

IDAHO DEPARTMENT OF LANDS

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IN THE MATTER OF:

RULEMAKING PUBLIC HEARING
FOR IDAPA 20.02.01

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August 15, 2019; 4:30 PM

HELD AT: Coeur d'Alene, Idaho

BEFORE:

APPEARANCES:

TRANSCRIBER: CHARLENE E. GOLOJUCH

1 MR. CRAIG FOSS: All right. Welcome,
2 everybody. My name is Craig Foss. I'm the Forestry
3 and Fire Division Administrator for the Idaho
4 Department of Lands. Thank you all for attending
5 this hearing. Before we start, I want to provide
6 some general background. The Idaho Department of
7 Lands is not proposing any changes to 20-02-01
8 Rules Pertaining to the Forest Practices Act.
9 Currently, these rules are in a temporary proposed
10 status and are anticipated to be reauthorized by the
11 2020 legislature. This public hearing, by request,
12 is focused on a specific subsection, the Stream
13 Protection Rule, 030.07.e.ii, also known as, "The
14 Shade Rule." The rules promulgation process
15 described in the Idaho Administrative Bulletin of
16 June 19th, opened all Idaho administrative rules to
17 comment. For background on this rule, IDL entered
18 into negotiated rule-making in 2012 through 2013, to
19 develop new tree retention requirements for Class I
20 fish-bearing streams. This was in response to water
21 quality audit findings from as early as the year 2000
22 that indicated the rules in place for shade and large
23 woody debris recruitment for such streams were not
24 adequately maintaining water quality. IDL believes
25 the negotiating rule-making process was very

1 productive, and it ended with a new rule to promote
2 landowners', forest management of the repairing area,
3 on Class I streams, while providing statutorily
4 required protection to maintain water quality. The
5 new rule was published on July 1, 2014. The format
6 of this hearing is prescribed by rule. This
7 particular format for proposed rule-making does not
8 include an opportunity for multi-party dialogue. The
9 hearing is your opportunity to provide public
10 testimony regarding the proposed rules pertaining to
11 the Forest Practices Act. If you have questions or
12 would like to discuss some other aspect of forest
13 practices in Idaho, please contact Gary Hess
14 directly. This is a public forum and I ask all of
15 you to listen respectfully to all speakers and to
16 speak respectfully to all listeners. The proposed
17 rules were published in the June 19, 2019, Idaho
18 Administrative Bulletin, Special Edition, Volume 19,
19 pages 4,099 through 4,100; and pages 4,125 through
20 4,151. The rule in the bulletin is the official
21 version and all comments should be based on that
22 version. Our rulemaking website is updated and
23 provides a web link to the bulletin. A simple
24 internet search for Idaho Administrative Bulletin 19-
25 6-SE will lead you to the correct place to read the

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1 rules. Both written and oral comments are useful at
2 this stage of the rule-making. Changes to the
3 proposed rules can only be made based on written or
4 oral comments received on or before August 16, 2019.
5 IDL will review these comments and evaluate whether
6 or not rule changes are needed. Your comments and
7 any IDL suggestions for changes will be presented at
8 the Idaho State Board of Land Commissioners meeting
9 in September for a decision. We will compare the
10 pending rule for review by the land commissioners at
11 their October meeting. Based on their
12 recommendation, we'll then submit the pending rule
13 for consideration by the 2020 legislature. Please
14 make sure the department receives your comments
15 before August 16th. If you brought written comments
16 today, please make sure to give us a copy, because
17 written and oral comments receive equal treatment to
18 ensure all who desire to testify get the opportunity
19 to speak. Those who plan to submit written comments
20 may want to use this opportunity to briefly summarize
21 the written comments or to elaborate on specific
22 points. Simply reading your submitted written
23 comments verbatim does not enhance their impact.
24 Regardless of whether you have written comments to
25 submit, please do not hesitate to testify today.

