



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**

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Chair  
Box 686  
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Carol Mascareñas  
Vice-Chair  
5000 Baltimore Circle  
Idaho Falls, ID 83401

Dr. Joan Cloonan  
Secretary  
9038 W. Beachside Lane  
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Dr. John R. MacMillan  
P.O. Box 712  
Buhl, ID 83316

Kermit V. Kiebert  
P.O. Box 970  
Ponderay, ID 83852

John McCreedy  
1951 S. Saturn Way  
Ste. 100  
Boise, ID 83709

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

**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 McCreedy, Member  
Kevin Boling, Member

**BOARD MEMBERS ABSENT**

None

**LEGAL COUNSEL**

Douglas M. Conde  
Harriet A. Hensley

**BOARD ASSISTANT**

Rosie Alonzo  
(208) 373-0240

**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 McCreedy
- 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 Wicherski, 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 McCreedy 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 61<sup>st</sup> 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. McCreedy 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 McCreedy, 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

**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 received 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 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° C to .3°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°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 61<sup>st</sup> 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° C from October 23 to April 15 (the current standard) to a weekly maximum temperature of 14.5 ° C from October 23 to November 6, and, then the weekly maximum temperature of 13 ° 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. Burnell 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 61<sup>st</sup> 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 rationale 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.

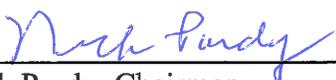
Dr. MacMillan also inquired about a group that had threatened to sue in regard to the antidegradation rules and was the suit still on-going. Mr. Conde said the suit filed by Idaho Conservation League (ICL) was to force the State and EPA to adopt an antidegradation implementation provision and the State 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.

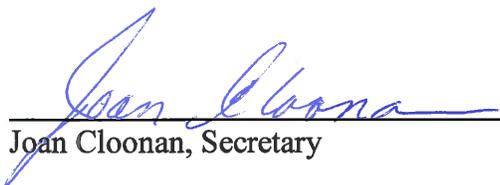
There were no further questions from the Board, so Chairman Purdy opened the floor for public comment.

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 61<sup>st</sup> 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

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BEFORE THE BOARD OF ENVIRONMENTAL QUALITY  
STATE OF IDAHO

----- x Case No. 0101-11-02

CANYON COUNTY, :

Petitioner, :

vs. :

IDAHO DEPARTMENT OF ENVIRONMENTAL :  
QUALITY, :

Respondent. :

----- x

REPORTER'S 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

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A P P E A R A N C E S

1

2

3 FOR DEQ:

4 L. Nicholas "Nick" Purdy

5 Carol Mascarenas

6 Joan Cloonan

7 John R. MacMillan

8 Kermit V. Kiebert

9 John McCreedy

10 Kevin C. Boling

11 Harriet A. Hensley

12 Douglas M. Conde

13 Lisa Carlson

14

15

16

17 FOR CANYON COUNTY:

18 Samuel Laugheed

19

20

21

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\* \* \* \* \*

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1 MR. PURDY: Docket No. 0101-11-02.

2 I'd like to take just a couple of minutes and

3 either have Doug or Harriet maybe bring us

4 up-to-date. We have two new board members. And

5 my understanding of this case, and correct me, is

6 the DEQ some time ago passed a rule on vehicle

7 testing because of the reaching attainment of

8 certain parts of the state, but primarily here at

9 Ada County, Canyon County. And the legislature

10 passed law number 39-116B, which gave the DEQ

11 authority to limit the pollutions. And the best

12 way we found -- the DEQ found was by testing of

13 vehicles.

14 And the argument here is that Canyon

15 County doesn't want to -- the long and short of it

16 is they don't want to test their vehicles. But

17 the argument here is when some of their vehicles

18 weren't granted registration as per the Idaho

19 Code, they filed a petition. And we filed a

20 petition back, and it went to a hearing officer.

21 And the hearing officer -- number 17 on your tab

22 here, I think the very back page, covers it very

23 clearly. The hearing officer ruled in favor of

24 the DEQ on the summary judgment. And the hearing

25 officer states in the back of your tab 17 of the

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1 petition that his approval of the summary judgment

2 DEQ does not have any force until some action is

3 taken by the Board. And that's what we're doing

4 here today is to either ratify his action or

5 modify it or send it back to the hearing officer.

6 So I'd like either Harriet or Doug to

7 maybe comment on this. Isn't that what we're

8 doing?

9 MS. HENSLEY: Mr. Chairman, Members of the

10 Board, I think you captured the procedural posture

11 of the case, and I need not say anymore about

12 that. I think you captured it well.

13 My understanding is that the DEQ and

14 Canyon County each have 30 minutes for oral

15 argument, including rebuttal. And my

16 understanding is that Canyon County will be the

17 first to present oral argument.

18 MR. PURDY: Okay. Would you please state

19 your name for the record.

20 MR. LAUGHEED: Good morning. My name is

21 Sam Laugheed.

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

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

24 County.

25 MR. PURDY: Are you the attorney for Canyon

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1 County?  
 2 **MR. LAUGHEED:** I am. I am the Chief Civil  
 3 Deputy of the Canyon County Prosecuting Attorney's  
 4 Office, and I'm here on behalf of my clients, the  
 5 Board of County Commissioners.  
 6 **MR. PURDY:** You have 30 minutes.  
 7 **MR. LAUGHEED:** I would ask to reserve three  
 8 minutes for rebuttal.  
 9 As I said, I'm here on behalf of my  
 10 clients, the Board of County Commissioners. They,  
 11 in turn, are here on behalf of the people of  
 12 Canyon County, their constituents. Not only those  
 13 who disagree with the idea of vehicle emission  
 14 testing, but those who think vehicle emission  
 15 testing is a good idea. We're here on behalf of  
 16 all the residents of Canyon County because all the  
 17 residents of Canyon County, whatever their opinion  
 18 is, are entitled to due process. They are  
 19 entitled to equal protection. They are entitled  
 20 to have Idaho law operate the way it is designed  
 21 to operate.  
 22 Before addressing the specifics of the  
 23 County's argument, I would like to take a few  
 24 moments to talk about what we're not here to talk  
 25 about, things not at issue.

