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
MR. CRAIG FOSS: All right. Welcome, everybody. My name is Craig Foss. I’m the Forestry and Fire Division Administrator for the Idaho Department of Lands. Thank you all for attending this hearing. Before we start, I want to provide some general background. The Idaho Department of Lands is not proposing any changes to 20-02-01 Rules Pertaining to the Forest Practices Act. Currently, these rules are in a temporary proposed status and are anticipated to be reauthorized by the 2020 legislature. This public hearing, by request, is focused on a specific subsection, the Stream Protection Rule, 030.07.e.ii, also known as, “The Shade Rule.” The rules promulgation process described in the Idaho Administrative Bulletin of June 19th, opened all Idaho administrative rules to comment. For background on this rule, IDL entered into negotiated rule-making in 2012 through 2013, to develop new tree retention requirements for Class I fish-bearing streams. This was in response to water quality audit findings from as early as the year 2000 that indicated the rules in place for shade and large woody debris recruitment for such streams were not adequately maintaining water quality. IDL believes the negotiating rule-making process was very
productive, and it ended with a new rule to promote landowners’, forest management of the repairing area, on Class I streams, while providing statutorily required protection to maintain water quality. The new rule was published on July 1, 2014. The format of this hearing is prescribed by rule. This particular format for proposed rule-making does not include an opportunity for multi-party dialogue. The hearing is your opportunity to provide public testimony regarding the proposed rules pertaining to the Forest Practices Act. If you have questions or would like to discuss some other aspect of forest practices in Idaho, please contact Gary Hess directly. This is a public forum and I ask all of you to listen respectfully to all speakers and to speak respectively to all listeners. The proposed rules were published in the June 19, 2019, Idaho Administrative Bulletin, Special Edition, Volume 19, pages 4,099 through 4,100; and pages 4,125 through 4,151. The rule in the bulletin is the official version and all comments should be based on that version. Our rulemaking website is updated and provides a web link to the bulletin. A simple internet search for Idaho Administrative Bulletin 19-6-SE will lead you to the correct place to read the
rules. Both written and oral comments are useful at this stage of the rule-making. Changes to the proposed rules can only be made based on written or oral comments received on or before August 16, 2019. IDL will review these comments and evaluate whether or not rule changes are needed. Your comments and any IDL suggestions for changes will be presented at the Idaho State Board of Land Commissioners meeting in September for a decision. We will compare the pending rule for review by the land commissioners at their October meeting. Based on their recommendation, we’ll then submit the pending rule for consideration by the 2020 legislature. Please make sure the department receives your comments before August 16th. If you brought written comments today, please make sure to give us a copy, because written and oral comments receive equal treatment to ensure all who desire to testify get the opportunity to speak. Those who plan to submit written comments may want to use this opportunity to briefly summarize the written comments or to elaborate on specific points. Simply reading your submitted written comments verbatim does not enhance their impact. Regardless of whether you have written comments to submit, please do not hesitate to testify today.
This is your opportunity to provide feedback on the rules. Please make sure that you signed in at the back of the room and have checked the boxes for either written testimony, oral testimony or both. Everyone who wants to speak gets one opportunity. There will be no rebuttals. A time limit on testimony may be necessary, depending on the number of attendees that signed up to testify. A few housekeeping matters. The restrooms and the water fountain are to the left of the front desk. You came in; the front desk was in front of you; to your left down the hall are restrooms and a water fountain.

