



State of Idaho
DEPARTMENT OF ENVIRONMENTAL QUALITY
BOARD OF ENVIRONMENTAL QUALITY

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

C. L. "Butch" Otter, Governor
Toni Hardesty, Director

MEMBERS OF THE BOARD

L. Nicholas "Nick" Purdy
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Carol Mascareñas
Vice-Chair
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Idaho Falls, ID 83401

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Kevin C. Boling
5881 N. Ferdinand Court
Coeur d'Alene, ID 83814

IDAHO BOARD OF ENVIRONMENTAL QUALITY

MINUTES

February 16, 2012

The Board of Environmental Quality convened on February 16, 2012, at 8:00 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 McCreedy, Member
Kevin Boling, Member

BOARD MEMBERS ABSENT

None

LEGAL COUNSEL

Douglas M. Conde
Harriet A. Hensley

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
Curt Fransen, Deputy Director
Lisa Carlson, Deputy Attorney General – DEQ
Jess Byrne, Intergovernmental Affairs Coordinator
Orville Green, Administrator, Waste Management & Remediation Division
Barry Burnell, Administrator, Water Quality Division
Pete Wagner, Regional Administrator, Boise Regional Office
Tim Wendland, Loan Program Manager
Kari Kostka, Policy Analyst
David Luft, Regional Airshed Manager
Jonathan Pettit, Vehicle I/M Coordinator

BOARD ASSISTANT

Rosie Alonzo
(208) 373-0240

OTHERS PRESENT:

Della Johnson, citizen
Alma Hasse, ICARE
Al Freeman, citizen
Charles Johnson, citizen

- ❖ 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 8:00 a.m.. Roll call was taken with all members present, except Ms. Carol Mascareñas and Mr. Kermit Kiebert. There was a quorum. (Note: Ms. Mascareñas and Mr. Kiebert arrived within the first half-hour.)

Chairman Purdy opened the floor for the public to address the Board on topics not specifically on the agenda.

Ms. Alma Hasse, Executive Director for Idaho Concerned Area Residents for the Environment (ICARE), commented on various air quality issues, not relating to the contested case before the Board today. Chairman Purdy thanked Ms. Hasse and asked that she put her concerns on paper and submit them to the Board. There were no other public comments.

AGENDA ITEM NO. 1: DIRECTOR'S REPORT

Director Toni Hardesty presented her report before the Board.

Legislative update:

- **Budget Request** - DEQ presentation to the Joint Finance and Appropriation Committee was on February 1. Dedicated funding requests for this year include: \$398,700 from Water Pollution Control Account to continue the water quality monitoring with the BURP Program; \$100,000 and one-time spending authority for the Coeur d'Alene Basin Yard Remediation to finish using ARRA funding; \$200,000 one-time funds for the Lake Pend Oreille Brownfield Coalition; \$1,571, 200 from the Bunker Hill Trust Fund as part of the Hecla settlement. Our supplemental budget hearing was held February 15 for Bunker Hill funding. DEQ's actual budget hearing for the remainder of our budget will be held on February 21.
- **Legislative Rules Review** - All rules that the Board passed, and submitted to the Legislature, have approved by the Legislature.

- **Legislation of Interest -**
 - SCR116 is asking for an interim legislative committee to study primacy for DEQ to take over the National Pollution Discharge Elimination System (NPDES) permitting program.
 - SB1318 amends statutory procedures for negotiated rule making and to provide for notice of rulemaking to be placed on an agency's website. Authors of the bill used DEQ as the model, so it is consistent with what we are now doing with some minor changes.
 - SB1231 amends the Motor Vehicle Inspection and Maintenance Program to allow for a one year waiver from requirements if \$250 were spent on repairs. DEQ's current rule threshold is \$200, so this bill is being sent to amending order to line up that statute with DEQ's rule.
 - HJM009 was introduced to oppose EPA's proposed Record of Decision (ROD) amendment in the Silver Valley. It would direct State officials to have EPA rescind the Superfund designation and be out of the State in five years. There were a number of concerns legally how it could actually operate. The Joint Memorial is being held in committee.
 - SCR115 rejects certain rules of the Bureau of Occupational Licenses relating to the Board of Drinking Water and Wastewater Professionals.

- **ROD Amendment** – EPA's proposed plan laid out the process for another 70-100 years and \$1.3 billion. The state and locals had many concerns with EPA's approach. DEQ has worked extensively with EPA reconfiguring the ROD amendment. Significant changes were made in the right direction. In yesterday's (February 15, 2012) Basin Commission meeting, information was put out for a 30 year plan and \$736 million.

- **Underground Storage Program** – In 2007, The Idaho Legislature promulgated the Idaho Underground Storage Tank Compliance Act establishing a statewide system for Idaho to regulate UST facilities in lieu of EPA. DEQ has been developing state rules and making changes to the statutory penalty authority essential to take over primacy for this program and on December 8, 2011 received "tentative approval" for our UST program. EPA's final federal register notice should be published within the next 30 days or so.

Director Hardesty mentioned she will be resigning as Director of DEQ on February 24. Mr. Curt Fransen will take over as the Interim Director. She expressed her gratitude toward the Board for their great working relationship.

Chairman Purdy also expressed on behalf of the Board their appreciation to Director Hardesty for all her diligent work and their pleasure of working with her. She will be missed.

Chairman Purdy inquired about DEQ's role in the Energy Exploration. Director Hardesty responded that with regards to the permitting, the Idaho Department of Lands (IDL) will be the lead agency. DEQ has worked with IDL on the development of their rules. All of DEQ's existing authorities will be in place. There will be some authorities that over-lap so there will be a memorandum of understanding set to outline those responsibilities.

Mr. Boling asked for explanation to better understand the NPDES primacy issue and how many other states do not have NPDES primacy. Director Hardesty responded by explaining that there

has been an interest by industry and by the State to pursue primacy for a number of years. One of the biggest hurdles, however, is funding. Governor Otter supports DEQ having primacy, but it cannot be funded with General Funds. Senator Hammond is sponsoring the legislation this year. His idea is to form an interim committee, inviting interested stakeholders to the table to work through the process and details. There are four states that do not have NPDES primacy.

Mr. McCreedy inquired about the lawsuit filed by the Greater Yellowstone Coalition challenging EPA's approval of the antidegradation program and does DEQ intend to take a role. Director Hardesty mentioned that DEQ was surprised, and turned to Mr. Conde to respond. Mr. Conde stated that DEQ expected a lawsuit from another entity, but not from the Coalition. He has not yet discussed with DEQ if the agency will actively intervene. DEQ will be there defending EPA's approval. The Coalition only raised two issues – the definition of degradation and the insignificant discharge that exempts one from a high water quality analysis.

