designated use and with these rule sections open for revision, it was appropriate for DEQ to update the eight Boise River tributaries.

Because this is a clean-up rule-making incorporating House Bill 153, DEQ did not hold a public hearing. The proposed rule was published on DEQ’s webpage. It was also open for public comment. DEQ received one comment from the Greater Yellowstone Coalition, but it did not generate a change to the rule. DEQ submitted this particular rule and House Bill 153 to EPA back in April, 2011. The EPA did approve the antidegradation rule on August 18, 2011 to enable DEQ to develop section 401 water quality certifications on the EPA draft NPDES permits.
DEQ anticipates no cost to the regulated community with this change. Negotiated rulemaking was not conducted. The standards in this proposed rule are not broader in scope or more stringent than federal regulations and do not regulate an activity not regulated by the federal government. With that, Mr. Burnell and Mr. Essig stood for questions from the Board.

Chairman Purdy questioned the Legislature changing the rules after an extensive amount of negotiation in the rulemaking process, and having agreement with participants at the Board meeting.

Mr. Burnell responded that the Legislature has the authority to review and approve executive branch rules. The Legislature can delete sections from rules and did so through House Concurrent Resolution 16. The majority of the discussion by the Legislators focused on the procedural components. A draft revision to the rules was developed by some of the groups who did not get what they wanted when the rule came before the Board. They convinced Legislators that changes needed to be made. DEQ was asked to review the changes that they were proposing to make sure what was being developed did not conflict with federal requirements or other court decisions. DEQ participated in the revision of the proposed change only to ensure no catastrophic changes were made. DEQ did not support House Bill 153 and testified that the current rule was the one we asked the Legislature to adopt. The Legislature decided that the 10% ambient concentration and the two pollutants shouldn’t be used for shifting water bodies from a Tier I to a Tier II.

Dr. MacMillan questioned why EPA had disapproved all eight of the Boise River tributaries. Mr. Essig did not recall the particulars but believed it was because DEQ had not presented sufficient rational for the current designations. Mr. Burnell added that DEQ had assistance in the development of that information, but in presenting it to EPA they had a different opinion and rejected the modification.

Dr. MacMillan also inquired about a group that had threatened to sue in regard to the antidegradation rules and was the suit still on-going. Mr. Conde said the suit filed by Idaho Conservation League (ICL) was to force the State and EPA to adopt an antidegradation implementation provision and the State did that. So that part of the law suit gone. ICL has five years to re-file a lawsuit to challenge EPA’s approval of our anti-degradation implementation provisions.

There were no further questions from the Board, so Chairman Purdy opened the floor for public comment.

Mr. Lynn Tominaga addressed the Board stating to reinforce Mr. Burnell’s comments, the reason the whole rule change came forth was because of the lawsuit and it was portrayed to the Legislature in that manner. There was an industry meeting, represented by agriculture, manufacturing, food processing and even the cities, where they all agreed on the changes proposed to the Legislature. There was also extensive legal research done in different regions backing up the reasoning why the changes could be made and be approved by EPA. He said he agreed with Mr. Burnell that some policy issues were pushed to the side, because not many Legislators understand water quality. Some of those issues will be resolved through that policy document. Chairman Purdy thanked him for shedding a little light.
MOTION: Ms. Carol Mascareñas moved the Board adopt as pending rules the Water Quality Standards as presented in the final proposal under Docket 58-0102-1103, with the pending rules becoming final and effective upon the adjournment sine die of the Second Regular Session of the 61st Idaho Legislature, if approved by the Idaho Legislature.

SECOND: Dr. Joan Cloonan
VOICE VOTE: Motion carried unanimously.

THE MEETING ADJOURNED AT 11:38 A.M.

__________________________
Nick Purdy, Chairman

__________________________
Joan Cloonan, Secretary

__________________________
Rosie Alonzo, Assistant to the Board and Recorder
BEFORE THE BOARD OF ENVIRONMENTAL QUALITY
STATE OF IDAHO

----------- x Case No. 0101-11-02
CANYON COUNTY, Petitioner,
v.
IDAHO DEPARTMENT OF ENVIRONMENTAL QUALITY, Respondent.

REPORTERS TRANSCRIPT OF PROCEEDINGS
held on November 9, 2011, 9:00 a.m.
before the
DEPARTMENT OF ENVIRONMENTAL QUALITY
1410 N. Hilton
Boise, ID 83706
Reported by
Brooke R. Bohr
CSR No. 753

MR. PURDY: Docket No. 0101-11-02. I'd like to take just a couple of minutes and either have Doug or Harriet maybe bring us up-to-date. We have two new board members. And my understanding of this case, and correct me, is the DEQ some time ago passed a rule on vehicle testing because of the reaching attainment of certain parts of the state, but primarily here at Ada County, Canyon County. And the legislature passed law number 39-116B, which gave the DEQ authority to limit the pollutions. And the best way we found -- the DEQ found was by testing of vehicles.

And the argument here is that Canyon County doesn't want to -- the long and short of it is they don't want to test their vehicles. But the argument here is when some of their vehicles weren't granted registration as per the Idaho Code, they filed a petition. And we filed a petition back, and it went to a hearing officer. And the hearing officer -- number 17 on your tab here, I think the very back page, covers it very clearly. The hearing officer ruled in favor of the DEQ on the summary judgment. And the hearing officer states in the back of your tab 17 of the

petition that his approval of the summary judgment DEQ does not have any force until some action is taken by the Board. And that's what we're doing here today is to either ratify his action or modify it or send it back to the hearing officer. So I'd like either Harriet or Doug to maybe comment on this. Isn't that what we're doing?

MS. HENSLER: Mr. Chairman, Members of the Board, I think you captured the procedural posture of the case, and I need not say anymore about that. I think you captured it well.

My understanding is that the DEQ and Canyon County each have 30 minutes for oral argument, including rebuttal. And my understanding is that Canyon County will be the first to present oral argument.

MR. PURDY: Okay. Would you please state your name for the record.

MR. LAUGHEED: Good morning. My name is Sam Laugheed.

MR. PURDY: Okay. And you're representing?

MR. LAUGHEED: I'm here on behalf of Canyon County.

