

MINUTES
SENATE RESOURCES & ENVIRONMENT COMMITTEE

DATE: Wednesday, January 26, 2022

TIME: 1:30 P.M.

PLACE: Room WW55

MEMBERS PRESENT: Chairman Vick, Vice Chairman Heider, and Senators VanOrden (Bair), Blair (Johnson), Patrick, Guthrie, Burtenshaw, Stennett, and Semmelroth

ABSENT/ EXCUSED: None

NOTE: The sign-in sheet, testimonies and other related materials will be retained with the minutes in the committee's office until the end of the session and will then be located on file with the minutes in the Legislative Services Library.

CONVENED: **Chairman Vick** called the meeting of the Senate Resources and Environment Committee (Committee) to order at 1:30 p.m.

PASSED THE GAVEL: Chairman Vick then passed the gavel to Vice Chairman Heider.

DOCKET NO. 37-0000-2100 **Idaho Department of Water Resources and Idaho Resource Board Omnibus Pending Rules**, page 219. **Mat Weaver** introduced himself as the Deputy Director for the Idaho Department of Water Resources (IDWR) and also his agency's designated Rules Regulation Officer. **Mr. Weaver** gave testimony on behalf of IDWR and the Idaho Water Resource Board (IWRB) regarding **Docket No. 37-0000-2100**, **Docket No. 37-0000-2100F**, and **Docket No. 37-0307-2101**. He provided three handouts, IWRB/IDWR Proposed Five Year Zero-Based Rulemaking Schedule (Attachment 1), 37.02.01 - Comprehensive State Water Plan Rule with changes (Attachment 2), and 37.03.07 - Stream Channel Alteration Rule with changes (Attachment 3). **Mr. Weaver** stated that with one exception, each of the pending rule chapters in **Docket No. 37-0000-2100** are the same as previously reviewed and approved by the legislature. The rule chapter that changed is 37.02.01, Comprehensive State Water Plan Rules, page 221. After a thorough review, staff from IDWR and the Office of the Attorney General found that there was no need to substantively amend or add to this rule, but some of the rule described outdated processes no longer needed and large portions of the rule restated Idaho Code. Therefore, IWRB eliminated those sections of the rule that were not needed or redundant through its non-fee omnibus proposed rule publication.

DISCUSSION: **Senator Stennett** asked about the 1993 date on the published rules and asked for the last year a comprehensive water plan was done for the state. **Mr. Weaver** responded that the Comprehensive State Water Plan has been updated multiple times since 1993 with the last update within the last 10 years.

MOTION: **Senator Burtenshaw** moved to approve **Docket No. 37-0000-2100**. **Senator VanOrden** seconded the motion. The motion carried by **voice vote**.

DOCKET NO. 37-0000-2100F **Idaho Department of Water Resources and Idaho Resource Board Omnibus Pending Fee Rules**, page 257. **Mr. Weaver** reviewed the fee categories included in **Docket No. 37-0000-2100F** and explained that no fee amounts were changed since previously reviewed and approved by the legislature.

MOTION: **Senator Guthrie** moved to approve **Docket No. 37-0000-2100F**. **Senator Blair** seconded the motion. The motion carried by **voice vote**.

**DOCKET NO.
37-0307-2101F**

Stream Channel Alteration Rules (New Chapter), page 436. This is a fee rule, although it is a new rule, it is listed in the Pending Fee Rule Book as **Docket No. 37-0307-2101**.

Mr. Weaver explained that existing 37.03.07 Rule 61 describes minimum standards for small scale mining with suction dredges, powered sluices, or non-powered equipment. Mining operations meeting minimum standards are not subject to more stringent procedural permit requirements described by law (i.e., the 3804-B Joint Application Permit process) and receive expedited permit approval. Due to concerns by at least one member of the public during the 2020 Legislative Session, and a subsequent discussion between legislators, IDWR, and the Department of Lands, IDWR conducted negotiated rulemaking of Rule 61 last year (2021).

Mr. Weaver reported the rulemaking had robust participation from the dredge mining community and other stakeholders. Some of the major issues negotiated during the rulemaking included whether to keep Rule 61, evaluation of the 5 inch nozzle diameter and 15 hp powered equipment limitations, the use of the terms "mechanized equipment," "powered equipment," and "non-powered equipment" to delineate mining activities, and whether to keep and clarify the permit exemption for "mining operation using non-powered equipment" that move less than "1/4 cubic yard per hour." Overwhelmingly, but not unanimously, participants supported keeping the minimum standard rule and the expedited permit process that it authorizes. **Mr. Weaver** referred the Committee to his third handout (Attachment 3) that reflects changes to this rule.

DISCUSSION:

Senator Stennett referred to comments made by NOAA (The National Oceanic and Atmospheric Administration) during the rulemaking process that expressed concerns regarding aquatic habitat and species, and she asked if these concerns, or concerns of other groups, were taken into consideration when IDWR was revising this rule. **Mr. Weaver** stated IDWR published all of the rulemaking materials associated with this process on their web page, including all of the written and oral comments, and compiled all of those comments into a single summary document. He stated NOAA submitted comments on the first draft of the rule, and their comments were addressed in part by the agency through revisions during the rulemaking process, although NOAA did not comment after the first draft. **Mr. Weaver** noted that the Idaho Conservation League (ICL) participated in all stages of this rulemaking and ultimately they did not support the final rule. He added that there were also several dredge miners that felt adamantly that Rule 61 should go away.