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1 This is your opportunity to provide feedback on the
2 rules. Please make sure that you signed in at the
3 back of the room and have checked the boxes for
4 either written testimony, oral testimony or both.
5 Everyone who wants to speak gets one opportunity.
6 There will be no rebuttals. A time limit on
7 testimony may be necessary, depending on the number
8 of attendees that signed up to testify. A few
9 housekeeping matters. The restrooms and the water
10 fountain are to the left of the front desk. You came
11 in; the front desk was in front of you; to your left
12 down the hall are restrooms and a water fountain.

13 MR. GARY HESS: The agenda for today is the
14 introduction; then I will address water quality in
15 Idaho, as it is impacted by forest practices; the
16 history of Idaho fish-bearing stream, shade and tree
17 retention rules, what is required by IDL through
18 state statute and rule and why this rule-making is
19 being conducted at this time; and then we'll take
20 testimony. I'm not going to read my slides. I'll
21 let you read the slides, but I will be reading my
22 notes. And I'm reading the notes because we had a
23 session this morning and I wanted to make sure that
24 the presentation I make is identical between this
25 afternoon's session and this morning's session.

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1 Because of federal and state law, the structural
2 relationships among federal and state agencies, the
3 monitoring implemented by IDL and DEQ and the IDL
4 Administration of Forest Practices BMP's , a non-
5 point source discharge elimination system permit is
6 not require for timber harvesting. Furthermore, a
7 third-party certifier, such as the American Tree Farm
8 System and the Sustainable Forestry Initiative,
9 reference compliance with these best-management
10 practices as part of their standards. This slide
11 depicts the structural relationships and the
12 monitoring processes in the Forest Practices Rule
13 Development are depicted graphically on this slide.
14 And it's a rather busy slide, so take your time
15 looking at that and let me know if there's anything
16 that doesn't make sense to you. I want to provide
17 some detail on the history of the current Class I
18 Tree Retention rules. Idaho's Forest Practice Rules
19 were adopted nearly entirely from Oregon's original
20 rules, which were likely developed by a group of
21 foresters using the best knowledge available at the
22 time. Both states' rules were developed in response
23 to federal requirements under the Clean Water Act.
24 It would have been inefficient to start from scratch,
25 yet comparative review reveals that IDL foresters

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1 were selective in what was not adopted from those
2 original rules. Over time, numerous modifications
3 and additions have been accomplished by the Forest
4 Practices Advisory Committee, but some of the rules
5 remain intact from the earlier-adopted Oregon rules.
6 In 1990, probably based on 15 year's experiences
7 trying to develop selective cutting prescriptions,
8 the original rule was simplified, but specific tree
9 retention requirements were added. Those tree
10 retention requirements were shown in this standing
11 tree table depicted on the slide. There has always
12 been a shade requirement and for almost two decades a
13 standing tree requirement. Please note the current
14 rule still supports the site specific riparian
15 management prescription variance option implemented
16 in 1990, where the rule cannot be met due to
17 particular site conditions. Every four years, Idaho
18 Department of Environmental Quality Practices
19 Program by monitoring force practice operations near
20 Class I streams on all but tribal lands in Idaho.
21 These audits, combined with IDL identified
22 enforcement issues have revealed the need to
23 periodically make adjustments to Idaho's rules.
24 Twenty years ago, the need to modify the 1972
25 Development Rule was apparent. In 2004, auditors

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1 initial visual observations of tree-density were not
2 borne out by subsequent stand density measurements
3 that were taken during the audit. It was also clear
4 that repeated entry under the 75% of current shade
5 paradigm was contributing to water quality issues.
6 IDL, FPAC and DEQ have evaluated available science
7 and used empirical studies, as well as modeling, to
8 inform shade and large-woody debris recruitment for
9 aquatic habitat health. By the time of the 2012
10 audit these efforts were well under way. I have
11 provided a handout that goes into great detail
12 regarding the rule adopted in 2014. I would
13 encourage you to read it, because it provides way
14 more detail than I have time to go into here. The
15 rule is a compromise between simplicity and specific
16 applicability in order to provide adequate protection
17 statewide, while incorporating regional differences
18 in forest types. Differing forest landscapes can
19 support varying numbers of trees of varying species,
20 so the rule uses the expected maximum tree density by
21 forest type as a metric. The relative stocking
22 compares actual stand density to this metric and the
23 limits are set to avoid mortality, and yet still
24 provide adequate shade and large woody debris. To do
25 less would risk not adequately meeting water quality

