



Idaho State Department of Agriculture  
P.O. Box 7249 • Boise, Idaho 83707  
P: 208.332.8500 • F: 208.334.2170  
www.agri.idaho.gov

**BRAD LITTLE**, GOVERNOR  
**CELIA GOULD**, DIRECTOR

August 19, 2020

## **Rules Governing Dairy Byproduct Analysis**

### Executive Summary

#### Negotiated Rulemaking

In 2018, the Idaho State Department of Agriculture (“ISDA”) received two petitions from industry stakeholders to conduct negotiated rulemaking for the Rules Governing Dairy Byproduct (“Rules”). The Milk Producers of Idaho (“MPI”) and Idaho Farm Bureau Federation (“IFBF”) submitted a joint petition requesting that phosphorus threshold (“PT”) remain a permanent option for Idaho dairy producers to use as a method of nutrient management regulation. The Idaho Dairyman’s Association (“IDA”) submitted a second petition requesting a “buffer” be incorporated into the enforcement section of the Rules to account for variability in soil phosphorus test results. Stakeholders have participated in nine informal rulemaking meetings since the petitions were submitted in 2018.

#### Current Rules Governing Dairy Byproduct

The PT method of regulating nutrient application to growing crops will sunset out of the Rules on June 30, 2023. This sunset clause was added to the Rules in 2017, after the IDA petitioned the ISDA to replace PT with a new method of nutrient management regulation known as phosphorus site indexing (“PSI”). The primary difference between these two methods of nutrient management is PT measures the amount of phosphorus land applied to the soil while PSI evaluates the risk of land applied phosphorus moving off the field and impacting both surface and groundwater. PT is designed to limit the application of phosphorus so that the nutrients applied though land application of dairy byproduct does not exceed the agronomic needs of a crop once soil phosphorus levels reach 40 parts per million (“ppm”). PSI, on the other hand, incentivizes best management practices to minimize impacts to the environment if a field is determined to have an increased risk of phosphorus running off the field following land application.

Under PT, once the level of soil phosphorus reaches 40 ppm, land application of dairy byproduct is limited to the nutrient needs of the growing crop. Annual soil tests are used to determine if soil phosphorus continues to trend upward on fields that have exceeded the 40 ppm threshold. Once a regulated field exceeds 40 ppm, there is nothing in the rule that requires land application of dairy byproduct to stop, however, all further land application is limited to crop uptake. Enforcement for non-compliance of a dairy NMP may only occur after a three-year evaluation that shows soil phosphorus is trending upward for two out of three consecutive years. A nutrient management standard (“NMS”) is a required component of PT and is the technical document that establishes, among other things, the soil phosphorus level where land application of dairy byproduct must be limited to crop uptake. The current NMS is the 1999 NRCS 590 document. The NRCS 590 document has been updated in part or in whole three (3) times since 1999.

- I. **Removing the PT Sunset Clause:** Deleting the sunset clause that would have eliminated the option of PT on June 30, 2023, triggers the requirement that the NMS be updated. As previously explained, the current rule utilizes the 1999 NRCS 590 standard that has been updated several times since its inception. In order to accomplish this, stakeholders along with ISDA, dedicated the largest amount of time to this issue. What resulted was an Idaho-specific nutrient management standard that will replace the 1999 NRCS 590. The proposed Idaho NMS represents a new method of developing a scientific standard for managing dairy byproduct that is based on the best available science and tailored to Idaho's environmental conditions. Stakeholders agreed that an Idaho specific NMS is appropriate, but could not reach consensus on several important elements of the NMS.
- II. **Establishing a Buffer to Account for Soil Phosphorus Variability:** The IDA petition suggested a buffer that would account for differences in soil phosphorus test results that have been observed. The buffer would be included in an updated NMS and would prevent a producer from being unfairly penalized for an annual soil test that may be artificially high due to variations in sampling or laboratory testing. Stakeholders did not reach a consensus on how to apply the concept of a buffer for the regulatory limits established for soil phosphorus.
- III. **Required Transition from PT to Phosphorus Indexing:** During negotiated rulemaking, a stakeholder suggested that if PT was going to be a permanent option in the Rules, then a soil phosphorus "trigger" should be established that would require a producer to stop using PT and switch to phosphorus indexing. Stakeholders acknowledged the idea and attempted to negotiate what the upper limit of soil phosphorus would be that would require the transition. Establishing a trigger to require a transition to PSI was a controversial topic and stakeholders have taken varying positions, ranging from the more conservative suggestion of 40 ppm; to a suggested limit of a 100 ppm trigger; while one stakeholder suggested that a trigger was not necessary at all. A constraining issue related to the determination of a "trigger" is the statutory requirement that the Rules utilize the best *available* peer reviewed science and supporting studies in proposing any portion of the Rules. See Idaho Code § 22-101A(2) (emphasis added). Scientific research was not identified that directly addresses the question of what soil phosphorus levels should trigger a transition from PT to another form of nutrient management. However, a literature review conducted by the University of Idaho, and included in the rulemaking record, indicates that fields with soil phosphorus at or above 40 ppm are at greater risk for impacting water quality. Consensus was not reached on this topic.