AGENDA ITEM NO. 2: ADOPTION OF MEETING MINUTES

Minutes for the November 9 & 10, 2012 Board of Environmental Quality meeting were not ready and will be approved at the meeting in May.

AGENDA ITEM NO. 3: CONTEST CASE HEARING

FREEMAN V DEQ. DOCKET No. 0101-11-04

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.

In a brief summary, Chairman Purdy said the Board will hear oral argument from the Petitioner, Mr. Al Freeman of Nampa, Idaho and from the respondent, Idaho Department of Environmental Quality ("DEQ"). He explained the Board can only accept comments and evidence that has already been submitted as part of the record and cannot take any new information.

Mr. Freeman had a document he wanted to read and submit copies to the board. Ms. Harriet Hensley, Attorney for the Board in this contested case, reminded Mr. Freeman his oral document would be recorded by the court recorder, but the Board cannot accept additional documents. If the document is read, it will end up in the record.

Mr. Al Freeman proceeded with his oral argument. Questions were asked by Board members.

Ms. Lisa Carlson, Deputy Attorney General, was representing DEQ in this matter. She proceeded to present her argument. This was followed with questions from the Board members to both Ms. Carlson and Mr. Freeman.

- **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: 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.

The meeting was closed to the public for the Board to go into executive session at 9:30 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 and the meeting was reopened to the public at 9:50 a.m.

Chairman Purdy asked board members if there were additional questions. Mr. McCreedy and Dr. Cloonan each made comments.

- **MOTION:** Mr. John McCreedy moved that the Idaho Board of Environmental Quality affirm the hearing officer's recommended order based upon the deliberations of the Board today and direct counsel, Ms. Hensley, to prepare write an order for the Boards review and consideration.
- **SECOND:** Dr. John MacMillan.
ROLL CALL VOTE: Chairman Purdy, aye; Carol Mascareñas, aye; Dr. Joan Cloonan, aye; Dr. Randy MacMillan, aye; Kermit Kiebert, aye; John McCreedy, aye; and, Kevin Boling, aye. Motion carried unanimously.

AGENDA ITEM NO. 4: CONTESTED CASE AND RULE DOCKET STATUS REPORT

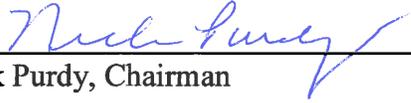
Ms. Paula Wilson, Rules Coordinator, reviewed the current contested case and rule docket status report. A reference copy of the promulgation Status Report is attached to the minutes on file.

AGENDA ITEM NO. 5: LOCAL REPORTS AND ITEMS BOARD MEMBERS MAY WISH TO PRESENT

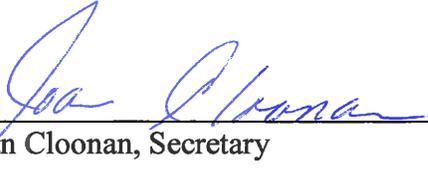
Chairman Purdy gave the opportunity for items the Board members would like to present on any issues not listed on the agenda. He asked Curt Fransen, Interim Director, to provide the Board with information about his biography and background. Mr. Fransen did so. The board members asked questions of Director Hardesty, relating to the process of the hiring of a permanent Director.

Director Hardesty reminded the Board of the confirmation hearing for three board members at Senate Health and Welfare Committee at 3:00 today.

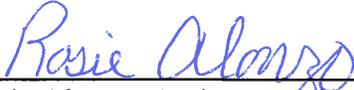
THE MEETING ADJOURNED AT 10:17 A.M.



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. 0101-11-04

W. ALLEN FREEMAN, :

Petitioner, :

vs. :

IDAHO DEPARTMENT OF ENVIRONMENTAL :
QUALITY, :

Respondent. :

----- x

REPORTER'S TRANSCRIPT OF PROCEEDINGS

held on February 16, 2012, 8:30 a.m.
before the:

DEPARTMENT OF ENVIRONMENTAL QUALITY
1410 N. Hilton
Boise, ID 83706

Reported by
Brooke R. Bohr
CSR No. 753

APPEARANCES

FOR DEQ:

- L. Nicholas "Nick" Purdy
- Carol Mascarenas
- Joan Cloonan
- John R. MacMillan
- Kermit V. Kiebert
- John McCreedy
- Kevin C. Bolling
- Harriet A. Hensley
- Douglas M. Conde
- Lisa Carlson

FOR W. ALLEN FREEMAN:
W. Allen Freeman

1 **MR. PURDY:** State your name and get it on
2 the record.

3 **MR. FREEMAN:** I'm Al Freeman. I live in
4 Nampa, Idaho. I'm a citizen of the state, and
5 I've lived here since 2001.

6 **MR. PURDY:** I want to make sure we
7 understand we're considering Docket Number
8 0101-11-04. We have comments and evidence that is
9 on the record and part of the record, but I see
10 you have the record in front of you there. You
11 can't take -- we can't take any new information.
12 So confine your evidence and remarks to what's
13 been submitted, please.

14 **MR. FREEMAN:** I will refer to laws, and I
15 think that that would be appropriate, I would
16 assume.

17 **MR. PURDY:** Um-hum.

18 **MR. FREEMAN:** This already involved the
19 Board as being applicable. I have this document
20 that I would just like to read, and I have copies
21 that I would submit to everybody after I read
22 it.

23 **MR. PURDY:** Is it part of the record that we
24 have or is this some new information?

25 **MR. FREEMAN:** I'm referring to laws that

1 apply to the Board with respect to this case and
2 with respect to the rule.

3 **MS. HENSLEY:** I'm the attorney for the
4 Board in this contested case, and your oral
5 argument, which I understand you will be reading,
6 will be recorded by the court reporter, but we
7 won't be taking any additional documents.
8 Everything you say will be recorded and be in the
9 record. We won't be accepting that document. It
10 will end up in the record.

11 **MR. FREEMAN:** That's fine.

12 DEQ Board Members, Ladies and
13 Gentlemen, I believe that we can agree as per the
14 provision of 39-116B, paragraph 1, the Board was
15 directed to initiate rulemaking to provide for the
16 implementation of a vehicle inspection and
17 maintenance program.

18 We can also agree it is very apparent
19 if there is no rule, DEQ does not have the
20 authority to implement VET. As cited in the
21 recommended order on page 3, the Idaho Supreme
22 Court was quoted, "It is not to be presumed that
23 the legislature performed an idle act of enacting
24 superfluous legislation."