MR. PURDY: Are you the attorney for Canyon
First, today's hearing is not about clean air. I think we can all agree that people in Idaho are entitled to clean air. We want our neighborhoods, our communities, our children, our friends to be healthy in a sustainable way. And I'll tell you that the Canyon County vehicle fleet -- and by "vehicle fleet," I mean those vehicles owned and operated by the political subdivision of Canyon County in the daily conduct of local government, our patrol vehicles, the vehicles that are out at the landfill, the vehicles that our maintenance drives. These vehicles are among the greenest in the state. Our fleet is among the greenest in the state. We run E-85. We have amazing extraordinary maintenance procedures in place. We believe in clean air, and we believe in achieving it in an economical way.

Nor are we here today to argue about politics, policy or science. We aren't here to talk about Ada County, the Treasure Valley Air Quality Council, pollution. We aren't even here to talk about vehicle emission testing. This is an important distinction and one that thus far DEQ has failed to grasp. We're not here to talk about science. And that is not to say, Ladies and...
arguments may be made in a different venue, but
are not relevant here."

Is that truly the position of DEQ,
that you would rather not talk about how you
promulgated these rules, how you interpret and
enforce them? That you would prefer, because it's
been invited in your briefing that we go directly
to District Court.

Our purpose, Ladies and Gentlemen, has
been to assist DEQ. We are not here in an
adversarial capacity. We are here as a friend of
this tribunal, and we are here to facilitate your
correction of errors. And we're not doing this
just out of the goodness of our hearts, you see.
We've got better things to do than sue DEQ. We've
got pressing issues that require our immediate
attention. We have not the time, not the
inclination, not the desire, not the money to
engage in frivolous litigation. So we're asking
you to show us where we're wrong. We're putting
all our cards on the table. Here is our argument.
Here is the law that supports our argument. Here
are the facts. Here is how they fit. Show us
we're wrong or fix your mistakes.

I have prepared a handout for the Board

that I would ask to be entered into the record.
I'm not going to insist it be part of the record.
All the information in here is already
incorporated by the briefing. This simply
organizes things and could be a reference point
for the Board.

MS. HENSLEY: May I interject, Mr. Chairman?
I would recommend that you not accept this into
the record.

MR. PURDY: Yeah. I think without having
the chance to review it, I don't think we should
accept it at this time.

MR. LAUGHEED: So will you not consider
looking at it then, as well?

MS. HENSLEY: As I said earlier, this case
should be heard on the record that's been
established.

MR. LAUGHEED: Absolutely. We'll make
copies of this available for anyone who is
interested. As I said, all this information is
already in the record.

There are four issues to talk about
today, three critical legal issues and one
overriding contextual issue. We're going to lay
these issues out for you, show you how the law

applies, show you how the facts are. And then the
final issue is the all-encompassing context that
informs everything that's happened so far at this
point.

The first legal issue: DEQ violated
the plain language of 39-116B when it determined
which counties and cities were subject to vehicle
emission testing. And in so doing, DEQ also
violated the plain spirit, the plain language, the
intent of the Idaho Administrative Procedures Act.
Accordingly, the rules that have been promulgated
are not consistent with the statute. And in so,
they are ineffective and voidable.

On this point, we'll first take a look
at the plain language of 39-116B. The plain
language is in this handout. If you look at the
subsection 2 of it, that's where it would start,
and it is part A, because that articulates the
very first thing this Board was to establish by
rulemaking, which counties and cities within the
area would be subject to testing. That's
clear plain language, right, subsection 2, part A.

Well, that's not what DEQ did. On
July 1st, 2008, 39-116B became law. On
November 7th, 2008, Canyon County received an
official letter from DEQ providing official
notice, not of rulemaking, not of Canyon County's
opportunity to be heard, but notice that DEQ had
already decided that Canyon County would be
subject to emission testing.

Now, 11 days after Canyon County was
provided this notice that we would be subject to
testing, DEQ initiated the very rulemaking by
which it was to determine which counties and
cities would be subject to testing.

That, Ladies and Gentlemen, is a
blatant disregard of due process. It is analogous
to a judge in a criminal trial telling a
defendant, "I'm going to find you guilty. I'm
going to sentence you to 45 days, but you do have
a right to a trial and right to be heard, after
which I'm going to sentence you to 45 days." That
is a mockery. It is a sham of due process.

Ladies and Gentlemen, that is exactly
what happened to Canyon County here. The response
that we got from DEQ when we brought this to its
attention: "Petitioner did not participate in the
rulemaking."

Well, we tried to reframe the argument,
then pointing out DEQ had admitted the material
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|-------------------------|-------------------------|
| emissions testing.      | Folks, all that does is, again, admit |
|                         | factual basis for our contention. It doesn't |
|                         | address the legal issue. It doesn't address the |
|                         | harm that was perpetrated against Canyon County. |
|                         | And so our brief that taking exception to this |
|                         | recommended order pointed that out. |
|                         | What did we get in response? Well, |
|                         | take a look at page 2 of your brief in support of |
|                         | the recommended order. Idaho Code Section 39-116B |
|                         | does not require a final rule be in place. That |
|                         | is not what we're talking about. And if I was |
|                         | here in an adversarial capacity, if we were in |
|                         | front of the District Court, then I love this |
|                         | record, but I'm not here in an adversarial |
|                         | capacity. The County is here to assist DEQ to fix |
|                         | these mistakes. And so I'm distressed by it |
|                         | ignoring the issue that has been raised. Tell |
|                         | Canyon County how we're wrong on this point or fix |
|                         | the mistake. |
|                         | The second issue to address is |
|                         | that DEQ's implementation of 39-116B has |
|                         | unconstitutionally rendered the statute local or |
|                         | special. It is a violation of Article 3, Section |
|                         | 19 of the Idaho Constitution for any law to treat |