Senator Stennett asked if there was coordination between relevant agencies when promulgating rules so that there was continuity, and who provides oversight of dredge miners. **Mr. Weaver** responded that the Stream Channel Protection Program is housed within his department. Aaron Golart is the statewide program manager for Stream Channel Protection. He and his staff receive applications, review them, seek comment from other agencies, and then issue a permit. **Mr. Weaver** explained that this is the standard process, which is done in conjunction with the Idaho Department of Lands and the Army Corps of Engineers, however, this rule speaks to an expedited process. IDWR allows an expedited process when they know the applicant is following specific minimum standards and their activity is de minimis in the stream channel. He reviewed places of concern, such as the south fork of the Clearwater River and McCoy Creek, which feeds into Palisades Reservoir, which have additional, more rigorous dredge mining permit processes. As far as oversight, **Mr. Weaver** responded that they do not have enough staff to observe every stream, but they rely on people observing possible illegal activity and reporting back to the department, who will initiate an investigation. He reported that there have been some significant enforcement actions within the last five years.

Senator Guthrie asked for clarification that this is a fee rule. **Mr. Weaver** responded that this is a fee rule.

TESTIMONY: **Jonathan Oppenheimer**, introduced himself as the External Relations Director for the Idaho Conservation League (ICL). He stated ICL was involved in all stages of this rulemaking process. **Mr. Oppenheimer** shared a concern that use of winches in dredge mining has the potential to make a significant impact on streams and aquatic habitat and that use of winches in dredge mining may be in violation of Section Nine of the Endangered Species Act. He disagreed with IDWR's response to comments addressing this topic and their interpretation of Section Nine. He is concerned that this could lead to liability both for the state of Idaho and for dredge miners, who may unintentionally interfere with the critical habitat of endangered species, such as salmon.

DISCUSSION: **Senator Stennett** asked Mr. Oppenheimer if the new version of this rule was an improvement. **Mr. Oppenheimer** responded that there were no improvements made with these changes. He added that the most significant change was the allowance for winches during dredging activity, and he did not see justification for this change.

Mr. Weaver responded that IDWR consulted with legal counsel when making changes to this rule. He added that the permissibility of using winches in the previous version of this rule was unclear, so changes to this rule include clarification on the definition of mechanized equipment, which provides more clarity on the permissibility of using winches.

MOTION: **Senator Burtenshaw** moved to approve **Docket No. 37-0307-2101F**. **Chairman Vick** seconded the motion. The motion carried by **voice vote**. **Senator Stennett** and **Senator Semmelroth** requested that they be recorded as voting nay.

DOCKET NO. 37-0101-2101F **Rules of Procedure of the Idaho Department of Water Resources and Idaho Water Resource Board** (New Chapter), page 415. This is a fee rule, although it is a new rule, it is listed in the Pending Fee Rule Book as **Docket No. 37-0101-2101**.

Peter Anderson, Hearing Officer Coordinator for IDWR, gave testimony on behalf of IDWR and IWRB regarding this Docket. He referred to both together as The Department. **Mr. Anderson** reported that no fee amounts were changed in this rulemaking. He explained that The Department is required by statute to either adopt their own rules of procedure, or to use the generic Attorney General rules, pursuant to Idaho Code § 67-5206. The Department adopted the Attorney General rules for rulemaking, however, they determined that a set of contested case rules specific to The Department's responsibility to administer and manage water rights and streams was needed.

Mr. Anderson explained this proposed rule provides for The Department's need for self-contained rules of procedure, and also fulfills the Governor's objective of reducing regulation through the Zero Based Regulation rulemaking process. Through this review, The Department simplified procedural rules so that they were more accessible to the general public, while providing clarity to the water bar, in hopes of reducing conflicts over the rules. Specifically, as part of this rulemaking, IDWR made considerable edits to consolidate definitions, establish filing standards, simplify procedures, and remove inconsistencies in word usage. They also eliminated outdated references to electronic signatures and televised proceedings, and approved the use of e-mail to file documents with The Department and serve them on other parties. This provided for clearly delineated informal administrative processing of applications and protests before the Department before entering

into the formal hearing process, and removed duplicative references to statutory provisions.

DISCUSSION: **Chairman Vick** asked for clarification on the time frame for the word count reduction within this Docket from 16,144 to approximately 10,727. **Mr. Anderson** responded that this reduction was done since this rule did not pass at the last legislative session.

MOTION: **Senator VanOrden** moved to approve **Docket No. 37-0101-2101F**. **Senator Stennett** seconded the motion. The motion carried by **voice vote**.

PASSED THE GAVEL: Vice Chairman Heider passed the gavel to Chairman Vick.

MINUTES APPROVAL: **Senator Stennett** moved to approve the Minutes of January 17, 2022. **Vice Chairman Heider** seconded the motion. The motion carried by **voice vote**.

ADJOURNED: There being no further business as this time, **Chairman Vick** adjourned the meeting at 2:14 p.m.

Senator Vick
Chair

Shelly Johnson
Secretary