25 Since the requirements stated in

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1 39-107D, paragraph 1, are applicable to any rule
 2 formulated and recommended by the Department to
 3 the Board, which is broader in scope or more
 4 stringent than fair law regulation or proposes
 5 to regulate an activity not regulated by the
 6 Federal Government. I am sure that we can agree
 7 that 39-107D is not superfluous law and its
 8 provisions apply to Administrative Rule 58.01.01.
 9 The purpose of this hearing is to
 10 answer the question, did DEQ comply with the
 11 required provisions of Idaho Code 39-107D and
 12 other applicable statutes when the Administrative
 13 Rules for the control of air pollution in Idaho
 14 was submitted to the 2010 Idaho Legislature for
 15 final approval. If the answer is yes, then the
 16 legality of the rule is affirmed. If the answer
 17 is no, then the rule must be repealed as specified
 18 in 39-107, paragraph 7, quote, the Board by
 19 affirmative vote of four of its members may repeal
 20 the rules of the Department that are necessary and
 21 feasible in order to carry out the purposes and
 22 provisions of this act and to enforce the laws of
 23 this state. With repeal, DEQ will have no
 24 operational authority to implement or continue a
 25 vehicle emissions testing for ozone in the

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1 Treasure Valley.
 2 What are in the provisions of 39-107D,
 3 paragraph 2, quote, states, to the degree that a
 4 Department action is based on science in proposing
 5 any rule subject to this section, the Department
 6 shall utilize, A, the best available peer review
 7 science and conducted studies scientific
 8 practices, and, B, data collected by accepted
 9 methods – that's an important phrase – or best
 10 available methods of the reliability of the method
 11 and nature of the decision justify use of the
 12 data.
 13 Paragraph 3 states, quote, any proposed
 14 rule subject to this section which proposes the
 15 standards necessary to protect human health and
 16 the environment shall also include in the
 17 rulemaking record requirements the following
 18 additional information.
 19 And paragraph E states, quote,
 20 identification of studies known to the Department
 21 that support are directly relevant or fail to
 22 support any estimate of environmental effects and
 23 the methodology used to reconcile inconsistencies
 24 in the data.
 25 The first question that must be asked

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1 and answered is was the Department action,
 2 submission of 58.01.01 Administrative Rule for
 3 legislative approval for implementation of VET
 4 for ozone in 39-116B based on science. To answer
 5 this question, we need to know what science and
 6 studies were utilized and identified per the law
 7 and known to the Department that support, are
 8 directly relevant to or fail to support any
 9 estimate of environmental effects from
 10 implementation of VET were made known to the
 11 legislation in DEQ testimony in the legislative
 12 hearing to approve the Administrative Rule. The
 13 answer is none.
 14 The Department did not comply with the
 15 provision of 39-107D, paragraph 3. The question
 16 that must be answered now is, A, what best
 17 reviewed science and in accordance with sound and
 18 objective scientific practices and, B, data
 19 collected by accepted methods or best available
 20 methods if the reliability of the method and
 21 nature of the decision justify use of the data
 22 were known to DEQ, but not utilized, and,
 23 therefore, concealed from many and unknown by the
 24 legislature in the Administrative Rule hearing
 25 and thereby not complying with provision 2 of

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1 39-107D. I've listed several of these items that
 2 were not shared.
 3 Number one, the 2002 PM10 SIP data
 4 included in vehicle miles traveled and reduced
 5 vehicle emissions of NOx and VOC for years 2010,
 6 2015, 2020. This information was known to DEQ in
 7 July 2002, but was not provided to the legislature
 8 at the Administrative hearing.
 9 Two, the PM10 SIP was approved by EPA
 10 July 30th, 2003, and was well documented based on
 11 the emissions, vehicle emissions, budget
 12 reductions required to be met by 2010 for vehicle
 13 NOx and VOC of 37 percent and 41.3 percent to meet
 14 conformity determinations for Ada County to
 15 receive Federal funding for transportation
 16 improvement programs and regional transportation
 17 plans. This information was known, to DEQ in
 18 2003, but was not provided to the legislature at
 19 the Administrative Rule Hearing.
 20 Number 3, DEQ Stockwell, et al., 2003
 21 report included that vehicle NOx would increase
 22 ozone. And the Desert Research Institute, May
 23 2008 report confirmed the Stockwell, et al.,
 24 increase the ozone in the Treasure Valley. This
 25 information was known to DEQ in 2003 and 2008 and

2 (Pages 5 to 8)

1 was not provided to the legislature at the
2 Administrative Rule Hearing.

3 Number 4, in November of 2009, based on
4 the 2004 EPA approved Mobile 6.2 program, required
5 by all states to use a -- to determine emission
6 conformity by 2006, COMPASS demonstrated the
7 vehicle at NOx and VOC required productions had
8 been exceeded. The reductions were 48.2 percent,
9 77 percent known to DEQ in 2009, but was not
10 provided to the legislature at the Administrative
11 Rule Hearing.

12 Number five, EPA's required additional
13 NOx and VOC by 2015 are an additional 16.2 percent
14 and 10 percent making total reductions from 1999
15 62.8 and 59.1 percent. This information was known
16 to DEQ in 2003, but was not provided to the
17 legislature at the Administrative Rule Hearing.

18 Number six, at legislative hearing
19 on 39-116B, DEQ estimated 2008 annual VET
20 reductions in vehicle NOx and VOC was 563 tons
21 and 533 tons based on DEQ's 1999 vehicle emissions
22 inventory. All of Ada County cars were being
23 tested annually. So in November of 2009, DEQ
24 Canyon County's reductions were only 114 tons and
25 138 tons. This information was known to DEQ and

1 was not provided to the legislature at the
2 Administrative Rule Hearing.

3 Number seven, EPA stated in the
4 Federal Register October 29th, 1999, with respect
5 to Minnesota, much of the improving ozone levels
6 nationwide had been attributed to the emissions
7 from the automobile. The EPA continues vehicle
8 emissions standards at the administrative level
9 and emissions from the automobile continue to
10 drop dramatically. The EPA has no reason to
11 believe that any marginal increase in VOC and
12 NOx emissions resulting from the shutdown of the
13 VET program for one hour or eight hour ozone NAA
14 QS standard. This information was available to
15 DEQ in 1999, but was not provided to the
16 legislature at the Administrative Rule Hearing.