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|-------------------------|-------------------------|
| persons in similar situations differently or that | metropolitan statistical area as determined by the |
| does not apply equally to all parts of the state. | United States Office of Management and Budget. |
| Now, this concept is embodied | The air shed within that MSA is the Treasure |
| throughout the Idaho Federal Constitution, and | Valley air shed. What does that include? Ada |
| that is of equal protection. So, again, I'd | County, Canyon County, parts of Boise, Gem, |
| invite you to take a look at the actual law, | Payette, Elmore and Owyhee counties. |
| 39-116B. And I would emphasize that none of the | So in order for DEQ's application of |
| arguments Canyon County has presented thus far are | this statute to be constitutional, those are the |
| based on anything other than the plain language of | areas that need to be treated equally. And the |
| that law. We aren't bringing in crazy opinions | fact of the matter is those areas have not been |
| from California, law from the East Coast. We're | treated equally. |
| talking about law that was written by Idaho for | And, once again, despite bringing this |
| Idahoans. | to DEQ's attention multiple times, we haven't |
| This time, take a look at subsection 1 | gotten an answer. DEQ's first response -- and |
| of 39-116B. What does it say? That this law | I'll refer to page 14 of that first brief -- was |
| applies to an air shed within a metropolitan | that a hearing officer has no authority to render |
| statistical area where certain scientific | a statute unconstitutional. |
| conditions have been determined by DEQ to exist. | Not only is that off point and a |
| Now, by that language, the statute arguably treats | mischaracterization of what the County is saying, |
| all of the states the same. All the air sheds | it is a misstatement of fact. It is a |
| within MSA's within the state are subject to this | misstatement of law. Certainly, a hearing officer |
| same determination process. | can't render a statute unconstitutional, but a |
| So which air shed and which MSA are we | hearing officer can certainly tell the agency |
| talking about for Canyon County? The record is | that its application of the statute is in error. |
| pretty clear that we are in the Boise, Nampa | And if the hearing officer who -- and let's be |
Canyon County v. DEQ

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1. plain – is a contract employee of the agency,
2. making $100 an hour to opine on whether its
3. employer has acted correctly, does not want to
4. address that issue, than it is incumbent on this
5. Board as the executive authority of DEQ to address
6. that issue squarely.
7. DEQ's next argument on this issue is
8. that because the motor vehicle fleets in Payette,
9. Gem, Boise, Elmore and Owyhee counties did not
10. significantly contribute to the elevated ozone
11. levels in or above the ozone design value, they
12. were lawfully excluded from the vehicle 1M
13. program.
14. That is an interesting argument, and
15. I'm glad to have it in writing because there's
16. nothing in 39-116B that allows DEQ to make that
17. decision. There's nothing in the law that allows
18. Canyon County to be plainly treated differently,
19. in terms of its privileges and liability, than
20. persons residing in these other counties also
21. within this air shed within the MSA.
22. Now, the County would submit that this
23. argument in responding to it is an example of DEQ
24. trying to have its cake and eat it too. On our
25. first issue, DEQ was supposed to decide which

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1. counties were subject to this by rulemaking.
2. DEQ said, well, no, it was obvious. So we told
3. you before the rulemaking that you would be
4. subject to it and you didn't participate anyway,
5. so what's the harm.
6. Now, on this issue we say, okay, you're
7. treating us differently from these other counties
8. in the same air shed. Now, all of a sudden in the
9. record, in the briefing that you have supplied,
10. DEQ suddenly relies on the fact that this is
11. determined by rulemaking and nobody objected to
12. these other counties not being included.
13. At this point, it becomes very clear to
14. the County that no matter what issue we try to
15. identify and factually address, we won't get a
16. response; that DEQ is engaging in situational
17. reasoning, whichever version best fits what's
18. happened is what we believe.
19. It is worth pointing out, Ladies and
20. Gentlemen, that this equal protection argument
21. fits in a complimentary manner with the first
22. issue we discussed. It seems clear that there are
23. but two reasonable interpretations of how 39-116B,
24. subsections 2 and 3 were designed to interact
25. within subsection 1. Either, satisfaction of the

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1. threshold events in subsection 1, those scientific
2. conditions, triggered the contemporaneous
3. initiation of both rulemaking and discussions
4. regarding a Joint Exercise of Powers Agreement
5. between DEQ and all the counties within the
6. Treasure Valley air shed, or the second option,
7. satisfaction of those conditions initiated in
8. subsection 2, whereby DEQ would determine by
9. rulemaking which counties and cities would be
10. subject to subsection 3.
11. Either of these interpretations would
12. have provided some assurance that Article 3,
13. Section 19 of the Idaho Constitution had not been
14. affected; that DEQ had not impermissibly exercised
15. legislative power.
16. Instead, by DEQ's acts and own
17. admissions and arguments and briefing in this
18. matter, it used interpretation number one for
19. Canyon County and interpretation number two for
20. everybody else. And that is unconstitutional.
21. When we bring this to DEQ's attention,
22. what do we get? Look at page 5 of the second
23. briefing: "Petitioner continues to contend that
24. 39-116B requires a final rule be in place."
25. Well, that's not what we're contending.

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1. I don't know how scientists win arguments about
2. science, but I can tell you, you don't win legal
3. arguments by completely misstating your opponent's
4. position. Unfortunately, the presiding officer
5. who issued the recommended order in this case
6. adopts this same strategy.
7. What does the recommended order
8. provide? Look at page 3: "The County's
9. contention that the manner in which the State
10. applied the statute is unconstitutional, and can't
11. announce to the claim that the Board did not have
12. the legal authority to adopt the rules pursuant to
13. which the statute has been applied."
14. This is nonresponse, it is circular,
15. and it certainly doesn't reflect what we're
16. arguing. Of course, DEQ has the constitutional
17. authority to adopt its rules. That's a ridiculous
18. interpretation of what we've said. And this is
19. all in the record that you already have. I would
20. encourage you to review it. And while you're
21. looking it up, remember, this is DEQ's last
22. opportunity to voluntarily address these issues
23. without judicial intervention.
24. Now, third, and perhaps most important,
25. most obvious, at least, and most economically

5 (Pages 17 to 20)

Tucker & Associates, 605 W. Fort St., Boise, ID 83702 (208) 345-3704
www.etucker.net
1 injurious to Canyon County, DEQ has applied and
2 interpreted 39-116B in a way that makes the
3 statute have a retrospective or retroactive effect
4 without a clear expression of legislative intent
5 that it should or even that it could do so.
6 Now, this time, looking at 39-116B,
7 take a look at subsection 4. Pursuant to Idaho
8 Code 73101, Idaho laws are not retroactive unless
9 expressly so declared by the legislature. Also,
10 pursuant to 73106, no right approved prior to the
11 date a law takes effect may be affected by that
12 law.
13 In this case, 39-116B became effective
14 on July 1st, 2008. The testing it contemplates
15 for the Treasure Valley air shed was not final and
16 not approved until March 29th of 2010. By plain
17 operation of Idaho law, therefore, no registration
18 transaction completed prior to March 29th, 2010,
19 could or even should or even could have been
20 affected by vehicle emission testing.
21 Now, let's raise the bar a little more.
22 This is already offensive. It is already
23 indicative, in Canyon County's mind, of
24 administrative abuse, but it gets worse because
25 payment of a vehicle registration pursuant to