MR. GARY HESS: The agenda for today is the introduction; then I will address water quality in Idaho, as it is impacted by forest practices; the history of Idaho fish-bearing stream, shade and tree retention rules, what is required by IDL through state statute and rule and why this rule-making is being conducted at this time; and then we’ll take testimony. I’m not going to read my slides. I’ll let you read the slides, but I will be reading my notes. And I’m reading the notes because we had a session this morning and I wanted to make sure that the presentation I make is identical between this afternoon’s session and this morning’s session.
Because of federal and state law, the structural relationships among federal and state agencies, the monitoring implemented by IDL and DEQ and the IDL Administration of Forest Practices BMP’s, a non-point source discharge elimination system permit is not require for timber harvesting. Furthermore, a third-party certifier, such as the American Tree Farm System and the Sustainable Forestry Initiative, reference compliance with these best-management practices as part of their standards. This slide depicts the structural relationships and the monitoring processes in the Forest Practices Rule Development are depicted graphically on this slide. And it’s a rather busy slide, so take your time looking at that and let me know if there’s anything that doesn’t make sense to you. I want to provide some detail on the history of the current Class I Tree Retention rules. Idaho’s Forest Practice Rules were adopted nearly entirely from Oregon’s original rules, which were likely developed by a group of foresters using the best knowledge available at the time. Both states’ rules were developed in response to federal requirements under the Clean Water Act. It would have been inefficient to start from scratch, yet comparative review reveals that IDL foresters
were selective in what was not adopted from those original rules. Over time, numerous modifications and additions have been accomplished by the Forest Practices Advisory Committee, but some of the rules remain intact from the earlier-adopted Oregon rules. In 1990, probably based on 15 year’s experiences trying to develop selective cutting prescriptions, the original rule was simplified, but specific tree retention requirements were added. Those tree retention requirements were shown in this standing tree table depicted on the slide. There has always been a shade requirement and for almost two decades a standing tree requirement. Please note the current rule still supports the site specific riparian management prescription variance option implemented in 1990, where the rule cannot be met due to particular site conditions. Every four years, Idaho Department of Environmental Quality Practices Program by monitoring force practice operations near Class I streams on all but tribal lands in Idaho. These audits, combined with IDL identified enforcement issues have revealed the need to periodically make adjustments to Idaho’s rules. Twenty years ago, the need to modify the 1972 Development Rule was apparent. In 2004, auditors
initial visual observations of tree-density were not borne out by subsequent stand density measurements that were taken during the audit. It was also clear that repeated entry under the 75% of current shade paradigm was contributing to water quality issues. IDL, FPAC and DEQ have evaluated available science and used empirical studies, as well as modeling, to inform shade and large-woody debris recruitment for aquatic habitat health. By the time of the 2012 audit these efforts were well under way. I have provided a handout that goes into great detail regarding the rule adopted in 2014. I would encourage you to read it, because it provides way more detail than I have time to go into here. The rule is a compromise between simplicity and specific applicability in order to provide adequate protection statewide, while incorporating regional differences in forest types. Differing forest landscapes can support varying numbers of trees of varying species, so the rule uses the expected maximum tree density by forest type as a metric. The relative stocking compares actual stand density to this metric and the limits are set to avoid mortality, and yet still provide adequate shade and large woody debris. To do less would risk not adequately meeting water quality
requirements and to do more by incorporating orientation, topography and stream size would only create a less manageable rule and likely not gain much in maintaining water quality. I’m going to focus now on what IDL is continuing to do to help landowners achieve their forest management objectives, while demonstrating that the relative stocking limits are achieving the desired metrics for water quality. Idaho private forestry specialists have conducted hundreds of site visits to assist landowners and operators with the rule. IDL and IDEQ have conducted surveys and studies to determine how the rule is being implemented, how often and how much actual cutting occurs, and how harvesting relates to shade reduction. The IDL operational monitoring survey determined that from 2016 through 2018, approximately two-thirds of stream protection zones identified for harvest have demonstrated some level of harvest. Of those, nearly all of the industrial landowners and two-thirds of the non-industrial landowners choose the 60-10, option two. The DEQ shade effectiveness study will calculate shade removal through pre-harvest and post-harvest measurements of sites harvested to the exact limit of the rule. IDL and FPAC committed to using the
empirical information from these studies to compare with the calculations done when the rule was formulated. These comparisons will reveal if the current relative stocking limits are supported by what is actually happening on the ground. Idaho had a legacy fish-bearing stream tree retention rule that audit findings determined did not adequately protect shade nor large woody debris recruitment. Regulators struggled with the term “significant and substantial,” and how to define current shade, post-harvest shade and until shade recovers. Responsible operators did not have a definitive guide with which to manage the timber and the SPZ and uncertain, left more than necessary. Irresponsible operators practiced multiple reentry until SPZ’s were laid bare—laid nearly bare, or they were cited. Stand conditions of riparian areas range from severely understocked to heavily overstocked and unhealthy. Today with the current rule, nearly two decades of research and deliberation have gone into the current rule and research continues to ensure its validity. Many operators are surprised at the degree of management flexibility with in the SPZ, while still providing sufficient stream protection. A majority are selecting the option to harvest prescription,
which can provide easily accessible value but also leaves more trees in the inner-50 feet where the shade contribution is greater. In many cases, more trees are being left in the outer-25 feet than before, which results in a less abrupt change in the canopy than the previous 50-foot standing tree buffer. Now, I’d like to discuss the rule-making process that we’re in today. As governed by the Administrative Procedures Act of Idaho Code, Title 67, Chapter 52, all rules expire July 1st of every year, unless extended by statute by the legislature. The legislature did not do this in 2019. All state agencies initiated a temporary and proposed rule-making to fill the regulatory gaps. Temporary rules were effective on June 30, 2019. For IDAPA 20-02-01, rules pertaining to the Idaho Forest Practices Act, no changes are proposed to the temporary proposed rule at this time. This diagram shows a hierarchy of state documents, from the constitution down to legislative statutes and the state agency rules, which is where we are today in this discussion. And below that are policies, procedures, guidelines and other written interpretations of the administrative rules. Under normal negotiated rule-making there would be stakeholder, technical expert
and Forest Practices Advisory Committee discussions about requested or suggested rule changes well in advance of the Land Board approval to enter rule-making, which typically would occur sometime around April. There would then be a negotiated rule-making process to craft specific language then to ensure all interested parties participate prior to a proposed rule. This did not happen in this unique situation. The current rules went directly to the proposed rules. We started in late June in this current process with these proposed rules and we are here, in August now, in the proposed rule-making status. The very compressed timeline from June to August results from the Office of Administrative Rules trying to fit this unique situation into their normal business schedule. This chart is basically just to compare what the normal negotiated rule-making timeline would look like compared to the proposed rule situation that we’re in as a result of the rules not being reauthorized in January. No negotiations were held because the existing rules were proposed for adoption. Changes usually require a negotiated rule-making. Public comment period is required for proposed rule-making. In this case, sufficient petitions were received to schedule a public hearing
for IDAPA 20-02-01, as required by Idaho Code, and
the hearing was scheduled for today, August 15th, in
Coeur d’Alene by request and scheduled in accordance
with 74--excuse me--Title 74, Chapter 204. Public
comments will be accepted through August 16. Changes
to the proposed rule can only be made based on
testimony received at hearing or written comments.
Comments on the proposed rule will be presented at
the September Land Board meeting. Then a proposed
rule will be presented at the October Land Board
meeting and then it would become a pending rule. And
that pending rule and notice must be submitted to the
Office of Administrative Rules by October 16th in
order to get it in to the legislative session, the
2020 legislative session. The format for the hearing
is an opportunity to provide testimony. Time limit
may be imposed depending upon the number of people
signed up to provide oral testimony. Written
comments will also be accepted. This is an
opportunity to comment on the current proposed rule.
It is not a forum to negotiate the proposed rule
language. And with that, we can start our public
testimony. Matt, could you state your name?