Consensus among all stakeholders is not a required element of informal negotiated rulemaking. As outlined above, each of the three fundamental issues important to this rulemaking did not result in consensus. However, a lack of consensus alone does not justify suspending rulemaking. Notwithstanding the varying positions stakeholders have taken on the issues surrounding this rulemaking, the ISDA is obligated to follow the law as it facilitates informal negotiated rulemaking and ultimately makes the important decision to move forward with formal rulemaking procedures by proposing a rule. The utilization of the best available science to promulgate rule requirements for these Rules is not just sound methodology, it is mandated. See Idaho Code § 22-101A(2).

The rulemaking record contains an important literature review published by scientists at the University of Idaho evaluating the risk of excess soil phosphorus to the environment. The basis for this research was to evaluate the risk that application of phosphorus beyond the agronomic needs of a growing crop may have on surface and ground water quality. This literature review is directly relevant to this negotiated rulemaking. The study found "[p]hosphorus applied to the land can be lost through runoff or leaching. This can degrade surface waters and reduce the amount of phosphorus available for crops." See A. Carey, A. Moore and A. Laytem, (2011), Phosphorus in the Calcareous Soils of Southern Idaho: A Literature Review with Implications for Crop Production, Manure Management and Water Quality. University of Idaho Extension, Bul. 877 at 6. This same study, citing the Natural Resource Conservation Service, recommends that soil phosphorus levels should be kept under 40 ppm to protect water quality. See Carey *et al.* at 2. The petitioners who brought this rulemaking

request to the ISDA have indicated that they will only support a trigger set at 100 ppm. This level exceeds the scientific recommendation for the upper limit of soil phosphorus by 2.5 times. Petitioner's recommendation cannot be reconciled with the best available science informing this negotiated rulemaking and additionally cannot be reconciled with the Dairy Environmental Control Act ("DECA"). See Idaho Code § 37-602(2) (directing the ISDA to enforce dairy NMPs "to ensure that dairy environmental management systems are constructed, operated and maintained in a manner that protects the natural resources of this state").

Because the petitioners recommendation cannot meet the threshold legal requirements in Idaho Code § 22-101A and DECA, the ISDA has elected **not** to move forward with formal negotiated rulemaking.

What follows this executive summary, is a more detailed analysis of the informal negotiated rulemaking record with statutory and rulemaking record citations.

### Overview

The ISDA received two petitions to initiate negotiated rulemaking to amend the Rules. The first petition, submitted jointly by the IFBF and MPI, dated April 30, 2018, stated in part: "We request that the rule be modified to allow dairy farmers the option of choosing either the phosphorus threshold method OR the phosphorus indexing method in the future, with no sunset on the use of the threshold method." The rulemaking petition's reference to either "phosphorus threshold" or "phosphorus indexing" is related to the method that a dairy nutrient management plan ("NMP") is developed and implemented by the dairy and enforced by the ISDA. The second petition submitted by the IDA on May 14, 2018, requested "as the Nutrient Management Standard rules within the Dairy Environmental Control Act are being discussed/negotiated this summer we include in that discussion a consideration for variances that may occur within the results provided dairymen by soil and manure testing labs." The ISDA published a Notice of Intent to Promulgate Rules in the June 2018 Administrative Bulletin. A second Notice of Intent to Promulgate Rules was published in the October 2018 Administrative Bulletin notifying the public that the ISDA intended to continue informal negotiated rulemaking, hosting public meetings on the second Tuesday of each month, in order to complete the negotiated rulemaking.