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1 49401 Idaho Code is the functional equivalent of
2 property tax. It is not subject to refund under
3 49402.
4 So not only has DEQ attached a new
5 consequence, a new condition to a past
6 transaction, it has done so to the payment of a
7 property tax.
8 So the county brings this error to
9 DEQ's attention, and what do we get in response.
10 In the first brief from DEQ, page 15, "The testing
11 requirements were not required prior to enactment
12 of the law. Petitioner has not been divested with
13 the benefit of fully paid registrations."
14 Okay, the testing requirements were not
15 required prior to enactment of the law, sure,
16 absolutely, certainly, but that's not the issue.
17 Petitioner has not been divested of the benefit of
18 fully paid registrations? Well, that is a factual
19 one. And the fact that you say it hasn't happened
20 doesn't change reality. Clearly, as a factual
21 matter, Canyon County and countless residents of
22 Canyon County had valid registrations, had paid a
23 property tax to receive it, which was valid, only
24 to have it revoked because of this new law, or
25 they were coerced into testing because of this new

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1 law.
2 DEQ tries, at this point, to advance a
3 legal argument to this legal question. Let me
4 read it into the record here from page 16 or 17 of
5 your first brief: "39-116B regulates future
6 activity. If you don't test your motor vehicle,
7 then your registration will be revoked. One may
8 receive a driver's license, but must abide by the
9 standards. One may hold a liquor license, but was
10 required to stop serving those under age 21 when
11 the law changed. Lawyers, doctors, nurses,
12 realtors and others who obtained licenses must
13 abide by new standards and laws applicable to
14 licensure."
15 Okay. So let's take a look at these
16 examples. Only one of them is really analogous to
17 the situation. That's one about a liquor
18 license.
19 Liquor licenses, like motor vehicle
20 registrations, are governed by Idaho Code.
21 Specifically, Idaho Code 23-910, which is in this
22 packet. It provides in subsection 6 that any
23 liquor license which is held by any licensee
24 disqualified under the provisions of this new law
25 from being issued a license shall forthwith be

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1 revoked by the director."
2 That is express legislative authority.
3 And by it, the legislative, therefore, lawfully
4 attached a new legal consequence to an event that
5 was complete before the law. Without that kind of
6 expressed declaration in the liquor license law, a
7 person who had such a license prior to the
8 adoption of this new law would be presumptively
9 grandfathered in. They would maintain the benefit
10 of that license until it expired, and they had to
11 renew it. At which time, if they were
12 disqualified by the law, they would not be able to
13 get a new one.
14 39-116B does not have any sort of
15 express declaration of retroactive effect. It
16 does not contemplate revocation of a registration
17 transaction that was valid, complete at the time
18 the law was passed it. It applies only
19 prospectively to registration transactions that
20 were complete after the effective date of the law,
21 which, again, given the rulemaking, wasn't until
22 March of 2010.
23 Now, once again, this issue was brought
24 to DEQ's attention, and it is not addressed. Take
25 a look at page 14 and 15 of the next response
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| 1. brief: "It appears Petitioner believes that when Idaho legislature passed 39-116B it did not intend it would take effect on July 1st, 2008." That is not what the County is saying. DEQ goes onto define—use Webster definitions for ordinary terms like "revoke" and "any." And that gets us nowhere because, frankly, those words are not in dispute. Take a look at DEQ's own example, the liquor license thing. Subsection 6 of that law has an expressed declaration of retroactive effect, plus the words "revoke" and "any." This is a fundamental proposition of law. It is not some crazy novel argument that the County is advancing here. But let's go a step further and imagine the statute is ambiguous, and maybe it can be interpreted the way DEQ argues it is and maybe it can be argued the way the County argues it should be. In that case, according to Idaho law, you look at the legislative intent. You examine the reasonableness of the proposed interpretations and the policy that defines them. So answer this, do public policy and reasonableness support so extreme an act as divesting a citizen of the benefit of a license, the fee for which has been legislatively equated to a tax. Canyon County doesn't think so. Unfortunately, for everybody here, DEQ apparently does. Take a look at your recommended order on this point. First, again, DEQ apparently lacks jurisdiction to review its own acts. Second, this is a quote from page 4, "The retroactive claim does not involve allegations of constitutional violations, the presiding officer concludes that 39-116B is protected in application of the law, meaning from the date of the agency's rulemaking regarding vehicle emission testing was complete, the provision would occur from that date forward." The statute has no provision meant to punish or penalize alleged transgressions that occur prior to the completion of rulemaking. That's right. But the order continues: "As a result, there's no retroactive application rendering 39-116B an ex post facto law or in violation of 73101." Wait. The fact that the law doesn't have an expressed declaration of retrospective effect does not mean that DEQ did not apply it to a past transaction compels a legal conclusion in the County's favor. What did we get in response? DEQ's brief in support of the recommended order. It says, "Wheeler vs. Idaho Department of Health and Welfare is the sole case cited by Petitioner in support of its claim." It involves a statute where the law was not applied retroactively and the --

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| MS. HENSLEY: Mr. Laughed, my apologies. This would be the Chairman's decision. We realize nobody was quite keeping track of the time here, but my understanding is that your 30 minutes is up. And, of course, it is up to the Chairman to allow you to continue. I just wanted to alert the Chairman of that fact.

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| 1. do so, which is the point at issue, that DEQ has not done what the law says.

And, again, I don't mean to belabor this point, but this is the context, DEQ still has not addressed this concern. In rereading the recommended order and rereading all the briefing that DEQ has filed, it's become clear that I'm not sure if DEQ attempted to understand the County's argument.

The briefs have been clear. We're not talking about ex post facto law. The first time that phrase appeared was in the recommended order. An ex post facto law is an entirely different creature from a law that is retroactive or 

retroactive in effect. So, in our brief, taking exception to the recommended order, we illustrated the difference between contending that the statute has been applied in violation of ex post facto and a law, a statute, that has been unlawfully applied retroactive. The County continues to assert an application of the correct analysis whether DEQ's application of 39-116B has taken away or impaired a vested right or created a new obligation, imposed a new duty or attached a new disability to

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improve the air quality in the Treasure Valley.