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1 Gentlemen, that my clients agree with the  
 2 scientific conclusions of DEQ in this matter  
 3 because they do not, neither do many other people  
 4 in Canyon County, people who have appeared at  
 5 every open meeting you've had, every hearing that  
 6 the legislature has had in enacting this law and  
 7 have tried to document what they believe is DEQ's  
 8 failure to use good science.  
 9 The thing is, that is not what we're  
 10 here to talk about today. None of that matters  
 11 because what we're here to talk about is the law,  
 12 not science, not politics, not history, not  
 13 discretion, but the law.  
 14 And, Ladies and Gentlemen, unlike  
 15 policy, unlike science, the Department of  
 16 Environmental Quality cannot spin the law, neither  
 17 can the County. The law can't be spun. It stands  
 18 alone. It is the foundation of a level playing  
 19 field. And that's where we want to be today, on a  
 20 level playing field talking about the law and  
 21 trying to fix some mistakes that have been made.  
 22 Now, Canyon County believes that the  
 23 law is squarely on our side in this matter,  
 24 specifically with regard to these three main  
 25 issues we're going to talk about today. And I

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1 First, today's hearing is not about  
 2 clean air. I think we can all agree that people  
 3 in Idaho are entitled to clean air. We want our  
 4 neighborhoods, our communities, our children, our  
 5 friends to be healthy in a sustainable way. And  
 6 I'll tell you that the Canyon County vehicle  
 7 fleet -- and by "vehicle fleet," I mean those  
 8 vehicles owned and operated by the political  
 9 subdivision of Canyon County in the daily conduct  
 10 of local government, our patrol vehicles, the  
 11 vehicles that are out at the landfill, the  
 12 vehicles that our maintenance drives. These  
 13 vehicles are among the greenest in the state. Our  
 14 fleet is among the greenest in the state. We run  
 15 E-85. We have amazing extraordinary maintenance  
 16 procedures in place. We believe in clean air, and  
 17 we believe in achieving it in an economical way.  
 18 Nor are we here today to argue about  
 19 politics, policy or science. We aren't here to  
 20 talk about Ada County, the Treasure Valley Air  
 21 Quality Council, pollution. We aren't even here  
 22 to talk about vehicle emission testing. This is  
 23 an important distinction and one that thus far DEQ  
 24 has failed to grasp. We're not here to talk about  
 25 science. And that is not to say, Ladies and

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1 would submit to you that this is the reason the  
 2 Department of Environmental Quality does not want  
 3 to talk about the law, why it would prefer to talk  
 4 about science, the history of the issue, politics,  
 5 anything but the law.  
 6 In fact, your attorney has raised an  
 7 issue that has seemingly been adopted in position  
 8 by your recommended order that this process, this  
 9 venue is not the right one to talk about the law.  
 10 I think that's laughable.  
 11 The purpose of administrative review is  
 12 to give the agency an opportunity to fix its  
 13 mistakes, to fix its errors. Canyon County has  
 14 identified errors in DEQ's interpretation and  
 15 execution of 39-116B. Errors that go to the heart  
 16 of the rulemaking process. Errors that have  
 17 imposed grievous constitutional harm on the people  
 18 of Canyon County. Errors that have imposed  
 19 economic harm on the people of Canyon County.  
 20 But when we bring this up, the response  
 21 we get -- and I'll quote from DEQ's May 13th  
 22 brief -- "Petitioner challenges the underlying  
 23 program and the rules DEQ adopted to implement the  
 24 program. They provide no basis for avoiding  
 25 revocation of the vehicle registrations. These

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1 arguments may be made in a different venue, but  
 2 are not relevant here."  
 3 Is that truly the position of DEQ,  
 4 that you would rather not talk about how you  
 5 promulgated these rules, how you interpret and  
 6 enforce them? That you would prefer, because it's  
 7 been invited in your briefing that we go directly  
 8 to District Court.  
 9 Our purpose, Ladies and Gentlemen, has  
 10 been to assist DEQ. We are not here in an  
 11 adversarial capacity. We are here as a friend of  
 12 this tribunal, and we are here to facilitate your  
 13 correction of errors. And we're not doing this  
 14 just out of the goodness of our hearts, you see.  
 15 We've got better things to do than sue DEQ. We've  
 16 got pressing issues that require our immediate  
 17 attention. We have not the time, not the  
 18 inclination, not the desire, not the money to  
 19 engage in frivolous litigation. So we're asking  
 20 you to show us where we're wrong. We're putting  
 21 all our cards on the table. Here is our argument.  
 22 Here is the law that supports our argument. Here  
 23 are the facts. Here is how they fit. Show us  
 24 we're wrong or fix your mistakes.  
 25 I have prepared a handout for the Board

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1 applies, show you how the facts are. And then the  
 2 final issue is the all-encompassing context that  
 3 informs everything that's happened so far at this  
 4 point.  
 5 The first legal issue: DEQ violated  
 6 the plain language of 39-116B when it determined  
 7 which counties and cities were subject to vehicle  
 8 emission testing. And in so doing, DEQ also  
 9 violated the plain spirit, the plain language, the  
 10 intent of the Idaho Administrative Procedures Act.  
 11 Accordingly, the rules that have been promulgated  
 12 are not consistent with the statute. And in so,  
 13 they are ineffective and voidable.  
 14 On this point, we'll first take a look  
 15 at the plain language of 39-116B. The plain  
 16 language is in this handout. If you look at the  
 17 subsection 2 of it, that's where it would start,  
 18 and it is part A, because that articulates the  
 19 very first thing this Board was to establish by  
 20 rulemaking, which counties and cities within the  
 21 air shed would be subject to testing. That's  
 22 clear plain language, right, subsection 2, part A.  
 23 Well, that's not what DEQ did. On  
 24 July 1st, 2008, 39-116B became law. On  
 25 November 7th, 2008, Canyon County received an

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1 that I would ask to be entered into the record.  
 2 I'm not going to insist it be part of the record.  
 3 All the information in here is already  
 4 incorporated by the briefing. This simply  
 5 organizes things and could be a reference point  
 6 for the Board.  
 7 MS. HENSLEY: May I interject, Mr. Chairman?  
 8 I would recommend that you not accept this into  
 9 the record.  
 10 MR. PURDY: Yeah. I think without having  
 11 the chance to review it, I don't think we should  
 12 accept it at this time.  
 13 MR. LAUGHEED: So will you not consider  
 14 looking at it then, as well?  
 15 MS. HENSLEY: As I said earlier, this case  
 16 should be heard on the record that's been  
 17 established.  
 18 MR. LAUGHEED: Absolutely. We'll make  
 19 copies of this available for anyone who is  
 20 interested. As I said, all this information is  
 21 already in the record.  
 22 There are four issues to talk about  
 23 today, three critical legal issues and one  
 24 overriding contextual issue. We're going to lay  
 25 these issues out for you, show you how the law