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1 requirements and to do more by incorporating
2 orientation, topography and stream size would only
3 create a less manageable rule and likely not gain
4 much in maintaining water quality. I'm going to
5 focus now on what IDL is continuing to do to help
6 landowners achieve their forest management
7 objectives, while demonstrating that the relative
8 stocking limits are achieving the desired metrics for
9 water quality. Idaho private forestry specialists
10 have conducted hundreds of site visits to assist
11 landowners and operators with the rule. IDL and IDEQ
12 have conducted surveys and studies to determine how
13 the rule is being implemented, how often and how much
14 actual cutting occurs, and how harvesting relates to
15 shade reduction. The IDL operational monitoring
16 survey determined that from 2016 through 2018,
17 approximately two-thirds of stream protection zones
18 identified for harvest have demonstrated some level
19 of harvest. Of those, nearly all of the industrial
20 landowners and two-thirds of the non-industrial
21 landowners choose the 60-10, option two. The DEQ
22 shade effectiveness study will calculate shade
23 removal through pre-harvest and post-harvest
24 measurements of sites harvested to the exact limit of
25 the rule. IDL and FPAC committed to using the

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1 empirical information from these studies to compare
2 with the calculations done when the rule was
3 formulated. These comparisons will reveal if the
4 current relative stocking limits are supported by
5 what is actually happening on the ground. Idaho had
6 a legacy fish-bearing stream tree retention rule that
7 audit findings determined did not adequately protect
8 shade nor large woody debris recruitment. Regulators
9 struggled with the term "significant and
10 substantial," and how to define current shade, post-
11 harvest shade and until shade recovers. Responsible
12 operators did not have a definitive guide with which
13 to manage the timber and the SPZ and uncertain, left
14 more than necessary. Irresponsible operators
15 practiced multiple reentry until SPZ's were laid
16 bare--laid nearly bare, or they were cited. Stand
17 conditions of riparian areas range from severely
18 understocked to heavily overstocked and unhealthy.
19 Today with the current rule, nearly two decades of
20 research and deliberation have gone into the current
21 rule and research continues to ensure its validity.
22 Many operators are surprised at the degree of
23 management flexibility with in the SPZ, while still
24 providing sufficient stream protection. A majority
25 are selecting the option to harvest prescription,

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1 which can provide easily accessible value but also
2 leaves more trees in the inner-50 feet where the
3 shade contribution is greater. In many cases, more
4 trees are being left in the outer-25 feet than
5 before, which results in a less abrupt change in the
6 canopy than the previous 50-foot standing tree
7 buffer. Now, I'd like to discuss the rule-making
8 process that we're in today. As governed by the
9 Administrative Procedures Act of Idaho Code, Title
10 67, Chapter 52, all rules expire July 1st of every
11 year, unless extended by statute by the legislature.
12 The legislature did not do this in 2019. All state
13 agencies initiated a temporary and proposed rule-
14 making to fill the regulatory gaps. Temporary rules
15 were effective on June 30, 2019. For IDAPA 20-02-
16 01, rules pertaining to the Idaho Forest Practices
17 Act, no changes are proposed to the temporary
18 proposed rule at this time. This diagram shows a
19 hierarchy of state documents, from the constitution
20 down to legislative statutes and the state agency
21 rules, which is where we are today in this
22 discussion. And below that are policies, procedures,
23 guidelines and other written interpretations of the
24 administrative rules. Under normal negotiated rule-
25 making there would be stakeholder, technical expert