MR. MATT NYKIEL: Yeah. My name’s Matt
Nykiel, N-Y-K-I-E-L, and I’m with the Idaho
MR. HESS: If you could please provide your testimony. There’s a microphone here at the podium.

MR. NYKIEL: So, Matt Nykiel, with the Idaho Conservation League. In general, our comments are just that we would encourage IDL to reject any changes at this point to the current rule. As was presented, there’s currently a University of Idaho study underway. We would recommend that we hold off on changing the rule until that study comes out. We’d know more information about what the best adaptive management strategies there are. And we’d also like to note that, as you’re all well aware, the Shared Stewardship Program is getting off the ground. And so, we’re concerned that if there were changes made now to the rule it would create, potentially, too great uncertainty between the state and federal government on how to run shared stewardship and whether or not any changes to the rule would adequately be required to the Clean Water Act NEPA. And so, that’s just added reason why we’re recommending that no changes be made at this point; we wait until the University of Idaho study is completed and we continue to maintain that certainty between state and federal governments for shared
stewardship. We’ll be submitting some written
comments that have a bit more detail, but that’s
just…

MR. HESS: Okay, thank you.
MR. NYKIEL: Thanks.
MR. HESS: Is there anybody that called in
that wanted to provide oral testimony?

MR. HAWK STONE: This is Hawk Stone DEQ.
MR. HESS: Yes.
MR. STONE: Hawk Stone?
MR. HESS: Yes, we can hear you.
MR. STONE: Okay. I just wanted to let you
know that I’m not going to be testifying right now.

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

MR. STONE: [Unintelligible].
CORI: Can you give me your name? I’m
sorry. I couldn’t catch you. What’s your first
name? Hello? Sir?

MR. HESS: Cori, We’ll get his name to you.
CORI: Okay.

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

[END OF HEARING]