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1 official letter from DEQ providing official  
 2 notice, not of rulemaking, not of Canyon County's  
 3 opportunity to be heard, but notice that DEQ had  
 4 already decided that Canyon County would be  
 5 subject to emission testing.  
 6 Now, 11 days after Canyon County was  
 7 provided this notice that we would be subject to  
 8 testing, DEQ initiated the very rulemaking by  
 9 which it was to determine which counties and  
 10 cities would be subject to testing.  
 11 That, Ladies and Gentlemen, is a  
 12 blatant disregard of due process. It is analogous  
 13 to a judge in a criminal trial telling a  
 14 defendant, "I'm going to find you guilty. I'm  
 15 going to sentence you to 45 days, but you do have  
 16 a right to a trial and right to be heard, after  
 17 which I'm going to sentence you to 45 days." That  
 18 is a mockery. It is a sham of due process.  
 19 Ladies and Gentlemen, that is exactly  
 20 what happened to Canyon County here. The response  
 21 that we got from DEQ when we brought this to its  
 22 attention: "Petitioner did not participate in the  
 23 rulemaking."  
 24 Well, we tried to reframe the argument,  
 25 then pointing out DEQ had admitted the material

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1 facts. And that was apparently arguing that the  
 2 fact that Canyon County did not participate in a  
 3 rulemaking process, the outcome of which had  
 4 already been decided, that somehow mitigated this  
 5 error, that it cured the fact that Canyon County  
 6 was given preemptive notice of rulemaking.  
 7 The response we get, it doesn't address  
 8 the issue: "Canyon County continues to contend  
 9 that the statute requires a final rule be in  
 10 place."  
 11 That prompted the first time the county  
 12 said, "You are not addressing our question." You  
 13 are not providing the answer we're looking for.  
 14 The answer that makes us step back and go, okay,  
 15 maybe this is not worth pursuing.  
 16 So what does the recommended order  
 17 conclude on this point? It says, well, the notice  
 18 sent to canyon county was sent after the date it  
 19 became law, 39-116B became law, and after the  
 20 occurrence of events which triggered the  
 21 rulemaking and well in advance of the effective  
 22 date of the ruling. The notice sent was to inform  
 23 Canyon County of the status and existence of the  
 24 law and the effect such statute would have on  
 25 Canyon County and requirement for vehicle

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1 persons in similar situations differently or that  
 2 does not apply equally to all parts of the state.  
 3 Now, this concept is embodied  
 4 throughout the Idaho Federal Constitution, and  
 5 that is of equal protection. So, again, I'd  
 6 invite you to take a look at the actual law,  
 7 39-116B. And I would emphasize that none of the  
 8 arguments Canyon County has presented thus far are  
 9 based on anything other than the plain language of  
 10 that law. We aren't bringing in crazy opinions  
 11 from California, law from the East Coast. We're  
 12 talking about law that was written by Idaho for  
 13 Idahoans.  
 14 This time, take a look at subsection 1  
 15 of 39-116B. What does it say? That this law  
 16 applies to an air shed within a metropolitan  
 17 statistical area where certain scientific  
 18 conditions have been determined by DEQ to exist.  
 19 Now, by that language, the statute arguably treats  
 20 all of the states the same. All the air sheds  
 21 within MSA's within the state are subject to this  
 22 same determination process.  
 23 So which air shed and which MSA are we  
 24 talking about for Canyon County? The record is  
 25 pretty clear that we are in the Boise, Nampa

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1 emissions testing.  
 2 Folks, all that does is, again, admit  
 3 factual basis for our contention. It doesn't  
 4 address the legal issue. It doesn't address the  
 5 harm that was perpetrated against Canyon County.  
 6 And so our brief that taking exception to this  
 7 recommended order pointed that out.  
 8 What did we get in response? Well,  
 9 take a look at page 2 of your brief in support of  
 10 the recommended order. Idaho Code Section 39-116B  
 11 does not require a final rule be in place. That  
 12 is not what we're talking about. And if I was  
 13 here in an adversarial capacity, if we were in  
 14 front of the District Court, then I love this  
 15 record, but I'm not here in an adversarial  
 16 capacity. The County is here to assist DEQ to fix  
 17 these mistakes. And so I'm distressed by it  
 18 ignoring the issue that has been raised. Tell  
 19 Canyon County how we're wrong on this point or fix  
 20 the mistake.  
 21 The second issue to address is  
 22 that DEQ's implementation of 39-116B has  
 23 unconstitutionally rendered the statute local or  
 24 special. It is a violation of Article 3, Section  
 25 19 of the Idaho Constitution for any law to treat

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1 metropolitan statistical area as determined by the  
 2 United States Office of Management and Budget.  
 3 The air shed within that MSA is the Treasure  
 4 Valley air shed. What does that include? Ada  
 5 County, Canyon County, parts of Boise, Gem,  
 6 Payette, Elmore and Owyhee counties.  
 7 So in order for DEQ's application of  
 8 this statute to be constitutional, those are the  
 9 areas that need to be treated equally. And the  
 10 fact of the matter is those areas have not been  
 11 treated equally.  
 12 And, once again, despite bringing this  
 13 to DEQ's attention multiple times, we haven't  
 14 gotten an answer. DEQ's first response -- and  
 15 I'll refer to page 14 of that first brief -- was  
 16 that a hearing officer has no authority to render  
 17 a statute unconstitutional.  
 18 Not only is that off point and a  
 19 mischaracterization of what the County is saying,  
 20 it is a misstatement of fact. It is a  
 21 misstatement of law. Certainly, a hearing officer  
 22 can't render a statute unconstitutional, but a  
 23 hearing officer can certainly tell the agency  
 24 that its application of the statute is in error.  
 25 And if the hearing officer who -- and let's be

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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 IM  
 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 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 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 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

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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

Page 23

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 the 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 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 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

6 (Pages 21 to 24)

1 brief: "It appears Petitioner believes that when  
2 Idaho legislature passed 39-116B it did not intend  
3 it would take effect on July 1st, 2008." That is  
4 not what the County is saying.

5 DEQ goes onto define -- use Webster  
6 definitions for ordinary terms like "revoke" and  
7 "any." And that gets us nowhere because, frankly,  
8 those words are not in dispute.

9 Take a look at DEQ's own example, the  
10 liquor license thing. Subsection 6 of that law  
11 has an expressed declaration of retroactive  
12 effect, plus the words "revoke" and "any."

13 This is a fundamental proposition of  
14 law. It is not some crazy novel argument that the  
15 County is advancing here. But let's go a step  
16 further and imagine the statute is ambiguous, and  
17 maybe it can be interpreted the way DEQ argues it  
18 is and maybe it can be argued the way the County  
19 argues it should be.

20 In that case, according to Idaho law,  
21 you look at the legislative intent. You examine  
22 the reasonableness of the proposed interpretations  
23 and the policy that defines them.

24 So answer this, do public policy and  
25 reasonableness support so extreme an act as

1 divesting a citizen of the benefit of a license,  
2 the fee for which has been legislatively equated  
3 to a tax. Canyon County doesn't think so.  
4 Unfortunately, for everybody here, DEQ apparently  
5 does.