In conducting informal negotiated rulemaking, the ISDA acts as a facilitator for rulemaking participants. The Idaho Legislature is the final arbiter of agency rules and ultimately determines what rules or portions of rules are approved or rejected. When ISDA utilizes strawman rule text in the rulemaking process, it is intended to solicit feedback from stakeholders and does not represent the agency's position on the rule. ISDA's strawman rule is not a proposed rule, and it is subject to change.

### Rulemaking Authority

The ISDA authority to promulgate rules related to a dairy NMP is found in two places. First, the DECA authorizes the ISDA to "adopt rules to implement this chapter." Idaho Code § 37-603(1). Second, Idaho Code § 37-401(4) states, "All dairy farms shall have a nutrient management plan approved by the department. The nutrient management plan shall cover the dairy farm site and other land owned and operated by the dairy farm owner or operator. . . ." Idaho Code § 37-405 provides, "The department of agriculture is hereby invested with the authority to make rules and orders as may be necessary or desirable for carrying out its various functions and the intent and purpose of this act."

The dairy NMP is a component of the environmental management system required on each dairy farm. Specific to the NMP requirement, DECA mandates "[e]ach dairy farm shall have a dairy nutrient management plan that is approved by the department and included in the dairy farm's environmental management plan. The dairy nutrient management plan shall be implemented by the dairy farm and enforced by the department to prevent unauthorized discharges, unauthorized releases, violations of state water quality standards, contamination of ground water and surface water and endangerment to human health and the environment." Idaho Code § 37-606(1).

Idaho Code provides important direction on the scope and reach of environmental rules governing dairies. The ISDA is required by DECA to implement programs that “recognize, support and promote performance and innovation in the design, construction, operation and maintenance of dairy environmental management systems.” Idaho Code § 37-603(2).

Idaho Code § 22-101A also applies to rulemaking conducted under the DECA placing several enumerated conditions on the ISDA’s rulemaking authority. See Idaho Code § 22-101A (7). Of particular importance, Idaho Code § 22-101A(2) states: “In proposing any rule or portions of any rule pursuant to chapter 49, title 22, Idaho Code, chapter 38, Title 25, Idaho Code, or **chapter 4, title 37, Idaho Code**, the director shall utilize: (a) the best available peer reviewed science and supporting studies conducted in accordance with sound and objective scientific practices; . . .” Idaho Code § 22-101A(2) (emphasis added).

Important to this rulemaking analysis is Title 37, Chapter 6, was added to Idaho Code in 2014. Prior to the enactment of DECA, the ISDA rulemaking authority specific to the Rules was found in Title 37, Chapter 4. Rulemaking authority and requirements for Idaho dairies to have an NMP still exist in Title 37, Chapter 4. See Idaho Code §§ 37-401(1), (4), (5); 37-405. Specifically, Idaho Code § 37-401(4) states, “All dairy farms shall have a nutrient management plan approved by the department. The nutrient management plan shall cover the dairy farm site and other land owned and operated by the dairy farm owner or operator. . . .” Idaho Code § 37-405 provides, “The department of agriculture is hereby invested with the authority to make rules and orders as may be necessary or desirable for carrying out its various functions and the intent and purpose of this act.” Authority to promulgate rules related to a dairy NMP appear in both chapter 4 and chapter 6 of Title 37.

#### Informal Rulemaking

The ISDA hosted nine informal rulemaking meetings throughout the duration of the negotiated rulemaking. During the summer of 2018, the ISDA hosted meetings on June 27, 2018, and July 11, 2018. The ISDA solicited written comments from the general public and interested stakeholders until August 3, 2018. Participating stakeholders agreed that this rulemaking would require several meetings and more time than the 2018 rulemaking schedule allows to complete the rulemaking process. The ISDA, with input from participating stakeholders, determined the best course of action was to continue the negotiated rulemaking to the following year.