17 39-102A, paragraph 6, states: "The
18 legislature further intends that environmental
19 quality programs be promulgated and managed such
20 that the benefits of pollution control measures,
21 VET, have a reasonable relationship to the
22 economic impacts of such measures."

23 DEQ completely ignored the provision
24 in this law, and the legislature has not been
25 apprised of the huge economic consequences of VET.

1 From 2002 to 2010 using the 250,000 as the average
2 number of vehicles in Ada County at an average
3 cost of \$15 per test, the annual cost of VET was
4 \$3.75 million. At a very conservative ripple
5 effect factor of 2 to 1. The economy lost
6 \$7.5 million rather than gained it. The annual
7 cost of VET to Ada County was \$15 million for a
8 total eight-year economic loss of \$120 million.

9 DEQ stated on June 4th, 2003, that
10 CO was not a problem in the Treasure Valley.
11 DEQ still continued to drain Ada County's economy
12 of \$15 million a year since 2003. Solution, DEQ
13 should put CO VET into a contingency status for
14 2012 to 2022 and CO SIP immediately to comply with
15 39-102A, paragraph 6.

16 I'll go away from my script. In
17 today's economic times, we need to increase the
18 economy -- our investment in the economy. We need
19 to increase jobs. Both Ada and Canyon Counties
20 with \$350,000 in Ada County and \$120,000 in
21 Canyon County, \$10 each annual VET cost is \$2.35
22 million. Again, at the 2 to 1 economic ripple
23 effect, the annual economic loss is \$4.7 million.
24 Total ten-year economic loss, \$94 million. This
25 information was available to DEQ in 2010, but was

1 not provided to the legislature at the
2 Administrative Rule Hearing.

3 It is important for you to be advised
4 in November of 2011, the 2011 ozone readings
5 had not been quality assured. DEQ knew the
6 Treasure Valley 2009, 2010 and 2011 three-year
7 average ozone reading is now below the 85 percent
8 or higher condition for DEQ to implement VET for
9 ozone.

10 The purpose of this hearing is to
11 answer the question, did DEQ comply with the
12 required provisions of Idaho Code 39-107D and
13 other applicable statutes when the Administrative
14 Rule 58.01.01, rules for the air control of Idaho
15 submitted to the 2010 Idaho State Legislature for
16 final approval. With the above information, it is
17 obvious there were significant scientific studies
18 and data known to DEQ, but not utilized. DEQ did
19 not comply with the provisions in paragraph 2 and
20 paragraph 3, 39-107A, paragraph 6, and 39-102A,
21 as this information was not provided to the
22 legislature at the Administrative Rule Hearings.

23 Therefore, according to 39-107,
24 paragraph 7, it is incumbent this Board take the
25 appropriate action and repeal Administrative Rule

1 58.01.01 rules for the control of air pollution in
2 Idaho Sections 517 to 526.

3 Thank you for your attention and your
4 time. I'm available to answer any questions and
5 clarify anything I have said.

6 **MR. PURDY:** Thank you, Mr. Freeman.
7 Are there questions for Mr. Freeman
8 from the Board?

9 Mr. Freeman, my understanding is that
10 you're asking for an extension for your 2005
11 Toyota for the testing.

12 **MR. FREEMAN:** 2003.

13 **MR. PURDY:** It seems like you're asking for
14 a repeal of 58-101.

15 **MR. FREEMAN:** The rationale is simple,
16 Mr. Chairman. If the rule is not legal, it is
17 null and void, and then there is no vehicle
18 emissions testing and I don't have to have my car
19 tested. It is not a -- simply, it is a legal
20 issue. If there's no rule, I don't have to test
21 my car. So I'm asking that in this way, I'm
22 saying that there is a real problem here.

23 **MR. PURDY:** Yeah. I understand. I'm just
24 not sure we can -- I think we can give you an
25 exemption, I believe, is what we're doing. I

1 don't know that we can repeal. But we'll get into
2 that with our counsel, I guess.

3 **MR. FREEMAN:** I understand that.

4 **MR. PURDY:** I just want to make sure what
5 you were asking for.

6 **MR. FREEMAN:** I understand that is the
7 position, that the exemption has nothing to do
8 with the rule. But it has everything to do with
9 the rule because if the rule does not exist, then
10 I do not have to test my car, nor do the 600,000,
11 500,000 people that live here have to test their
12 cars.

13 **MR. PURDY:** Okay.

14 **MR. FREEMAN:** So because the existence of
15 the rule predicates testing be done, if it is not
16 legal, as I maintain, because of the reasons it
17 did not meet the law that you are supposed to
18 enforce, then that settles the case.

19 **MR. PURDY:** Okay. I understand.

20 Are there any other questions?

21 **MR. McCREEDY:** Mr. Chairman, Mr. Freeman.

22 If I understand your argument, you're
23 saying the rule that requires you and others to
24 test their vehicles is based on, essentially, bad,
25 incomplete and misleading science?

1 **MR. FREEMAN:** Not bad, misleading science.
2 It is the fact that the science that we used was
3 not current science at the Administrative Rule
4 Hearing. There was science used in the 39-116B,
5 yes, but that's not the issue before the Board.
6 We deferred to that information when it was used
7 because it wasn't up-to-date. But that's a
8 subject that we could discuss later on a different
9 basis.

10 But my point is that all of these --
11 all of this work, all of this science, all of this
12 knowledge, all of this data was not provided.
13 There was no data provided to the legislature of
14 the nature that I recited here. And the rule --
15 the law, specifically, states that that has to be
16 provided in the hearing on the rule, and none was
17 provided.

18 **MR. McCREEDY:** Looking at 39-116B, it,
19 essentially, requires DEQ to make a factual
20 determination of whether the air shed has design
21 values equal to or above 85 percent of the
22 relevant national ambient qualities.

23 **MR. FREEMAN:** Correct.

24 **MR. McCREEDY:** I don't see that in your
25 materials.

1 **MR. FREEMAN:** Because I dealt with the
2 rule only. I would love to delve into that with
3 you, because in 2008, there was a significant
4 amount of data that indicated that while the
5 readings were at that level, the information to
6 get the law passed was not related to the
7 legislature for their consideration in getting the
8 law passed.

9 **MR. McCREEDY:** Let me ask it another way.

10 Was DEQ's conclusion that a vehicle
11 emission testing program should be developed
12 wrong? I mean, was the analysis that Rick Hardy
13 did regarding the design values incorrect?

14 **MR. FREEMAN:** Thank you for bringing that
15 up. That was one thing I did not comment on.

16 **MR. McCREEDY:** I don't see that any of your
17 submittals really go to that issue.