6 Take a look at your recommended order  
7 on this point. First, again, DEQ apparently lacks  
8 jurisdiction to review its own acts. Second, this  
9 is a quote from page 4, "The retroactive claim  
10 does not involve allegations of constitutional  
11 violations, the presiding officer concludes that  
12 39-116B is protected in application of the law,  
13 meaning from the date of the agency's rulemaking  
14 regarding vehicle emission testing was complete,  
15 the provision would occur from that date forward.

16 The statute has no provision meant to  
17 punish or penalize alleged transgressions that  
18 occur prior to the completion of rulemaking.  
19 That's right. But the order continues: "As a  
20 result, there's no retroactive application  
21 rendering 39-116B an ex post facto law or in  
22 violation of 73101.

23 Wait. The fact that the law doesn't  
24 have an expressed declaration of retrospective  
25 effect does not mean that DEQ did not apply it to

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

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

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

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

1 a past transaction compels a legal conclusion in  
2 the County's favor.

3 What did we get in response? DEQ's  
4 brief in support of the recommended order. It  
5 says, "Wheeler vs. Idaho Department of Health and  
6 Welfare is the sole case cited by Petitioner in  
7 support of its claim." It involves a statute  
8 where the law was not applied retroactively and  
9 the --

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

17 **MR. PURDY:** Yeah. You had, actually, about  
18 one more minute. Can you summarize in a minute?

19 **MR. LAUGHEED:** Well, I don't know that I can  
20 summarize it in a minute, but all this information  
21 is part of the record already. Every argument I'm  
22 making today is not unique to today. It's been  
23 made at least three times. We still have not  
24 gotten an answer.

25 **MR. PURDY:** You'll have rebuttal time after

1 the DEQ makes theirs.  
 2 **MR. LAUGHEED:** Thank you, sir. I'll stop  
 3 there.  
 4 **MR. PURDY:** Thank you.  
 5 Do you want to hear the DEQ or take a  
 6 short break? Let's hear the DEQ and, then we'll  
 7 go into executive session and take a break after  
 8 we hear the DEQ.  
 9 Is that okay? Are you ready to go?  
 10 **MS. CARLSON:** Yes, I am.  
 11 Thank you, Chairman. Thank you,  
 12 Members of the Board. My name is Lisa Carlson.  
 13 I'm a Deputy Attorney General, and I am  
 14 representing the Department of Environmental  
 15 Quality in this matter.  
 16 The Department of Environmental Quality  
 17 fully supports the recommended order granting  
 18 summary judgment to DEQ issued by the hearing  
 19 officer on August 19th, 2011. Counsel is correct,  
 20 the briefs provide the background information on  
 21 Idaho 39-116B.  
 22 In 2005, the passage of the Treasure  
 23 Valley Regional Air Quality Council Act occurred.  
 24 And part of the passage was that council was  
 25 required to create a plan to protect, preserve and

1 improve the air quality in the Treasure Valley.  
 2 The plan required was submitted to the legislature  
 3 in 2007, and that plan recommended that a vehicle  
 4 inspection maintenance plan be put in place in the  
 5 Treasure Valley then in 2007. But, finally, in  
 6 2008, 39-116B was passed.  
 7 39-116B is a law that the Treasure  
 8 Valley Air Quality Council submitted to the  
 9 legislature, was passed and signed by the  
 10 government, and it requires certain duties of the  
 11 Department of Environmental Quality.  
 12 And I am here to tell you today that  
 13 DEQ has followed the letter of that law over and  
 14 above what is required by the law. And we have  
 15 explained that to the petitioner numerous times in  
 16 our brief and in oral argument, and we will do it  
 17 again today.  
 18 What does 39-116B require? 39-116B  
 19 says if two criteria are met, then there are two  
 20 duties of DEQ. The two criteria that have been  
 21 met and that facts have not been in dispute in  
 22 this petition is that in the metropolitan  
 23 statistical area as designed by the OMB and the  
 24 air shed as defined by DEQ and in concentrations  
 25 of the National Air Quality standard or about 85

1 percent of the ambient motor vehicle emissions  
 2 constitute one of the two contributing sources to  
 3 that design value.  
 4 As a result of those occurrences,  
 5 DEQ is required to do two things under the law.  
 6 Number one, they are required to initiate a  
 7 rulemaking to establish the minimum standards for  
 8 a vehicle maintenance program. And, number two,  
 9 they are required to reach out to counties and  
 10 cities within the air shed and discuss with them  
 11 and invite them to participate. Those criteria  
 12 were met in December of 2008. That is not  
 13 disputed.  
 14 What Petitioner is asking for today is  
 15 an exemption from the program for its motor  
 16 vehicles, the motor vehicles registered to  
 17 Canyon County. The Petitioner also requested --  
 18 although it hasn't been brought up today. But the  
 19 Petitioner also requested that the Board  
 20 voluntarily suspend testing until the deficiencies  
 21 described in the petition are remedied.  
 22 In my briefs, I explain why Petitioner  
 23 has failed to state a claim for relief. I further  
 24 explained why summary judgment in favor of DEQ  
 25 must be granted. The hearing officer agreed with

1 DEQ's arguments and ruled in DEQ's favor. DEQ and  
 2 petitioner do agree on several things. They agree  
 3 this matter is right for determination. They  
 4 agreed there are no material facts in dispute.  
 5 They agree on the legal standards for the Motion  
 6 to Dismiss and the Motion for Summary Judgment.  
 7 They also agree it is clear from the plain reading  
 8 of the statute that satisfaction of the threshold  
 9 events in Idaho Code Section 39-116B(1) could  
 10 trigger both the contemporaneous initiation of  
 11 rulemaking and discussions regarding the Joint  
 12 Exercise of Powers Agreement.  
 13 Petitioner seeks an order that exempts  
 14 its vehicles and that are in Attachment A to the  
 15 petition and then additional vehicles that were  
 16 added on, and DEQ did not oppose that those be  
 17 added on to the petition.  
 18 What we disagree upon. We disagree  
 19 upon the legal scope of this contested case.  
 20 Petitioner seeks an exemption for its vehicles,  
 21 yet it fails to state under which exemption its  
 22 vehicles fall.  
 23 In a hearing to challenge the  
 24 revocation due to failure to comply with the  
 25 program established under the statute, the entire

8 (Pages 29 to 32)

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1 program is not subject to challenge. We disagree  
 2 on this. However, we fully brief why we think the  
 3 program and all of the legal procedures were  
 4 followed to the letter of the law.  
 5 So although we disagree, we did not  
 6 hide behind an argument saying, no, they must  
 7 claim an exemption, we also explained in full  
 8 detail in every brief and oral argument, and I  
 9 will do it again today, why we did follow the  
 10 law, the procedural law.  
 11 Petitioner, again, I argue -- DEQ  
 12 argues it did comply with the program, and,  
 13 therefore, the revocation should not take place.  
 14 For example, Petitioner should be arguing its  
 15 vehicles are exempt because the vehicles are no  
 16 longer registered in Canyon County, they are older  
 17 than the ones required for testing, those sorts of  
 18 arguments. Those arguments were not put in place.  
 19 The challenge of DEQ's application of  
 20 the statute of the rules, again, I do not believe  
 21 are properly before this Board of Environmental  
 22 Quality. Yet, I will respond to each of them.  
 23 As noted in my brief and the hearing  
 24 officer's recommended order, neither the hearing  
 25 officer, nor the Board have the authority to