The plan required was submitted to the legislature in 2007, and that plan recommended that a vehicle inspection maintenance plan be put in place in the Treasure Valley then in 2007. But, finally, in 2008, 39-116B was passed.

39-116B is a law that the Treasure Valley Air Quality Council submitted to the legislature, was passed and signed by the government, and it requires certain duties of the Department of Environmental Quality.

And I am here to tell you today that DEQ has followed the letter of that law over and above what is required by the law. And we have explained to the petitioner numerous times in our brief and in oral argument, and we will do it again today.

What does 39-116B require? 39-116B says if two criteria are met, then there are two duties of DEQ. The two criteria that have been met and that facts have not been in dispute in this petition is that in the metropolitan statistical area as designed by the OMB and the air shed as defined by DEQ and in concentrations of the National Air Quality standard or about 85 percent of the ambient motor vehicle emissions constitute one of the two contributing sources to that design value.

As a result of those occurrences, DEQ is required to do two things under the law. Number one, they are required to initiate a rulemaking to establish the minimum standards for a vehicle maintenance program. And, number two, they are required to reach out to counties and cities within the air shed and discuss with them and invite them to participate. Those criteria were met in December of 2008. That is not disputed.

What Petitioner is asking for today is an exemption from the program for its motor vehicles, the motor vehicles registered to Canyon County. The Petitioner also requested -- although it hasn't been brought up today. But the Petitioner also requested that the Board voluntarily suspend testing until the deficiencies described in the petition are remedied. In my briefs, I explain why Petitioner has failed to state a claim for relief. If further explained why summary judgment in favor of DEQ must be granted. The hearing officer agreed with DEQ's arguments and ruled in DEQ's favor. DEQ and petitioner do agree on several things. They agree this matter is right for determination. They agreed there are no material facts in dispute. They agree on the legal standards for the Motion to Dismiss and the Motion for Summary Judgment. They also agree it is clear from the plain reading of the statute that satisfaction of the threshold events in Idaho Code Section 39-116B(1) could trigger both the contemporaneous initiation of rulemaking and discussions regarding the Joint Exercise of Powers Agreement.

Petitioner seeks an order that exempts its vehicles and that are in Attachment A to the petition and then additional vehicles that were added on, and DEQ did not oppose that those be added on to the petition.

What we disagree upon. We disagree upon the legal scope of this contested case. Petitioner seeks an exemption for its vehicles, yet it fails to state under which exemption its vehicles fall.

In a hearing to challenge the revocation due to failure to comply with the program established under the statute, the entire
program is not subject to challenge. We disagree
on this. However, we fully brief why we think the
program and all of the legal procedures were
followed to the letter of the law.
So although we disagree, we did not
hide behind an argument saying, no, they must
claim an exemption, we also explained in full
detail in every brief and oral argument, and I
will do it again today, why we did follow the
law, the procedural law.

Petitioner, again, I argue -- DEQ
argues it did comply with the program, and,
therefore, the revocation should not take place.
For example, Petitioner should be arguing its
vehicles are exempt because the vehicles are no
longer registered in Canyon County, they are older
than the ones required for testing, those sorts of
arguments. Those arguments were not put in place.
The challenge of DEQ's application of
the statute, the rules, again, I do not believe
are properly before this Board of Environmental
Quality. Yet, I will respond to each of them.
As noted in my brief and the hearing
officer's recommended order, neither the hearing
officer, nor the Board have the authority to
decide constitutional law and challenges.

Nevertheless, let me re-cap again what I
think are Petitioner's arguments because they do
move around a bit through the briefs, and why they
in no way entitle the motor vehicles registered to
Canyon County an exemption from the Commission's
testing requirements.

First, Petitioner argued DEQ failed to
comply with procedural requirements promulgating
the rules under Idaho Code Section 39-116B. DEQ
followed every procedural requirement in
promulgating those rules. There's no question
about that. They do acknowledge that it is a
reasonable -- the Petitioner does acknowledge
that it is a reasonable interpretation that
satisfaction of the threshold events in subsection
1 triggered rulemaking and discussions regarding a
joint exercise.

So I'm not really sure what section of
the rules DEQ did not comply with, what they
procedurally did not do in promulgating 39-116B.
They argue that DEQ impermissibly determined that
Payette, Boise, Gem, Elmore and Owyhee counties
should not be part of the program. But what DEQ
did is exactly what it is required to do by law.

39-116B(2) says as part of the
rulemaking, the rulemaking participants, and then,
ultimately, you, the Board of Environmental
Quality, must have a rule in place that provides
for the counties and cities within the air shed
that will be subject to the motor vehicle
inspection and maintenance program. The Bureau
of -- the OMB decides the metropolitan statistical
area. DEQ decides the air shed. The Board of
Environmental Quality in promulgating the rule
decides which cities and counties within that air
shed be subject to the inspection and maintenance
program. That is exactly what you did.

And DEQ in preparation for the first
rulemaking did an abundance of modeling.
Rick Hardy's affidavit is attached to one of the
briefs. He explains the modeling that he did to
show that some of these smaller counties, the
emissions from their vehicles did not
significantly contribute to the elevated ozone
design values. That is a rational basis as to why
DEQ proposed -- only proposed, because DEQ can't
go into a rulemaking and say this is what the
answer is, because it is you that ultimately
decide and then it is the legislature that

ultimately blesses what the final law is.

DEQ proposed that those counties
would be excluded. Nobody objected. Everybody
understood and agreed. And I haven't heard
Petitioner say, no, they disagree, that they
really did contribute to the ozone value, and
from an environmental standpoint they should be
included. No one objected. That process went
through. You promulgated a rule that excluded
those counties. That is what the law provides
for. It makes sense. It is rational, and it is
an environmentally sound and scientifically sound
decision.

If the -- if the negotiated
rule group or the Board or the legislature opposed
the exclusion of Payette, Gem, Elmore and Owyhee
counties, those counties would have been included
in the program.

The Board of Environmental Quality,
you, complied with the law in promulgating the
rule that excluded some counties and cities from
the program based on their insignificant
contribution.

In a further brief, it appears that
what Petitioner is arguing is that because DEQ did
made." All of that information was out there and available to Petitioner.