18 **MR. FREEMAN:** In 2004, the EPA came out with
19 the Mobile 6.2 program, and they said all states
20 have to use the 6.2 program, Mobile 6.2. But they
21 allowed a two-year delay, and it ended in 2006.
22 So as of 2006, EPA will only recognize Mobile 6.2.
23 That's why COMPASS in their filing for TIP used
24 the Mobile 6.2 program.

25 But in the 2005 and the 2008 emission

1 inventories, that's based on Mobile 6. That does
 2 not meet the conformity requirements. And the
 3 only reason there's emissions inventories done in
 4 2005 and 2008 is because of the PM10 SIP. And
 5 that is for -- and those -- the requirement of
 6 EPA based on the PM10 SIP set up the required
 7 reductions in NOx and VOC in vehicles in PM10 to
 8 be done and achieved by 2010.

9 So my -- I cannot explain why they
 10 didn't use 6.2, but I have information here that
 11 proves that using 6.2 achieved the projected
 12 result reductions in NOx and VOC from automobiles
 13 that the DEQ's people that prepared the emission
 14 inventories did not show were being received. I
 15 cannot conceive of the fact that 18 months before
 16 they have to file for TIP funding from EPA that we
 17 had a 50 percent reduction in nitrous oxides, for
 18 instance.

19 So am I going to question an expert's
 20 calculations? No. I question the use of
 21 Mobile 6. And I don't know if Mobile 6, if you
 22 use Mobile 6.2, it would result in any change.
 23 All I know is the law says, EPA says, and if it is
 24 not followed, that leaves a question as to the
 25 voracity -- not voracity, but the authenticity of

1 the information that is being provided.

2 And that's my point in this matter of
 3 the rule, and that is that this information was
 4 not provided. And it is required to be provided
 5 by law, and it is required by the Board to deal
 6 with. And if information isn't provided as
 7 required by law, then there's a problem with the
 8 rule.

9 **MR. McCREEDY:** Okay. Thank you.
 10 Thank you, Mr. Chairman.

11 **MR. PURDY:** Any other questions of
 12 Mr. Freeman?

13 **MS. CLOONAN:** Mr. Freeman, I want to
 14 clarify one thing. I think you said it several
 15 times. You said information was not provided to
 16 the legislature in the Administrative Hearing.

17 **MR. FREEMAN:** That's correct.

18 **MS. CLOONAN:** Isn't it the Board that is
 19 promulgating the regulation?

20 **MR. FREEMAN:** The Board caused DEQ to make
 21 the rule, but the rule is not effective until it
 22 is approved by the legislature.

23 **MS. CLOONAN:** Right. But the Board
 24 promulgates the regulation, and rarely does the
 25 legislature -- it is the Board that evaluates all

1 of the information that comes before it. And the
 2 DEQ has but a question from me, did you provide
 3 information to the Board during any of its
 4 hearings, you or your colleagues?

5 **MR. FREEMAN:** Yes. We testified. I
 6 personally testified in front of the Senate
 7 hearings.

8 **MS. CLOONAN:** Excuse me, I'm sorry. Did you
 9 provide information to the board?

10 **MR. FREEMAN:** To you people?

11 **MS. CLOONAN:** Right.

12 **MR. FREEMAN:** Yes. I met before the Board
 13 before you sent it to the legislature, and we
 14 provided information to you, yes.

15 **MS. CLOONAN:** Okay.

16 **MR. FREEMAN:** Not to this extent.

17 **MS. CLOONAN:** True. But there was -- I
 18 understand. I understand. There was a lot of
 19 information that was provided to us.

20 **MR. FREEMAN:** This is my second appearance
 21 before you.

22 **MS. CLOONAN:** I wanted to clarify that, yes.
 23 And the process that we go through in promulgating
 24 a regulation that the information required under
 25 Section 39-107D is information that is provided

1 that DEQ must have and that the Board would have
 2 before it when it promulgates a regulation.

3 **MR. FREEMAN:** Yes. And that is where I have
 4 a deep concern, and that is that you can only --
 5 the legislature can only respond according to the
 6 information you provided. If you are not provided
 7 the rest of this information, then it is not a
 8 factor, you don't know it.

9 **MR. PURDY:** Okay. Thank you.

10 Are there any other questions of
 11 Mr. Freeman?

12 Why don't we take a real short break,
 13 and then we'll throw the ball to the DEQ, I guess.

14 (Recess taken.)

15 **MR. PURDY:** We'll call the meeting back to
 16 order and have a presentation by DEQ on Docket
 17 Number 0101-11-04.

18 Lisa?

19 **MS. CARLSON:** Thank you, Mr. Chairman.
 20 Members of the Board, my name is
 21 Lisa Carlson. I'm a Deputy Attorney General, and
 22 I'm here representing the Idaho Department of
 23 Environmental Quality in this contested case.

24 My argument before you today is going
 25 to be fairly brief, and hopefully will clarify

1 what exactly the issues are that you are to
2 decide.

3 As an aside, some of the information
4 that was presented in earlier oral argument by
5 Mr. Freeman was new information, information
6 regarding costs and some of the other testimony
7 that he provided. I did not object to that
8 information because I do believe it is irrelevant
9 to the issues before you and wanted to give him
10 the opportunity to provide the information that he
11 wanted to provide.

12 The issue before you today is whether
13 petitioner's vehicle falls within an exemption
14 under the rules -- under the inspection and
15 maintenance rules. That is the purpose of this
16 hearing, to make that determination.

17 Petitioner claims that his vehicle is
18 exempt because DEQ -- and this is a quote from his
19 petition, DEQ used 1999 data and legislative
20 testimony to get 39-116B passed and did not comply
21 with the rulemaking provisions of 39-107D(1) and
22 (2) making 517 through 526 illegal, null and void.
23 That is his argument as to why his vehicle should
24 be exempt from vehicle emissions testing.

25 The passage of Idaho Code Section

1 39-116B and promulgation of the rules required
2 pursuant thereto are matters irrelevant to whether
3 petitioner's vehicle is entitled to exemption.

4 Nevertheless, DEQ explained both in
5 its briefs and oral argument that DEQ did comply
6 with Idaho Code Section 39-107D(1) and (2) when
7 promulgating 517 through 526. The hearing officer
8 agreed and issued a recommended order. The rules
9 are valid and petitioner's vehicle does not fall
10 within one of the exemptions under the rule.
11 Petitioner's vehicle is not an electric car or
12 hybrid car, it is not a plastic car, it is not a
13 motor home, it is not less than 1500 pounds, it is
14 not less than five years old, it is not older than
15 1981, it is not farm equipment and it is not
16 solely used in the business of agriculture. Those
17 are the reasons that the Petitioner would be
18 allowed an exemption.