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1 39-116B(2) says as part of the  
 2 rulemaking, the rulemaking participants, and then,  
 3 ultimately, you, the Board of Environmental  
 4 Quality, must have a rule in place that provides  
 5 for the counties and cities within the air shed  
 6 that will be subject to the motor vehicle  
 7 inspection and maintenance program. The Bureau  
 8 of -- the OMB decides the metropolitan statistical  
 9 area. DEQ decides the air shed. The Board of  
 10 Environmental Quality in promulgating the rule  
 11 decides which cities and counties within that air  
 12 shed be subject to the inspection and maintenance  
 13 program. That is exactly what you did.  
 14 And DEQ in preparation for the first  
 15 rulemaking did an abundance of modeling.  
 16 Rick Hardy's affidavit is attached to one of the  
 17 briefs. He explains the modeling that he did to  
 18 show that some of these smaller counties, the  
 19 emissions from their vehicles did not  
 20 significantly contribute to the elevated ozone  
 21 design values. That is a rational basis as to why  
 22 DEQ proposed -- only proposed, because DEQ can't  
 23 go into a rulemaking and say this is what the  
 24 answer is, because it is you that ultimately  
 25 decide and then it is the legislature that

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1 decide constitutional law and challenges.  
 2 Nevertheless, let me recap again what I  
 3 think are Petitioner's arguments because they do  
 4 move around a bit through the briefs, and why they  
 5 in no way entitle the motor vehicles registered to  
 6 Canyon County an exemption from the Commission's  
 7 testing requirements.  
 8 First, Petitioner argued DEQ failed to  
 9 comply with procedural requirements promulgating  
 10 the rules under Idaho Code Section 39-116B. DEQ  
 11 followed every procedural requirement in  
 12 promulgating those rules. There's no question  
 13 about that. They do acknowledge that it is a  
 14 reasonable -- the Petitioner does acknowledge  
 15 that it is a reasonable interpretation that  
 16 satisfaction of the threshold events in subsection  
 17 1 triggered rulemaking and discussions regarding a  
 18 joint exercise.  
 19 So I'm not really sure what section of  
 20 the rules DEQ did not comply with, what they  
 21 procedurally did not do in promulgating 39-116B.  
 22 They argue that DEQ impermissibly determined that  
 23 Payette, Boise, Gem, Elmore and Owyhee counties  
 24 should not be part of the program. But what DEQ  
 25 did is exactly what it is required to do by law.

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1 ultimately blesses what the final law is.  
 2 DEQ proposed that those counties  
 3 would be excluded. Nobody objected. Everybody  
 4 understood and agreed. And I haven't heard  
 5 Petitioner say, no, they disagree, that they  
 6 really did contribute to the ozone value, and  
 7 from an environmental standpoint they should be  
 8 included. No one objected. That process went  
 9 through. You promulgated a rule that excluded  
 10 those counties. That is what the law provides  
 11 for. It makes sense. It is rational, and it is  
 12 an environmentally sound and scientifically sound  
 13 decision.  
 14 If the -- again, if the negotiated  
 15 rule group or the Board or the legislature opposed  
 16 the exclusion of Payette, Gem, Elmore and Owyhee  
 17 counties, those counties would have been included  
 18 in the program.  
 19 The Board of Environmental Quality,  
 20 you, complied with the law in promulgating the  
 21 rule that excluded some counties and cities from  
 22 the program based on their insignificant  
 23 contribution.  
 24 In a further brief, it appears that  
 25 what Petitioner is arguing is that because DEQ did

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1 not offer the Joint Powers Agreement to the  
 2 counties and cities likely to be excluded from the  
 3 program at the time it was offered to Canyon and  
 4 Ada County and their cities, that the entire  
 5 program is invalid, and, therefore, its vehicles  
 6 should be exempt. But there's no language in the  
 7 statute that supports this argument.  
 8 In addition, discussing an agreement  
 9 with counties that would not be likely subject to  
 10 the program because there is insignificant,  
 11 unnecessary expenditure of taxpayer funds.  
 12 Additionally, many of the cities that were  
 13 ultimately excluded and counties ultimately  
 14 excluded did participate in the rulemaking. So  
 15 they were involved and knew what was going on and  
 16 what the process was both for the Joint Powers  
 17 Agreement and the rulemaking.  
 18 Petitioner chose not to respond -- or  
 19 chose not to participate in the rulemaking, and  
 20 they didn't have to. DEQ, though, continued to  
 21 provide them information about the rulemaking,  
 22 sent, approximately, 14 E-mails to Petitioner  
 23 explaining, "Here is the next rulemaking. Here  
 24 is the latest draft. This is where we are. This  
 25 is the science beyond some of the proposals being

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1 made." All of that information was out there and  
 2 available to Petitioner.  
 3 DEQ -- and I can say this because I  
 4 was very involved in the rulemaking. DEQ goes  
 5 over and above and beyond trying to get people  
 6 to participate in rulemakings. Paula creates a  
 7 fabulous website so that people can go on and  
 8 understand what is going on at any time. They  
 9 really do a fabulous job. And it is so difficult  
 10 for me to understand how anybody could argue that  
 11 somehow they were not allowed to participate or  
 12 somehow they were discouraged, because that just  
 13 simply is not the case.  
 14 So DEQ, you, Board of Environmental  
 15 Quality, complied with the law when you  
 16 promulgated the rule including certain cities of  
 17 the air shed as defined by DEQ within the  
 18 metropolitan statistical area. There's no  
 19 question that that rule was promulgated correctly.  
 20 And DEQ, there is no reason and it was  
 21 not required anywhere under the statute that  
 22 they -- when they were discussing Joint Powers  
 23 Agreement, that they also had to discuss that  
 24 Joint Powers Agreement with cities and counties  
 25 that they didn't at that point think would be part

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1 of the program because of their insignificant  
 2 contributions to the ozone level.  
 3 I think this is the third, but the  
 4 final argument that I'm going to discuss that  
 5 Petitioner continues to bring up is that they  
 6 argue that DEQ's implementation of 39-116B  
 7 attaches a new disability to past transactions in  
 8 the absence of a clear expression of legislative  
 9 intent they may do so.  
 10 I think what Petitioner is saying is  
 11 that the requirement to test the vehicles should  
 12 not kick in until after their vehicles are  
 13 registered again after the passage of the statute,  
 14 and, therefore, that their vehicles should not be  
 15 subject to testing until after they renew their  
 16 registrations. I think that is the underlying  
 17 argument that is being made. Although it is  
 18 never, you know, straightforwardly stated.  
 19 Again, the hearing officer found as a  
 20 matter of law that the legislature did intend for  
 21 the statute and the rule to apply to vehicle  
 22 registrations existing when the rulemaking was  
 23 complete. Petitioner's argument is difficult to  
 24 respond to. The statute itself is clear. It  
 25 applies to current registrations. The plain