The ISDA hosted additional negotiated rulemaking meetings in October, November and December 2018, and May, June and August 2019. During the August 2019 meeting, the stakeholders present indicated there was again no consensus among the organizations represented at the meeting. The following excerpt from the August 14, 2019 meeting minutes conveys this fact:

Dr. Scott Leibsle convened the meeting at 11:10 a.m. Dr. Leibsle explained that this is a continuation of a public negotiated rulemaking meeting for IDAPA 02.04.14 Rules Governing Dairy Byproduct. Following introductions he indicated that at the last meeting the group did not reach consensus for a phosphorus level for indexing [sic]. He asked those present to share input from their constituents. Rick Naerebout stated that the Idaho Dairyman’s Board could support a level of 60 ppm, but after discussing with Marv Patten he understands that there may not be consensus so he would have the rulemaking be continued. Russ Hendricks explained that the Dairy Committee of the Idaho Farm Bureau needs a level of 100 ppm and he suggests continuing to discuss the issue.

The ISDA received written comments from two stakeholders following the August 14, 2019 negotiated rulemaking meeting. MPI stated that “the best path forward is to continue the negotiated rulemaking through the next year. Thank you for your patience on the matter.” See Email from Milk Producers of Idaho, August 21, 2019, available at <https://agri.idaho.gov/main/i-need-to-see-lawsrules/rulemaking/isda-rulemaking-2018-2019/rules-governing-dairy-byproduct-2018-2019/>. The Idaho Conservation League (“ICL”) stated “Our

preference would be to declare ‘no consensus’ and retain the existing rule.” See Email from Idaho Conservation League, August 19, 2019, available at <https://agri.idaho.gov/main/i-need-to/see-lawsrules/rulemaking/isda-rulemaking-2018-2019/rules-governing-dairy-byproduct-2018-2019/>. The ISDA, again after receiving input from the participating stakeholders, continued the negotiated rulemaking into 2020. ISDA hosted the last negotiated rulemaking meeting on June 16, 2020, and solicited comments from the public and stakeholders through June 30, 2020. The ISDA received 14 written comment submissions from individuals or organizations during the course of the three years. The complete rulemaking record is available on the ISDA website and can be viewed at the following link: <https://agri.idaho.gov/main/i-need-to/see-lawsrules/rulemaking/isda-rulemaking-2018-2019/rules-governing-dairy-byproduct-2018-2019/>

## Analysis

DECA articulates the legislative findings and purpose of the statute in Idaho Code § 37-602. The Idaho legislature made a specific point to codify the importance of protecting water quality by stating that “The water resources of the state are among the state’s most valuable natural resources.” Idaho Code § 37-602(1)(a). This policy declaration is balanced by the following legislative statement: “Maintaining an ecologically sound and economically viable dairy industry in this state is vital to the Idaho economy.” Idaho Code § 37-602(1)(b). The legislature recognized that “Dairy environmental management systems that are constructed, operated and maintained in accordance with plans that are approved by the department of agriculture are an effective means of protecting the state’s water resources . . .” but also directed the ISDA to “encourage and promote performance and innovation in the design, construction, operation and maintenance of dairy environmental management systems.” Idaho Code § 37-602(1) (c), (e). The Idaho legislature declared the purpose of DECA “is to authorize the department of agriculture to review, approve and enforce dairy environmental management plans to ensure that dairy environmental management systems are constructed, operated and maintained in a manner that protects the natural resources of the state.” Idaho Code § 37-602(2). The policy directive purposefully placed in the introductory section of DECA provides important direction and sideboards to rulemaking conducted under the statute. Idaho Code § 22-101A also provides important sideboards for rulemaking affecting the dairy industry. “In proposing any rule or portions of any rule pursuant to . . . chapter 4, title 37, Idaho code, the director shall utilize: (a) the best available peer reviewed science and supporting studies conducted in accordance with sound and objective scientific practices . . .” Idaho Code § 22-101A(2)(a). Throughout the course of this negotiated rulemaking, the ISDA has emphasized these policy statements and statutory requirements. In fact, the ISDA encouraged participating stakeholders to submit scholarly articles or other peer reviewed publications that meet these statutory obligations.