19 I'm going to go back and talk a little
20 bit about 39-116B. The Board is familiar with
21 that statute, and we have had a previous contested
22 case regarding the vehicle inspection maintenance
23 program.

24 39-116B requires that DEQ enter into
25 rulemaking when two conditions are met. One, when

1 an air shed is defined by DEQ within a
2 metropolitan concentration design values equal to
3 or above 85 percent for three consecutive years,
4 and, two, DEQ determines that motor vehicle
5 emissions constitute one of the top two emission
6 sources contributing to that 85 percent of the
7 max design value. Those two conditions were met
8 by the summer -- end of the summer of 2008.

9 I did not hear anything from Petitioner
10 objecting to that or disagreeing that those two
11 conditions had not been met. Petitioner did not
12 argue there was bad or misleading science. In
13 2008, those two conditions were met. Those two
14 conditions were not subject to rulemaking
15 procedures. Those are the two conditions that
16 DEQ was directed to make by the Idaho Legislature.

17 As a result of DEQ making those
18 determinations, which are not subject to 39-107D
19 because they aren't part of the rulemaking, but as
20 a result of those two decisions, DEQ entered into
21 a negotiated rulemaking to establish the minimum
22 standards for the inspection maintenance program.
23 The only science-based decision in those rules
24 that you all promulgated, 517 through 526, the
25 only science-based decision in those rules was

1 excluding certain cities within the air shed that
2 DEQ determined had an insignificant contribution
3 to the 85 percent design value. That was a
4 science-based decision in that rulemaking.

5 Petitioner has not objected to that
6 determination. That is the only science-based
7 determination that was presented to you, and
8 that's why, as directed by the Legislature, as
9 directed by the statute, the statute specifically
10 said the rule needs to provide the specific
11 counties and cities under which the program will
12 be subject to, and DEQ determined some of the
13 smaller cities would not be subject to the
14 program. DEQ used the best available model and
15 data in making that science-based decision.
16 Again, that's in the affidavit of Richard Hardy,
17 and Petitioner does not dispute the finding.

18 DEQ did follow 39-107D(1) and (2)
19 when promulgating the rule. I think an argument
20 could be made that Idaho Code 39-116B specifically
21 required the rulemaking and 39-107D, perhaps,
22 wouldn't even apply to the rulemaking as
23 presented, but it did.

24 DEQ provided in the notice that the
25 rules promulgated that the proposed rule does not

1 regulate an activity not regulated by the
 2 Federal Government, nor is it more stringent than
 3 Federal regulations. The Clean Air Act requires
 4 in marginal ozone nonattainment areas a vehicle
 5 inspection maintenance program. This proposed
 6 rule is broader in scope than the Federal law
 7 as it applies to sources in an area not yet
 8 designated nonattainment. Pursuant to 39-116B,
 9 Petitioner's motor vehicle does not fall within
 10 the listed exemptions from emissions testing.
 11 The criteria in Idaho Code Section 39-116B were
 12 met. The rules promulgated pursuant to this
 13 determination comply with the procedural
 14 requirements under the Idaho Code 39-107D.

15 I respectfully request the Board enter
 16 a final order dismissing this and granting it as a
 17 matter of law.

18 I will answer any questions that you
 19 may have.

20 **MR. PURDY:** Any questions, Members of the
 21 Board of the DEQ?

22 Lisa, at what point can we quit
 23 testing? Is there anything in the rule that if we
 24 reach a certain level of reduction that the
 25 program ceases?

1 **MS. CARLSON:** Chairman, Members of the
 2 Board, Idaho Code Section 39-116B(6) states,
 3 "Every five years, beginning with the
 4 implementation of the program, the director shall
 5 review the air quality data and determine whether
 6 an air quality program pursuant to the provisions
 7 of this section shall be continued, modified or
 8 terminated."

9 So, in my opinion, what will happen
 10 within five years is DEQ will look at the data,
 11 look at the air quality data, and they'll look
 12 at the results from the vehicle inspection
 13 maintenance testing program and make a
 14 determination as to whether the program should
 15 continue or whether the program does not need to
 16 continue because the vehicle fleet has gotten so
 17 much cleaner or air quality has gotten cleaner or
 18 industrial sources have gotten cleaner. That's
 19 what the statute directs. So in five years.

20 **MR. PURDY:** That's next year, isn't it?
 21 2008 is when the legislature enacted 39-116B.

22 **MS. CARLSON:** Mr. Chairman, Members of the
 23 Board, I would hesitate to state a specific
 24 number on the record at this point because it is
 25 something I would want to discuss with DEQ first.

1 **MR. PURDY:** Okay. There is a sunset, maybe,
 2 some day.

3 Any other questions?

4 **MR. BOLLING:** Yes.

5 **MR. PURDY:** Yes, Mr. Bolling.

6 **MR. BOLLING:** Mr. Freeman in his testimony
 7 talked about certain DEQ protocols, Mobile 6
 8 versus 6.2 as being -- as DEQ did not follow those
 9 and does not refute the fact that the ambient air
 10 quality exceeded the 85 percent standard in which
 11 you say categorically meets the standard DEQ needs
 12 to affect in order to promulgate the rule.

13 I'm confused by -- Mr. Freeman, how
 14 does the one trump the other? How does your claim
 15 it didn't follow proper protocol from EPA and
 16 you're not refuting the fact that the air quality
 17 exceeded the standard, how do you reconcile those
 18 two for me in order to reach a decision?

19 **MR. FREEMAN:** With respect to the Mobile 6
 20 and Mobile 6.2, EPA sets the program, computer
 21 program that the states are required to use when
 22 they develop the data for emissions inventory.
 23 And it used to be Mobile 5 and then it became
 24 Mobile 6. They even had Mobile 5B.

25 Anyway, in 2004, they upgraded it to

1 Mobile 6.2. And in the EPA register, it says that
 2 the states have to use it after 2006. They were
 3 flexible in the 2004 area. So the only reason
 4 that emission inventories are required to right
 5 now is because of the PM10 SIP, and they have to
 6 be done every three years.

7 Okay. So we have the 2002 SIP, now we
 8 have the 2005, 2008, and they have to have
 9 emission inventories to meet the requirements of
 10 the PM10 SIP. So with the rule that you -- with
 11 EPA's standard that you have to use Mobile 6.2,
 12 then that is exactly what they should be using for
 13 the emission inventories by law.