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1 language of the statute uses the word "revoke,"  
 2 uses the word "any." It doesn't say new  
 3 registrations. It says, "any registrations."  
 4 And, again, I mean, I go back to some  
 5 of the arguments that I made in my brief. New  
 6 laws are passed every day. If a new speed limit  
 7 is applied in a school area and it includes in the  
 8 statement that your license will be taken away if  
 9 you violated that speed limit, the defense  
 10 couldn't be, no, not until I renew my license  
 11 should this apply. That is not going to happen.  
 12 Registration of a motor vehicle doesn't somehow  
 13 include application of a new law to that motor  
 14 vehicle. DEQ did not require that testing occur  
 15 prior to the passage of the statute. The  
 16 legislature decided if certain conditions were  
 17 met, emissions testing would simply be a new  
 18 requirement of motor vehicle owners.  
 19 The fact that the registration -- some  
 20 of the registration dollars do go to the County as  
 21 part of a tax, and the statute says in lieu of  
 22 property tax or registration you pay a  
 23 registration, I don't understand what difference  
 24 that makes, which is why it is difficult for me to  
 25 explain why -- I don't think it makes any

10 (Pages 37 to 40)

1 difference. It seems to me what Petitioner is  
 2 saying is okay if it is in lieu of property taxes,  
 3 then if your vehicle emissions registration is  
 4 revoked, then you must also pay an additional  
 5 property tax. I just don't get that. To me, it  
 6 doesn't matter. I don't see any legal distinction  
 7 between that.

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

16 We don't have that situation here.  
 17 There's no equitable lines argument. Canyon  
 18 County is not arguing that we wouldn't have any  
 19 vehicles if we knew we were going to have to have  
 20 their emissions tested. They are not making that  
 21 argument.

22 There is no ambiguity in the statute  
 23 as to what vehicles this law applies to. And even  
 24 if one could make that argument, I think the  
 25 legislative intent is clear and I think Governor

1 Otter's letter to the Canyon County Commissioner  
 2 on June 1st, 2010, made it clear because Governor  
 3 Otter explained that the summer of 2010 would be a  
 4 critical time to determine compliance with air  
 5 quality standards and implementation of a program  
 6 designed to prevent poor air quality and ward off  
 7 a costly nonattainment status under the Clean Air  
 8 Act.

9 There was no question as to when the  
 10 statute applied or what vehicles it applied to.  
 11 The statute and the rules applied to any vehicle  
 12 that fails to comply with the program.

13 Well, actually, I think this argument,  
 14 just in case it comes up again. Petitioner argued  
 15 that DEQ notification procedures are subject to  
 16 critical failure. I'm going to point out again,  
 17 although it wasn't argued in this oral argument  
 18 because Petitioner is here before you today, it  
 19 was not prejudiced by whatever notice it felt  
 20 constituted failure in response to Petitioner.

21 It was explained that it gave Canyon  
 22 County additional time to test its vehicles, and  
 23 Petitioner said that was unfounded and unlikely.  
 24 Idaho Code 39-116B(4)(A) merely requires for a  
 25 hearing to be had prior to revocation. DEQ

1 provides three notices, certainly more than is  
 2 required under the statute.

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

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

16 Petitioner's arguments not presented  
 17 until the date the motor vehicle registrations  
 18 were subject to revocation do not in any way  
 19 entitle its motor vehicles to an exemption.  
 20 The statute does not require a final rule be in  
 21 place prior to the discussion of and entry to a  
 22 Joint Powers Agreement. The statute provides that  
 23 the rule -- that the rule that is promulgated does  
 24 provide the cities and counties that would be  
 25 subject within the air shed that would be subject

1 to the program, the statute expressly provides  
 2 that registration be revoked for failure to comply  
 3 with the program, and Petitioner was provided with  
 4 that.

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

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

13 **MR. PURDY:** Are there any questions?  
 14 Let's let Mr. McCreedy.

15 **MR. McCREEDY:** Lisa, what was the first  
 16 notice of Canyon County? As I go through the  
 17 record, I think the first letter is a November  
 18 7th, 2008, letter. And I guess I'm just asking  
 19 was that the first official notice under the  
 20 statute? That was attached to Canyon County's  
 21 petition as Attachment B.

22 **MS. CARLSON:** Thank you, Chairman, and  
 23 Mr. McCreedy.  
 24 The first letter, the November 2000 --  
 25 the best place to find the sort of history or the

1 chronology of the letters and the communications  
2 is under Director Hardesty's affidavit. And that  
3 is attached to --

4 **MR. McCREEDY:** I looked at that, and I did  
5 not see that the November 7, 2008, letter was  
6 attached.

7 **MS. CARLSON:** The first official letter  
8 under the statute that gave the County 120 days to  
9 respond, because the statute specifically says  
10 that DEQ provide notification and ask them to  
11 respond in 120 days, that official letter was sent  
12 on April 22nd, 2009. And what that letter says is  
13 that in accordance with Idaho Code 39-116B(3),  
14 with this letter I'm requesting that Canyon County  
15 notify DEQ whether it intends, blah, blah, blah,  
16 blah, blah.

17 **MR. McCREEDY:** Is that letter in the record?

18 **MS. CARLSON:** Yes, it is.

19 **MR. McCREEDY:** If you can point me to that  
20 when you get a chance, if that would be  
21 acceptable, Mr. Chairman.

22 **MR. PURDY:** Okay.

23 **MS. CARLSON:** In the Motion to Dismiss on  
24 the alternative Motion for Summary Judgment, page  
25 4 of that brief quotes from that letter.

1 **MR. McCREEDY:** Okay.

2 **MS. MASCARENAS:** Mr. Chairman, what tab?

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

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

8 **MS. CLOONAN:** Is that the April 22nd letter?  
9 It is attached to the Petitioner's motion or the  
10 Petitioner's first tab.

11 **MR. McCREEDY:** Thank you.

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

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

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

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

1 the law talked about air quality, talked about  
2 science, talk about politics, talked about  
3 technical detail. We didn't get an answer to the  
4 three questions that we've asked again.

5 We also heard that technically you  
6 don't have the jurisdiction to do anything about  
7 our complaint, about our petition. We're not here  
8 in an adversarial capacity. We're here to help.  
9 What you do have the jurisdiction to do is the  
10 right thing, and that's what Canyon County is  
11 asking.