### *I. Application of Idaho Code § 22-101A to the Current Negotiated Rulemaking*

The IFBF asserted in its June 30, 2020 comment letter, that Idaho Code 22-101A is not applicable to the current negotiated rulemaking. The June 30, 2020 comment states:

[D]espite ISDA’s assertion that Idaho Code 22-101A requires the best available science for this rulemaking, the statute cited makes it clear that this rulemaking does not fall within its parameters. The proposed rule states on page one that it is being ‘adopted under the legal authority of Section 37-603’ which is title 37, chapter 6. However, Idaho Code 22-101A requires the best available science only when ‘proposing any rule, or portion of any rule pursuant to chapter 49, title 22, Idaho Code, chapter 38, title 25, Idaho Code, or chapter 4, title 37, Idaho code.’ Therefore, requiring the use of the best available science for this rulemaking is outside the scope of the statute as stipulated by the rule itself.

See Letter from Idaho Farm Bureau, June 30, 2020 available at <https://agri.idaho.gov/main/i-need-to/see-lawsrules/rulemaking/isda-rulemaking-2018-2019/rules-governing-dairy-byproduct-2018-2019/>. The IFBF comment letter cites to the draft Rules Governing Dairy Byproduct that is being utilized for informal negotiated rulemaking purposes. Draft rules are not in effect and have no force of law and are utilized for negotiation purposes only. It is expected and encouraged that a draft rule be scrutinized for errors or omissions along with

amendments put forward for discussion among stakeholders. The current Rules that are in place refer to the following legal authorities: “This chapter is adopted under the legal authority of Title 37, Chapters 3, 4, and 6, Idaho Code.” See Rules Governing Dairy Byproduct available at <https://adminrules.idaho.gov/rules/current/02/020414.pdf>.

As explained above, Idaho Code § 37-401(4) still requires Idaho dairies to have an NMP and Idaho Code § 37-405 vests ISDA with the necessary rulemaking authority. Furthermore, the existing Rules cites both Idaho Code § 37-401 (nutrient management plans required) and Idaho Code § 37-603 (authorities and duties of the director under DECA). Because Title 37, Chapter 4, Idaho Code still requires all Idaho dairies to have an NMP and this section is referenced specifically in Idaho Code § 22-101A, the requirement that the best available peer reviewed science and supporting studies are used to frame this rulemaking is mandatory.

## *II. Updating the Nutrient Management Standard Tied to Phosphorus Threshold*

Historically, the Rules Governing Dairy Byproduct have utilized the 1999 NRCS 590 for its NMS. The 1999 NRCS 590 establishes, among other things, that “soil tests are to be taken when nutrients will be applied as part of an on-going management program.” See 1999 NRCS 590 at 3. The NMS sets a soil phosphorus limit of 40 parts per million. See 1999 NRCS 590 at 4; table 3. Once this threshold is reached, land application must be curtailed to levels equivalent to the agronomic needs of the growing crop (often referred to as crop uptake). See 1999 NRCS 590 at 5; table 4. Updated versions of the conservation practice standards (“CPS”) and soil report considerations (“SRC”) of the NRCS 590 has been published by USDA scientists in 2007 (CPS), 2013 (CPS) and 2018 (SRC). See <https://efotg.sc.egov.usda.gov/#/details>.

Participating stakeholders have been working on updating the Idaho NMS that would apply to a phosphorus threshold NMP since this negotiated rulemaking began in 2018. See Email to Stakeholders – Dairy Byproduct, dated July 2, 2018, available at <https://agri.idaho.gov/main/i-need-to/see-lawsrules/rulemaking/isda-rulemaking-2018-2019/rules-governing-dairy-byproduct-2018-2019/>. This effort was complex and highly technical. See *id.* Very early on, stakeholders identified and discussed the connection between removing the sunset clause and the need to update the NMS. See Minutes – Dairy Byproduct, dated July 11, 2018, available at <https://agri.idaho.gov/main/i-need-to/see-lawsrules/rulemaking/isda-rulemaking-2018-2019/rules-governing-dairy-byproduct-2018-2019/>. Although there were varying points of view on how to proceed, the decision was made that an updated NMS would be required if a phosphorus threshold NMP was going to become a permanent option in the Rules. See Letter to Stakeholders – Dairy Byproduct dated August 15, 2018, available at <https://agri.idaho.gov/main/i-need-to/see-lawsrules/rulemaking/isda-rulemaking-2018-2019/rules-governing-dairy-byproduct-2018-2019/>. Instead of continuing to utilize the NRCS 590 guidance document to establish the NMS, an Idaho specific NMS was drafted with stakeholder input. This document utilizes relevant scientific standards from all versions of the NRCS 590, including those portions of the 1999 NRCS 590 that are still scientifically defensible and useful.