14 Okay. And when COMPASS came in
 15 and used 6.2 and proved from 6.2 that the required
 16 reductions that EPA set in 2003 had been achieved
 17 and exceeded, then it doesn't make sense for
 18 Mobile 6 data that was used to create the
 19 emissions inventory in 2005 and 2008. I don't
 20 know how you make that connection as to how -- why
 21 and how do you resolve it? I don't know. I know
 22 that's what the law says. That's what EPA says.
 23 That's what DEQ has to do. If they didn't do it,
 24 then the information is suspect.

25 I agree that in 2008, the 85 percent --

1 this is a different subject. In essence, it met
 2 85 percent. Now, there's some issues involved
 3 that are not a part of this issue on the table as
 4 to why it was .075, which was the standard.
 5 There's other issues involved in that, too.

6 But at this point, in answer to your
 7 question about is there a sunset, yes, it is
 8 supposed to sunset by law if the three-year
 9 average is under 85 percent, it should stop.

10 **MR. PURDY:** Thank you.

11 Yes, Lisa.

12 **MS. CARLSON:** Mr. Chairman, Members of the
 13 Board, I respectfully disagree with that statement
 14 that if the numbers are under it should stop.

15 I do want to get back to your question
 16 Chairman Purdy regarding when does the statute
 17 sunset or when would the program sunset, and
 18 you suggested, perhaps, next year. The statute
 19 says every five years, beginning with the
 20 implementation of the program. So the program
 21 began its implementation in June of 2010. That's
 22 when the program was initiated.

23 **MR. PURDY:** I read that Ada County started
 24 testing in about 2008, vehicle emission testing.

25 **MS. CARLSON:** Mr. Chairman, Members of the

1 Board, Ada County has been testing its vehicles
 2 since 1984.

3 **MR. PURDY:** Oh, okay. So there has been a
 4 program for a long time.

5 **MS. CARLSON:** Yes.

6 And Mr. Chairman, Members of the Board,
 7 this is kind of getting away from the contested
 8 case before you.

9 **MR. PURDY:** I'm sorry.

10 **MS. CARLSON:** But that program was initiated
 11 pursuant to a carbon monoxide nonattainment
 12 designation. And so the testing that Ada County
 13 has done since 1984 has been the result of carbon
 14 monoxide testing in the state implementation plan
 15 and a maintenance plan that we are continuing to
 16 operate under. 39-116B then brought in and said
 17 take a look at the entire air shed, which brought
 18 in Canyon County and some of its cities. And so
 19 the Ada County program needs to not only comply
 20 with the State implementation plan for carbon
 21 monoxide, but also 39-116B.

22 And DEQ has a Joint Powers Agreement
 23 with Ada County and its cities, such that the Air
 24 Quality Board continues to operate Ada County
 25 programs, so long as it complies with the

1 provisions under 39-116B. Canyon County and its
 2 cities and Kuna, they are operated under a program
 3 that DEQ is the governing authority for, if that
 4 helps.

5 **MR. PURDY:** Aren't we limited today just in
 6 being able to give Mr. Freeman exemption on his
 7 vehicle? We can't overturn the rule here. That
 8 is beyond our authority today, right? Wouldn't we
 9 have to go back to the hearing officer?

10 Just what is our position here, our
 11 authority?

12 **MS. CARLSON:** That is the argument that I
 13 would make, that Mr. Freeman, specifically, in his
 14 petition asked for an exemption, such that his
 15 vehicle would not be revoked. So that is the
 16 position that I would take, yes. Correct.

17 **MR. PURDY:** But if we were uncomfortable and
 18 agreed with some of the arguments, then we could
 19 send it back to the hearing officer? Would that
 20 be Plan B? I'm just trying to get my arms around
 21 this thing.

22 **MS. CARLSON:** Sure.

23 So there is a section in the contested
 24 case rules, and it is Section Number 416, which is
 25 the section that addresses review of rules.

1 There's also another section, Section 860, which
 2 is the petition for judicial review of an
 3 administrative rule by the Department.

4 So I think an argument can be made,
 5 he could ask for a review of a rule and say that
 6 it wasn't promulgated pursuant to the correct
 7 provisions. But he did not do that in this case
 8 because the only provision that is science-based
 9 in this rule is whether the cities that were
 10 excluded from the program, whether that was based
 11 on the best available science under 39-107D, and
 12 he did not do that.

13 The issue as to whether the 85 percent
 14 of the NAS exists and whether vehicles were the
 15 top two sources contributing to that 85 percent,
 16 that is not the rulemaking decision. That is a
 17 decision that DEQ makes as directed by the
 18 legislature.

19 Then you go to the rulemaking. And
 20 then under the rulemaking, I would argue there's
 21 an argument that 107D does not apply, that the
 22 legislature said go through 39-116B. If these
 23 provisions happen, do this. But even so, under
 24 the rule, the only science-based decision was the
 25 exclusion of those smaller cities. And that was

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1 not addressed in any of petitioner's arguments.
 2 And as far as I know, he does not refute that.
 3 **MR. PURDY:** Okay. Anymore questions to
 4 Lisa? If not, I think we ought to go into
 5 executive session and get some advice from
 6 Harriet.
 7 **MS. CLOONAN:** Mr. Chairman, pursuant to
 8 Idaho Code 67-2345F, I move that we go into
 9 executive session to discuss legal issues with our
 10 attorney.
 11 **MR. MacMILLAN:** Second.
 12 **MR. PURDY:** It's been moved and seconded
 13 that we enter into executive session to discuss
 14 Docket Number 0101-11-04. We need a roll call on
 15 that.
 16 **MS. ALONZO:** Chairman Purdy?
 17 **MR. PURDY:** Yes.
 18 **MS. ALONZO:** Dr. Cloonan?
 19 **MS. CLOONAN:** Yes.
 20 **MS. ALONZO:** Ms. Mascarenas?
 21 **MS. MASCARENAS:** Yes.
 22 **MS. ALONZO:** Dr. MacMillan?
 23 **MR. MacMILLAN:** Yes.
 24 **MS. ALONZO:** Mr. Kiebert?
 25 **MR. KIEBERT:** Aye.