12 I appreciate your time today.

13 **MR. PURDY:** Okay. Thank you. Does the DEQ  
14 want to rebut the rebuttal?

15 **MS. CARLSON:** No, Chairman and Members of  
16 the Board, other than to say we answered the three  
17 questions that were presented.

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

19 Are there any questions.

20 **MR. McCREEDY:** I do have a few questions for  
21 the representative of Canyon County.

22 Looking at the statute, 39-116B(1), A  
23 and B sets up the criteria for determining whether  
24 rulemaking is going to be initiated, that an air  
25 shed is above the 85 percent of ambient for three

1 consecutive years. Canyon County is not disputing  
2 that those facts are satisfied, are you?

3 **MR. LAUGHEED:** I'm sorry. I can't see your  
4 name, sir.

5 Mr. McCreedy, Mr. Chairman.

6 **MR. PURDY:** Yes.

7 **MR. LAUGHEED:** There's a fine distinction  
8 here because my clients do not agree with the  
9 way the exercise of discretion that has been done  
10 by the Director of DEQ with regard to those  
11 scientific elements. And there's many people in  
12 Canyon County that agree with them that this was  
13 incorrect. That is not an issue we're arguing  
14 about today, sir. I agree with that.

15 **MR. McCREEDY:** And neither are you arguing  
16 that under 39-116B(1)(D), that vehicles are one of  
17 the top two emissions sources contributing to the  
18 85 percent. I don't see that in your record that  
19 you're making that assertion.

20 **MR. LAUGHEED:** Mr. Chairman, Mr. McCreedy,  
21 that is correct.

22 **MR. McCREEDY:** In November of 2008, DEQ  
23 notified Canyon County that those two conditions  
24 were met, right?

25 **MR. LAUGHEED:** You're referring to the

1 November 7th, 2008, letter?  
 2 **MR. McCREEDY:** Right.  
 3 **MR. LAUGHEED:** If that is part of that  
 4 letter, I certainly wouldn't dispute that's the  
 5 same letter.  
 6 **MR. McCREEDY:** As I understand your first  
 7 argument, you're saying that the rulemaking should  
 8 have started before those two findings were made?  
 9 **MR. LAUGHEED:** No, sir. I'm saying that the  
 10 rulemaking should have started after those  
 11 findings were made and should have been applied  
 12 equally to Canyon County and other cities and  
 13 counties within the Treasure Valley air shed.  
 14 **MR. McCREEDY:** So if we look at the statute  
 15 again under 39-116B(2), are you saying DEQ and the  
 16 Board don't have authority to determine which  
 17 counties and cities do contribute significantly or  
 18 don't contribute significantly?  
 19 **MR. LAUGHEED:** DEQ has the authority through  
 20 the rulemaking process to make that determination.  
 21 **MR. McCREEDY:** And then on your equal  
 22 protection argument, what is the equal protection  
 23 standard that you want us to apply? If you're  
 24 saying that we have the authority to make  
 25 constitutional and legal decisions, I don't see

1 anywhere in the brief where you've identified the  
 2 equal protection standard that a court would have  
 3 this board apply. Is it the rational basis  
 4 standard?  
 5 **MR. LAUGHEED:** Mr. Chairman, Mr. McCreedy,  
 6 that is a good question. I'd be happy to, I  
 7 think, brief that. I don't know that I can  
 8 respond off-the-cuff to it. I can tell you that I  
 9 believe the equal protection argument in the US  
 10 Constitution and Idaho Constitution and the  
 11 foundation of the equal protection argument is one  
 12 that needs to be applied in fundamental fairness  
 13 equal to all parties before it. If the Board were  
 14 to apply Article 3, Section 18 to its  
 15 interpretation of this statute, it would see that  
 16 Canyon County has been treated differently than  
 17 have the other areas.  
 18 **MR. McCREEDY:** If I could, Mr. Chairman.  
 19 What is the equal protection standard we're  
 20 supposed to apply if we are to apply  
 21 constitutional law principles, the rational basis  
 22 standard?  
 23 **MS. CARLSON:** Yes. That is the position  
 24 that the Attorney General's Office would take. It  
 25 is a rational basis standard.

1 The other factual piece of information  
 2 that I think it important to point out and the  
 3 reason why I think it is important to point out is  
 4 because it demonstrates what DEQ has done over and  
 5 above what is required by law to help get the  
 6 citizens participating in this process.  
 7 DEQ made the determination that the two  
 8 prior criteria had been met by the summer of 2008.  
 9 So DEQ sent petitioner a letter dated November  
 10 7th, 2008, saying, you know, these criteria have  
 11 been met, we're initiating a rulemaking, please  
 12 participate.  
 13 So the follow-up letter, it isn't  
 14 that -- so the criteria had been met prior to DEQ  
 15 asking petitioner if they wanted to participate in  
 16 a Joint Powers Agreement.  
 17 **MR. McCREEDY:** One or two other questions.  
 18 Mr. Laugheed, are you arguing that all  
 19 Canyon County motor vehicles that were lawfully  
 20 registered as of March 2010 when the rule became  
 21 effected are grandfathered?  
 22 **MR. LAUGHEED:** Yes, sir.  
 23 **MR. McCREEDY:** And I don't believe you gave  
 24 us your fourth contextual argument. Can you  
 25 summarize that in one or two sentences, please?

1 **MR. LAUGHEED:** Mr. Chairman, Mr. McCreedy,  
 2 the fourth contextual argument I was referring to  
 3 is the failure of DEQ to directly address the  
 4 questions. The board members questioned about  
 5 which constitutional analysis should apply.  
 6 That's the sort of thing I would have hoped we  
 7 could have addressed throughout the briefing,  
 8 rather than so being posed by a board member  
 9 trying to find out what the argument is.  
 10 **MR. McCREEDY:** For the record, I would have  
 11 expected the petitioner to include it in its  
 12 briefing papers, not for a board member to ask.  
 13 But that's my opinion.  
 14 Thank you for allowing me to ask  
 15 questions.  
 16 **MR. PURDY:** Thank you. Good questions.  
 17 Are there any other questions or  
 18 comments?  
 19 (No response.)  
 20 **MR. PURDY:** Let's take about a ten-minute  
 21 break and then we'll reconvene.  
 22 (Recess taken.)  
 23 **MR. PURDY:** What's your pleasure on this?  
 24 **MS. CLOONAN:** Mr. Chairman, pursuant to  
 25 Idaho Code 7-2345-F, I, Joan Cloonan, move that we