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1 and Forest Practices Advisory Committee discussions
2 about requested or suggested rule changes well in
3 advance of the Land Board approval to enter rule-
4 making, which typically would occur sometime around
5 April. There would then be a negotiated rule-making
6 process to craft specific language then to ensure all
7 interested parties participate prior to a proposed
8 rule. This did not happen in this unique situation.
9 The current rules went directly to the proposed
10 rules. We started in late June in this current
11 process with these proposed rules and we are here, in
12 August now, in the proposed rule-making status. The
13 very compressed timeline from June to August results
14 from the Office of Administrative Rules trying to fit
15 this unique situation into their normal business
16 schedule. This chart is basically just to compare
17 what the normal negotiated rule-making timeline would
18 look like compared to the proposed rule situation
19 that we're in as a result of the rules not being
20 reauthorized in January. No negotiations were held
21 because the existing rules were proposed for
22 adoption. Changes usually require a negotiated rule-
23 making. Public comment period is required for
24 proposed rule-making. In this case, sufficient
25 petitions were received to schedule a public hearing

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1 for IDAPA 20-02-01, as required by Idaho Code, and
2 the hearing was scheduled for today, August 15th, in
3 Coeur d'Alene by request and scheduled in accordance
4 with 74--excuse me--Title 74, Chapter 204. Public
5 comments will be accepted through August 16. Changes
6 to the proposed rule can only be made based on
7 testimony received at hearing or written comments.
8 Comments on the proposed rule will be presented at
9 the September Land Board meeting. Then a proposed
10 rule will be presented at the October Land Board
11 meeting and then it would become a pending rule. And
12 that pending rule and notice must be submitted to the
13 Office of Administrative Rules by October 16th in
14 order to get it in to the legislative session, the
15 2020 legislative session. The format for the hearing
16 is an opportunity to provide testimony. Time limit
17 may be imposed depending upon the number of people
18 signed up to provide oral testimony. Written
19 comments will also be accepted. This is an
20 opportunity to comment on the current proposed rule.
21 It is not a forum to negotiate the proposed rule
22 language. And with that, we can start our public
23 testimony. Matt, could you state your name?

24 MR. MATT NYKIEL: Yeah. My name's Matt
25 Nykiel, N-Y-K-I-E-L, and I'm with the Idaho

1 Conservation League.

2 MR. HESS: If you could please provide your
3 testimony. There's a microphone here at the podium.

4 MR. NYKIEL: So, Matt Nykiel, with the Idaho
5 Conservation League. In general, our comments are
6 just that we would encourage IDL to reject any
7 changes at this point to the current rule. As was
8 presented, there's currently a University of Idaho
9 study underway. We would recommend that we hold off
10 on changing the rule until that study comes out.
11 We'd know more information about what the best
12 adaptive management strategies there are. And we'd
13 also like to note that, as you're all well aware, the
14 Shared Stewardship Program is getting off the ground.
15 And so, we're concerned that if there were changes
16 made now to the rule it would create, potentially,
17 too great uncertainty between the state and federal
18 government on how to run shared stewardship and
19 whether or not any changes to the rule would
20 adequately be required to the Clean Water Act NEPA.
21 And so, that's just added reason why we're
22 recommending that no changes be made at this point;
23 we wait until the University of Idaho study is
24 completed and we continue to maintain that certainty
25 between state and federal governments for shared

1 stewardship. We'll be submitting some written
2 comments that have a bit more detail, but that's
3 just...

4 MR. HESS: Okay, thank you.

5 MR. NYKIEL: Thanks.

6 MR. HESS: Is there anybody that called in
7 that wanted to provide oral testimony?

8 MR. HAWK STONE: This is Hawk Stone DEQ .

9 MR. HESS: Yes.

10 MR. STONE: Hawk Stone ?

11 MR. HESS: Yes, we can hear you.

12 MR. STONE: Okay. I just wanted to let you
13 know that I'm not going to be testifying right now.

14 CORI: Can I get your name, first, please?
15 You kind of came in at the--in the middle of it.

16 MR. STONE: [Unintelligible].

17 CORI: Can you give me your name? I'm
18 sorry. I couldn't catch you. What's your first
19 name? Hello? Sir?

20 MR. HESS: Cori, We'll get his name to you.

21 CORI: Okay.

22 MR. HESS: Anybody else? Okay. That ends
23 our public testimony. Thank you all. Appreciate it
24 very much.

25 [END OF HEARING]