DEQ -- and I can say this because I was very involved in the rulemaking. DEQ goes over and above and beyond trying to get people to participate in rulemakings. Paula creates a fabulous website so that people can go on and understand what is going on at any time. They really do a fabulous job. And it is so difficult for me to understand how anybody could argue that somehow they were not allowed to participate or somehow they were discouraged, because that just simply is not the case.

So DEQ, you, Board of Environmental Quality, complied with the law when you promulgated the rule including certain cities of the air shed as defined by DEQ within the metropolitan statistical area. There's no question that that rule was promulgated correctly.

And DEQ, there is no reason and it was not required anywhere under the statute that they -- when they were discussing Joint Powers Agreement, that they also had to discuss that Joint Powers Agreement with cities and counties that they didn't at that point think would be part of the program because of their insignificant contributions to the ozone level.

I think this is the third, but the final argument that I'm going to discuss that Petitioner continues to bring up is that they argue that DEQ's implementation of 39-116B attaches a new disability to past transactions in the absence of a clear expression of legislative intent they may do so.

I think what Petitioner is saying is that the requirement to test the vehicles should not kick in until after their vehicles are registered again after the passage of the statute, and, therefore, that their vehicles should not be subject to testing until after they renew their registrations. I think that is the underlying argument that is being made. Although it is never, you know, straightforwardly stated.

Again, the hearing officer found as a matter of law that the legislature did intend for the statute and the rule to apply to vehicle registrations existing when the rulemaking was complete. Petitioner's argument is difficult to respond to. The statute itself is clear. It applies to current registrations. The plain language of the statute uses the word "revoke," uses the word "any." It doesn't say new registrations. It says, "any registrations."

And, again, I mean, I go back to some of the arguments that I made in my brief. New laws are passed every day. If a new speed limit is applied in a school area and it includes in the statement that your license will be taken away if you violated that speed limit, the defense couldn't be, no, not until I renew my license should this apply. That is not going to happen. Registration of a motor vehicle doesn't somehow include application of a new law to that motor vehicle. DEQ did not require that testing occur prior to the passage of the statute. The legislature decided if certain conditions were met, emissions testing would simply be a new requirement of motor vehicle owners.

The fact that the registration -- some of the registration dollars do go to the County as part of a tax, and the statute says in lieu of property tax or registration you pay a registration, I don't understand what difference that makes, which is why it is difficult for me to explain why -- I don't think it makes any
difference. It seems to me what Petitioner is saying is okay if it is in lieu of property taxes, then if your vehicle emissions registration is revoked, then you must also pay an additional property tax. I just don’t get that. To me, it doesn’t matter. I don’t see any legal distinction between that.

The situation isn’t like — and this is where there’s a lot of law on retroactivity is, for instance, in zoning laws where someone gets a building permit and then the zoning laws change and the person that has the building permit argues, "Hey, I equitably relied upon the permit prior to starting to build, and, therefore, I have been damaged."

We don’t have that situation here. There’s no equitable laches argument. Canyon County is not arguing that we wouldn’t have any vehicles if we knew we were going to have to have their emissions tested. They are not making that argument.

There is no ambiguity in the statute as to what vehicles this law applies to. And even if one could make that argument, I think the legislative intent is clear and I think Governor provides three notices, certainly more than is required under the statute.

Petitioner has availed itself for the opportunity of a hearing as have others. DEQ has not used the defense that a motor vehicle owner was not entitled to, nor could not have a hearing because a certain time frame has passed. DEQ’s goal is to get the motor vehicle tested, not to revoke its registration.

Petitioner claims DEQ’s petition amounts to self-affirming dogma. But what DEQ has done is fulfill its duties and responsibilities under Idaho Code Section 39-116B with the utmost care and provided numerous opportunities for public input over and above that required by law.

Petitioner’s arguments not presented until the date the motor vehicle registrations were subject to revocation do not in any way entitle its motor vehicles to an exemption. The statute does not require a final rule be in place prior to the discussion of and entry to a Joint Powers Agreement. The statute provides that the rule — that the rule that is promulgated does provide the cities and counties that would be subject within the air shed that would be subject to the program, the statute expressly provides that registration be revoked for failure to comply with the program, and Petitioner was provided with that.

Petitioner has failed to provide upon which relief may be granted, no material facts or indications, and DEQ is entitled to summary judgment as a matter of law. DEQ respectfully requests that the Board enter the final order that was recommended by the hearing officer.

Thank you. And I will answer any questions that you may have.

MR. PURDY: Are there any questions?
Let’s let Mr. McCready.

MR. MCCREEDY: Lisa, what was the first notice of Canyon County? As I go through the record, I think the first letter is a November 7th, 2008, letter. And I guess I’m just asking was that the first official notice under the statute? That was attached to Canyon County’s petition as Attachment B.

MS. CARLSON: Thank you, Chairman, and Mr. McCready.

The first letter, the November 2000 --

the best place to find the sort of history or the
MR. McCREDY: Okay.

MS. MASCARENAS: Mr. Chairman, what tab?

MS. CARLSON: I don't know what tab it is.

MR. McCREDY: It would be under tab 4. It is page 4 of the Department's motion to dismiss. But I was curious if we could find the actual letter itself in the record.

MS. CLOONAN: Is that the April 22nd letter?

It is attached to the Petitioner's motion or the Petitioner's first tab.

MR. McCREDY: Thank you.

MR. PURDY: Did you have any further questions? Is there any other questions of the DEQ?

Well, let's let Mr. Laugheed have five minutes of rebuttal. Is that the ground rules, I guess, was five minutes?

MR. LAUGHEED: Mr. Chairman, I wouldn't object to that. I won't take five minutes. I can promise you that. Thank you, sir.

At the beginning of today's argument, I posed three specific questions and provided context and indicated the County was frustrated by not getting a response to those three questions. So what we heard in response was the history of

the law talked about air quality, talked about...
November 7th, 2008, letter?

MR. McCREEDY: Right.

MR. LAUGHEAD: If that is part of that letter, I certainly wouldn't dispute that’s the same letter.

MR. McCREEDY: As I understand your first argument, you're saying that the rulemaking should have started before those two findings were made?

MR. LAUGHEAD: No, sir. I'm saying that the rulemaking should have started after those findings were made and should have been applied equally to Canyon County and other cities and counties within the Treasure Valley air shed.