1 go into executive session to discuss legal issues  
 2 with our attorney.  
 3 **MR. PURDY:** Okay. Is there a second?  
 4 **MR. MacMILLAN:** Second.  
 5 **MR. PURDY:** Okay. It has been moved and  
 6 seconded that we go into executive session.  
 7 **MS. CLOONAN:** We need a roll call.  
 8 **MR. PURDY:** We'll have a roll call vote.  
 9 All in favor? Just go around. Aye.  
 10 **MR. McCREEDY:** John McCreedy. I vote yes.  
 11 **MR. MacMILLAN:** Okay. Randy MacMillan. I  
 12 vote yes.  
 13 **MS. MASCERANAS:** Carol Mascernas. I vote  
 14 yes.  
 15 **MR. PURDY:** Nick Purdy. Yes.  
 16 **MS. CLOONAN:** Joan Cloonan. Yes.  
 17 **MR. KIEBERT:** Kermit Kiebert. Aye.  
 18 **MR. BOLING:** Kevin Boling. Aye.  
 19 **MR. PURDY:** Okay. Then we'll adjourn and  
 20 come back in executive session and the audience  
 21 will have to leave.  
 22 (Recess taken.)  
 23 **MR. PURDY:** Call the DEQ Board back to order  
 24 for the contested case of Canyon County vs. DEQ.  
 25 We had deliberations on the hearing this morning.

1 **MR. BOLING:** Mr. Chairman, Mr. Laugheed, I'm  
 2 the newest member of the board. I just want to  
 3 just give you my impressions of what I heard this  
 4 morning and what I read prior to our getting  
 5 together.  
 6 What I see is a fairly consistent  
 7 pattern of the air quality plan being passed in  
 8 2005, the legislature approving the plan in 2007,  
 9 adopting the law in 2008, directing DEQ to  
 10 promulgate the rules associated with  
 11 implementation of the law.  
 12 And I tried very hard this morning to  
 13 understand and grasp exactly the legal nuance, if  
 14 that's probably an appropriate term, you were  
 15 trying to describe as where DEQ went wrong. And,  
 16 frankly, I can't find it. I can understand  
 17 Counsel Carlson's arguments. But trying to  
 18 connect the dots of your position, I couldn't get  
 19 there. So for what that's worth, that's my two  
 20 cents.  
 21 **MR. PURDY:** Thank you.  
 22 **MR. MacMILLAN:** Mr. Chairman, it seems to me  
 23 that the issue before this Board is whether DEQ --  
 24 one of the primary issues before the Board is  
 25 whether DEQ and this Board followed the

1 Administrative Procedures Act. And I agree with  
 2 Mr. Boling there that the evidence indicates that  
 3 once the State legislature approved House Bill  
 4 586, that DEQ did what the legislature directed  
 5 them to, that they went out of their way,  
 6 actually, trying to include the public in the  
 7 rulemaking. And the rule was properly brought  
 8 before this Board, and we had opportunity to  
 9 approve or disapprove that rule. We approved it.  
 10 The legislature went on and approved the rule that  
 11 this Board had adopted.  
 12 So I can't find in the record where DEQ  
 13 or this Board went wrong. So, Mr. Chairman, I  
 14 would support that in large measure, anyway, the  
 15 hearing officer's decision. I won't make a motion  
 16 quite yet, but that's the direction I'm headed.  
 17 **MR. PURDY:** Thank you, Mr. MacMillan.  
 18 **MS. MASCARENAS:** Similarly, I went through  
 19 the different arguments. On the first argument, I  
 20 guess, in summary, Canyon County wasn't allowed  
 21 due process by the letter that was first sent to  
 22 them, their interpretation was it was determined  
 23 right then.  
 24 **MR. PURDY:** The November 12th letter?  
 25 **MS. MASCARENAS:** The November 7th letter.

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

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

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1 technical analysis, as far as which counties  
 2 should be in or out. So I think as far as due  
 3 process and how they treated the counties in their  
 4 evaluation of who would be included or not, they  
 5 all went through the same model and same type of  
 6 analysis in that determination. So I think due  
 7 process was afforded there across all the counties  
 8 and cities, as well.  
 9 So that's my initial reaction.  
 10 **MR. PURDY:** Dr. Cloonan?  
 11 **MS. CLOONAN:** I was going to bring up some  
 12 of the same comments that Ms. Mascarenas did. The  
 13 November 7th letter, I believe, was interpreted as  
 14 more of a directive than it actually was. It is  
 15 not an enforceable letter. It really was putting  
 16 out what DEQ had found up to that point in time,  
 17 the work that they had done. And the due process  
 18 is definitely within the regulatory process, the  
 19 process of developing and negotiating the  
 20 regulation. Nothing was final until it went into  
 21 the regulation itself.  
 22 So as Ms. Mascarenas said, it could  
 23 have been, perhaps, more artfully drafted, but I  
 24 think it gave the opening for discussion and  
 25 further determinations. It was not a final

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1 that opportunity.  
 2 **MR. PURDY:** Thank you.  
 3 Any others?  
 4 **MR. McCREEDY:** Mr. Chairman, I would just  
 5 supplement the comments, because I agree with the  
 6 ones made so far. I think the four arguments that  
 7 were made by Canyon County are, essentially, due  
 8 process, equal protection and retroactivity.  
 9 The statute is pretty clear, 39-116B,  
 10 that if DEQ makes two findings, then rulemaking  
 11 will be initiated. There wasn't any challenge to  
 12 the findings. That was the basis for my question  
 13 to Mr. Laughed was was there a factual challenge  
 14 to the two findings that DEQ is required to make,  
 15 and there isn't that I can see in the record. So  
 16 then rulemaking was initiated. And I don't see  
 17 that there's really a strong argument that DEQ did  
 18 not perform its statutory and other obligations in  
 19 the rulemaking the way it was supposed to. So I'm  
 20 not persuaded there was a due process violation.  
 21 And this, of course, assumes that the Board should  
 22 be addressing constitutional issues in the first  
 23 place. I'm not sure necessarily what the law is  
 24 exactly on that point. But to the extent we are  
 25 authorized to address constitutional issues, I

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?

1 **MR. PURDY:** Yes.

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

3 **MS. CLOONAN:** Yes.

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

5 **MS. MASCARENAS:** Yes.

6 **MS. ALONZO:** Dr. MacMillan?

7 **MR. MacMILLAN:** Yes.

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

9 **MR. KIEBERT:** Aye.

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

11 **MR. McCREEDY:** Yes.

12 **MS. ALONZO:** Mr. Boling?

13 **MR. BOLING:** Yes.

14 **MR. PURDY:** Okay. It is unanimous, and I'll  
 15 ask Mrs. Hensley to write the order based on our  
 16 discussion here on the points that we brought up.

17 **MS. HENSLEY:** I will do that.

18 **MR. PURDY:** Thank you everybody.

19 (Hearing concluded at 11:00 a.m.)

20 --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 November 28, 2011.

17  
 18  
 19  
 20  
 21 Brooke R. Bohr, Court Reporter  
 22 CSR No. 753  
 23  
 24  
 25