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1 the affidavit of Rick Hardy to establish what I
 2 think is pretty competent evidence that, in fact,
 3 Canyon County is in the Treasure Valley air shed;
 4 that, in fact, at the time the Department adopted
 5 the rules -- the design values under 39-116B were
 6 at 85 percent on the ambient air quality standard,
 7 and motor vehicle emissions were one of the top
 8 two emission sources 39-116B, subsection B.
 9 And I think Rick's affidavit pretty
 10 well establishes that the Department did make
 11 those two conclusions based on sound science, and
 12 I don't see anything in Mr. Freeman's submittals
 13 that challenge those two conclusions.
 14 So if what he is doing is challenging
 15 the rule as it was presented to the Board or
 16 during the Board's deliberations or as it was
 17 presented to the legislature, I don't see the
 18 evidence to overturn those two conclusions.
 19 That's, essentially, my analysis of his
 20 petition, Mr. Chairman.
 21 **MR. PURDY:** Okay. Dr. Cloonan?
 22 **MS. CLOONAN:** Mr. Chairman, I would agree.
 23 And a lot of what I was hearing on the
 24 applicability of 39-107D(1) and (2), that
 25 applies to the rulemaking, not to the

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1 **MS. ALONZO:** Mr. McCreedy?
 2 **MR. McCREEDY:** Yes.
 3 **MS. ALONZO:** Mr. Bolling?
 4 **MR. BOLLING:** Yes.
 5 **MR. PURDY:** Okay. We'll ask the room be
 6 vacated, and it will probably be about ten
 7 minutes.
 8 (Recess taken.)
 9 **MR. PURDY:** We'll go back on the record.
 10 We had a motion made to go out of
 11 executive session.
 12 Harriet, we'll wait for Lisa. We'll
 13 wait a minute for Lisa to return.
 14 (Off the record.)
 15 **MR. PURDY:** Okay. We'll go back in session.
 16 Is there anymore discussion or anymore
 17 questions on this issue before us?
 18 **MR. McCREEDY:** I think -- I don't have
 19 anymore questions. My comments would be it is my
 20 understanding from the pleadings and the argument
 21 that Mr. Freeman is not challenging the statute
 22 itself, 39-116B, but instead the promulgation of
 23 the rules or the program that the statute
 24 requires.
 25 You know, I rely pretty heavily on

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1 legislature's affirmation or non-affirmation of
 2 the rule.
 3 And so applying that, I think that the
 4 Agency and the Board did have adequate data before
 5 it as it considered the rule. So I think that we
 6 are in compliance -- that it was in compliance
 7 with 39-107D(1) and (2), whether it needed to be
 8 or not, because it was directed specifically by
 9 the legislature that DEQ promulgate the rule. So
 10 on that part of it, I would -- I totally agree.
 11 And then on the other part, there's,
 12 really, two pieces to the petition, as far as I
 13 can see. We've got the exception from the rule,
 14 plus whether the rule was properly promulgated.
 15 So the exception to the rule, I don't see any
 16 evidence to grant or any reason to grant the
 17 exemption. It doesn't fall within any of the
 18 categories or no evidence has been presented that
 19 would indicate that it falls within any of the
 20 categories within the rule.
 21 **MR. McCREEDY:** Mr. Chairman, I would add one
 22 other comment. And that is, the statute itself
 23 has a five-year review provision in it. I mean,
 24 I would anticipate that air quality in the
 25 Treasure Valley is going to continue to be

1 studied, analyzed, changed, improved or worsen,
 2 and I think the legislature was wise to include
 3 the five-year review provision in the rule because
 4 if, in fact, testing vehicles in Canyon County and
 5 Ada County no longer provides any environmental
 6 benefit for the citizens in the valley, then we
 7 should not be testing those vehicles. So I will
 8 look forward to DEQ's five-year analysis to
 9 determine whether or not the program is still
 10 viable and should be used.

11 **MR. PURDY:** Agreed.

12 Are there any other comments?

13 What you're saying, it sounds like, or
 14 at least the two comments were that you're
 15 affirming the Hearing Officer's decision. Does
 16 anybody have any problem with that decision?

17 **MR. McCREEDY:** Mr. Chairman, I would move
 18 the Board affirm the Hearing Officer's recommended
 19 order based upon the deliberations of the Board
 20 today and direct counsel, Ms. Hensley, to prepare
 21 an appropriate order for the Board's review and
 22 consideration.

23 **MR. MacMILLAN:** Second.

24 **MR. PURDY:** Well, it's been moved and
 25 seconded that we affirm the Hearing Officer's

1 decision and that we direct Ms. Hensley to write
 2 an order so specifying.

3 Is there anymore discussion of the
 4 motion?

5 **MS. CLOONAN:** Mr. Chairman, I just want to
 6 make it clear that Ms. Hensley will be writing an
 7 opinion consistent with our comments and
 8 deliberation.

9 **MR. PURDY:** Okay. Well, let's have a roll
 10 call, Rosie, on motion, please.

11 **MS. ALONZO:** Chairman Purdy?

12 **MR. PURDY:** Yes.

13 **MS. ALONZO:** Ms. Mascarenas?

14 **MS. MASCARENAS:** Yes.

15 **MS. ALONZO:** Dr. Cloonan?

16 **MS. CLOONAN:** Yes.

17 **MS. ALONZO:** Dr. McMillan?

18 **MR. MacMILLAN:** Yes.

19 **MS. ALONZO:** Mr. Kiebert?

20 **MR. KIEBERT:** Aye.

21 **MS. ALONZO:** Mr. McCreedy?

22 **MR. McCREEDY:** Yes.

23 **MS. ALONZO:** Mr. Bolling?

24 **MR. BOLLING:** Yes.

25 **MR. PURDY:** Okay. We have unanimous

1 decision to affirm the Hearing Officer's decision.

2 I would like to thank Mr. Freeman. You
 3 have some very interesting information that I
 4 think we need to study some of it further. You
 5 brought up some pretty good points. Thank you.

6 Good job, Lisa. Very good.

7 Okay. With that, we'll close that.

8 (Hearing concluded at 9:56 a.m.)

9 —oOo—

1 REPORTER'S CERTIFICATE

2
 3
 4 I, BROOKE R. BOHR, Court Reporter, a
 5 Notary Public, do hereby certify:

6 That I am the reporter who took the
 7 proceedings had in the above-entitled action in
 8 machine shorthand and thereafter the same was
 9 reduced into typewriting under my direct
 10 supervision; and

11 That the foregoing transcript contains a
 12 full, true, and accurate record of the proceedings
 13 had in the above and foregoing cause, which was
 14 heard at Boise, Idaho.

15 IN WITNESS WHEREOF, I have hereunto set
 16 my hand March 9, 2012.

17
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 19
 20
 21 Brooke R. Bohr, Court Reporter
 22 CSR No. 753