MR. McCREEDY: So if we look at the statute again under 39-116B(2), are you saying DEQ and the Board don't have authority to determine which counties and cities do contribute significantly or don't contribute significantly?

MR. LAUGHEAD: DEQ has the authority through the rulemaking process to make that determination.

MR. McCREEDY: And then on your equal protection argument, what is the equal protection standard that you want us to apply? If you're saying that we have the authority to make constitutional and legal decisions, I don't see the other factual piece of information that I think it important to point out and the reason why I think it is important to point out is because it demonstrates what DEQ has done over and above what is required by law to help get the citizens participating in this process.

DEQ made the determination that the two prior criteria had been met by the summer of 2008. So DEQ sent petitioner a letter dated November 7th, 2008, saying, you know, these criteria have been met, we're initiating a rulemaking, please participate.

So the follow-up letter, it isn't that the criteria had been met prior to DEQ asking petitioner if they wanted to participate in a Joint Powers Agreement.

MR. McCREEDY: One or two other questions.

Mr. Laugheed, are you arguing that all Canyon County motor vehicles that were lawfully registered as of March 2010 when the rule became effective are grandfathered?

MR. LAUGHEAD: Yes, sir.

MR. McCREEDY: And I don't believe you gave us your fourth contextual argument. Can you summarize that in one or two sentences, please?

MR. LAUGHEAD: Mr. Chairman, Mr. McCreedy, the fourth contextual argument I was referring to is the failure of DEQ to directly address the questions. The board members questioned about which constitutional analysis should apply. That's the sort of thing I would have hoped we could have addressed throughout the briefing, rather than so being posed by a board member trying to find out what the argument is.

MR. McCREEDY: For the record, I would have expected the petitioner to include it in its briefing papers, not for a board member to ask.

But that's my opinion.

Thank you for allowing me to ask questions.

MR. PURDY: Thank you. Good questions. Are there any other questions or comments?

(No response.)

MR. PURDY: Let's take about a ten-minute break and then we'll reconvene.

(Recess taken.)

MR. PURDY: What's your pleasure on this?

MS. CLOONAN: Mr. Chairman, pursuant to Idaho Code 7-2345-F, I, Joan Cloonan, move that we
go into executive session to discuss legal issues
with our attorney.
MR. PURDY: Okay. Is there a second?
MR. MacMILLAN: Second.
MR. PURDY: Okay. It has been moved and
seconded that we go into executive session.
MS. CLOONAN: We need a roll call.
MR. PURDY: We'll have a roll call vote.
All in favor? Just go around. Aye.
MR. McCREDY: John McCredy. I vote yes.
MR. MacMILLAN: Okay. Randy MacMillan. I
vote yes.
MS. MASCARENAS: Carol Mascarenas. I vote
yes.
MR. PURDY: Nick Purdy. Yes.
MS. CLOONAN: Joan Cloonan. Yes.
MR. KIEBERT: Kermit Kiebert. Aye.
MR. BOLING: Kevin Boling. Aye.
MR. PURDY: Okay. Then we'll adjourn and
come back in executive session and the audience
will have to leave.
(Recess taken.)
MR. PURDY: Call the DEQ Board back to order
for the contested case of Canyon County vs. DEQ.
We had deliberations on the hearing this morning.

Administrative Procedures Act. And I agree with
Mr. Boling there that the evidence indicates that
once the State legislature approved House Bill
586, that DEQ did what the legislature directed
them to, that they went out of their way,
actually, trying to include the public in the
rulemaking. And the rule was properly brought
before this Board, and we had opportunity to
approve or disapprove that rule. We approved it.
The legislature went on and approved the rule that
this Board had adopted.
So I can't find in the record where DEQ
or this Board went wrong. So, Mr. Chairman, I
would suggest that in large measure, anyway, the
hearing officer's decision. I won't make a motion
quite yet, but that's the direction I'm headed.
MR. PURDY: Thank you, Mr. MacMillan.
MS. MASCARENAS: Similarly, I went through
the different arguments. On the first argument, I
guess, in summary, Canyon County wasn't allowed
due process by the letter that was first sent to
them, their interpretation was it was determined
right then.
MR. PURDY: The November 12th letter?
MS. MASCARENAS: The November 7th letter.

However, I went back to the letter and
read it again just to make sure I understood, you
know, where they were coming from. And, to me, it
does say that they are required -- you know, based
upon the modeling, that they would be required.
However, it goes on to say that pursuant to House
Bill 586, DEQ must establish minimum standards for
inspection and maintenance program.
If you look at the rule, you know,
included in that is designating the cities or
counties affected. And it goes on to say that the
rulemaking process has been initiated and open to
everybody. Once the rulemaking process has been
completed, the director will send a written notice
to those affected parties asking for parties to
enter into the Joint Powers Agreement.
So by the letter stating that, it still
leaves it open that they are one of the affected
parties referenced in the House Bill that we would
have to -- that they would have to follow it.
So I think, in my mind, it does show
the intent that it is an invitation to participate
in rulemaking, and it goes on to say that no
action is required right now. So, therefore, they
are not designating them officially as an affected
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1 party and initiating the 120 days. That goes in
2 the April 22nd letter.
3
4 So on that point, I think that they
5 were allowed due process, in that they were
6 invited to attend the meeting. You know, could we
7 have worded the letter better, you know, to make
8 that absolutely clear? Hindsight is always 20/20.
9 But I think it does in rereading it, in my mind,
10 show that it is not — still opens it up for due
11 process.
12
13 The other thing is at the start of the
14 negotiated rulemaking, I don't know the exact
15 reference, but DEQ started with an opening, "Here
16 are the conclusions of the affected cities and
17 counties. Does anyone have any objections?" And,
18 you know, there weren't any objections. Some of
19 the cities that were represented are in Canyon
20 County.
21
22 On the second point, as far as the,
23 you know, special treating of Canyon County and
24 Ada County separately, you know, if I look at
25 Mr. Hardy's testimony or his affidavit, I think
1 2 3 4 5 6 7 8 9
10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25
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tactical analysis, as far as which counties
should be in or out. So I think as far as due
process and how they treated the counties in their
evaluation of who would be included or not, they
all went through the same model and same type of
analysis in that determination. So I think due
process was afforded there across all the counties
and cities, as well.

So that's my initial reaction.

MR. PURDY: Dr. Cloonan?

MS. CLOONAN: I was going to bring up some
of the same comments that Ms. Mascarenas did. The
November 7th letter, I believe, was interpreted as
more of a directive than it actually was. It is
not an enforceable letter. It really was putting
out what DEQ had found up to that point in time,
the work that they had done. And the due process
is definitely within the regulatory process, the
process of developing and negotiating the
regulation. Nothing was final until it went into
the regulation itself.

So as Ms. Mascarenas said, it could
have been, perhaps, more artfully drafted, but I
think it gave the opening for discussion and
further determinations. It was not a final

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determination by any means.

1 On the issue of exemption, I really do
2 not see what basis — upon what basis we could
3 grant an exemption from testing within the —
4 having the regulations in place. There's nothing
5 put forward to say that this vehicle or that
6 vehicle should be exempted, based upon what is
7 strictly a — I think it is strictly a legal issue
8 here determining whether — excuse me. I have a
9 cold, and I'm having a hard time talking. I'll
10 leave it at that for the moment.
11
12 MR. PURDY: Thank you.
13
14 MR. MacMILLAN: Just to follow-up, I think
15 Joan captured it really well there. What some
16 people may be missing is that in the rulemaking
17 process itself, the public has an opportunity to
18 try to come in and change what DEQ is proposing.
19 That whole process is designed just for that.
20 That's what the Administrative Procedures Act
21 requires. That's what this Board expects to
22 happen in that rulemaking process where people
23 have opportunity, lots of opportunity to come in
24 and convince DEQ that their rule is wrong.
25 In my view, the County -- the Canyon
1 2 3 4 5 6 7 8 9
10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25
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County Commissioner didn't avail themselves of

that opportunity.

MR. PURDY: Thank you.

Any others?

MR. McCREADY: Mr. Chairman, I would just
supplement the comments, because I agree with the
ones made so far. I think the four arguments that
were made by Canyon County are, essentially, due
process, equal protection and retroactivity.

The statute is pretty clear, 39-116B,
that if DEQ makes two findings, then rulemaking
will be initiated. There wasn't any challenge to
the findings. That was the basis for my question
to Mr. Laugheed was was there a factual challenge
to the two findings that DEQ is required to make,
and there isn't that I can see in the record. So
then rulemaking was initiated. And I don't see
that there's really a strong argument that DEQ did
not perform its statutory and other obligations in
the rulemaking way it was supposed to. So I'm
not persuaded there was a due process violation.

And this, of course, assumes that the Board should
be addressing constitutional issues in the first
place. I'm not sure necessarily what the law is
exactly on that point. But to the extent we are
authorized to address constitutional issues, I

15 (Pages 57 to 60)

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| 1. don't think there's a due process violation. I  
2. don't think there's an equal protection violation.  
3. My understanding is the rational basis test would  
4. apply, and there seems to be a rational basis for  
5. treating cities and counties differently. That's  
6. in the affidavit of Mr. Hardy, as Ms. Mascarenas  
7. pointed out.  
8. On the retroactivity statement,  
9. clearly, it applies to registered vehicles. So if  
10. they are registered at the time the emission test  
11. is required and they fail the test, then  
12. revocation is the remedy. I think it is pretty  
13. clear on its face that's what was intended by the  
14. statute.  
15. The final argument that the DEQ has  
16. failed to address all the arguments that have been  
17. made, I think Ms. Carlson in your briefing and  
18. your argument you did address them. So I didn't  
19. think that one passed with very much muster  
20. either.  
21. I should say -- and excuse me for not  
22. disclosing this earlier -- that I was a member of  
23. the Treasure Valley Air Quality Council and did  
24. participate in the drafting of the underlying  
25. legislation. Having said that, I've tried to take  |
| 1. a look at the record and the arguments with an  
2. objective and careful eye.  
3. MR. PURDY: Okay. Well, I think I would  
4. entertain a motion.  
5. MR. MACMILLAN: Well, Mr. Chairman, I would  
6. move that the Board -- and I think this is what I  
7. would affirm the hearing officer's decision.  
8. MR. PURDY: Order, yeah, based on --  
9. MR. MACMILLAN: Based on all of the  
10. arguments that we have heard and discussion we've  
11. had. But based on the evidence we've heard today  
12. and the record, the hearing officer's order should  
13. be affirmed.  
14. MR. PURDY: Okay.  
15. MS. CLOONAN: Mr. Chairman, I would second  
16. that. But may I say that in the -- we will have a  
17. separate order which reflects the discussions that  
18. we have had in these deliberations, and that is  
19. also not in the motion itself, but it is my  
20. understanding in seconding it this will be the  
21. procedure that we'll go through.  
22. MR. PURDY: It's been moved and seconded  
23. that we affirm the order of the hearing officer.  
24. Could we have a roll call vote, Rosie?  
25. MS. ALONZO: Chairman Purdy? |

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| MR. PURDY: Yes.  
MS. ALONZO: Dr. Cloonan?  
MS. CLOONAN: Yes.  
MS. ALONZO: Ms. Mascarenas?  
MS. MASCARENAS: Yes.  
MS. ALONZO: Dr. MacMillan?  
MR. MacMillan: Yes.  
MS. ALONZO: Mr. Kiebert?  
MR. KIEBERT: Aye.  
MS. ALONZO: Mr. McCreedy?  
MR. MCCREEDY: Yes.  
MS. ALONZO: Mr. Boling?  
MR. BOLING: Yes.  
MR. PURDY: Okay. It is unanimous, and I'll  
ask Mrs. Hensley to write the order based on our  
discussion here on the points that we brought up.  
MS. HENSLEY: I will do that.  
MR. PURDY: Thank you everybody.  
(Hearing concluded at 11:00 a.m.)  
---oo---  |
| REPORTER'S CERTIFICATE  |
| I, BROOKE R. BOHR, Court Reporter, a  
Notary Public, do hereby certify:  
That I am the reporter who took the  
proceedings had in the above-entitled action in  
machine shorthand and thereafter the same was  
reduced into typewriting under my direct  
supervision; and  
That the foregoing transcript contains a  
full, true, and accurate record of the proceedings  
had in the above and foregoing cause, which was  
heard at Boise, Idaho.  
IN WITNESS WHEREOF, I have hereunto set  
my hand November 28, 2011.  |

Brooke R. Bohr, Court Reporter  
CSR No. 753  

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