An updated NMS was a required element of this negotiated rulemaking. The IFBF comment that the 1999 NRCS 590 standard should not be considered out of date simply because of its age misses the point. NRCS scientists and engineers have revised this standard three times since 1999. As mentioned above, updated versions of the 590 conservation practice standard and soil report considerations have been published in 2007, 2013 and 2018. These newer, updated standards represent the best available science and technology in soil science and nutrient management and are directly relevant to this rulemaking. Rulemaking stakeholders, recognizing that certain elements of the 1999 NRCS 590, may still be useful and scientifically defensible have developed an Idaho specific NMS incorporating sound scientific elements from all available NRCS 590 standards. This document represents a collaborative effort from stakeholder groups evaluating the best available science that is customized to Idaho’s climate, soil and hydraulic conditions.

## *III. Inclusion of a “Hard Trigger” Requiring a Transition from Phosphorus Threshold to Phosphorus Indexing*

Just prior to the June 16, 2020 negotiated rulemaking meeting, the IDA, MPI and IFBF collectively submitted proposed amendments to the draft Rules and the Dairy NMS. See Email from Rick Naerebout, dated June 15, 2020, available at <https://agri.idaho.gov/main/i-need-to/see-lawsrules/rulemaking/isda-rulemaking-2018-2019/rules-governing-dairy-byproduct-2018-2019/>. The changes proposed by the collective stakeholder group recommended that a phosphorus threshold cutoff or “trigger” be established at a soil phosphorus level of 100 parts per million. See id. Other material changes were proposed, however, it is the trigger of 100 parts per million that generates a significant complication with this negotiated rulemaking. The ICL opposed the IDA, MPI and IFBF proposal. See Letter from Idaho Conservation League, dated June 24, 2020, available at <https://agri.idaho.gov/main/i-need-to/see-lawsrules/rulemaking/isda-rulemaking-2018-2019/rules-governing-dairy-byproduct-2018-2019/>. The ICL comments cite to the Carey *et al.* literature review as the basis for its position.

Based on the available science, it seems that the most appropriate and defensible approach would be to limit the use of the phosphorus threshold method to fields with soil phosphorus concentrations of 40 ppm or less. As indicated by Carey *et al.*, 2011, soil P concentrations of 20-30 ppm (Olsen P) should be the threshold where groundwater contamination is the primary concern. Thus, setting a hard limit of 40 ppm (Olsen P) – above which the PSI would be mandatory – would provide a more adequate buffer that accounts for the variability associated with soil testing.

We note that Carey *et al.*, 2011 concluded that soil P concentrations of 40 ppm (Olsen P) should be the threshold where surface water contamination is the primary concern. . . .

See id. (citing A. Carey, A. Moore and A. Laytem, (2011), Phosphorus in the Calcareous Soils of Southern Idaho: A Literature Review with Implications for Crop Production, Manure Management and Water Quality. University of Idaho Extension, Bul. 877). Other participating stakeholders have not put forward any additional research or science for inclusion in the rulemaking record to support a “hard trigger” where PT would no longer be allowed. However, the IFBF objected to considering the Carey *et al.*, study as representing the best available science. See Letter from Idaho Farm Bureau, June 30, 2020 available at <https://agri.idaho.gov/main/i-need-to/see-lawsrules/rulemaking/isda-rulemaking-2018-2019/rules-governing-dairy-byproduct-2018-2019/>. IFBF, referring to the Carey *et al.*, study states:

The science that exists on this topic focuses upon the parameters and conditions under which phosphorus may transport from a field into surface or ground water. We are not aware of any studies, scientific or otherwise, that seek to determine the ideal ‘trigger point’ when a dairy operator should be legally required to switch from using a phosphorus threshold standard to a phosphorus indexing regime. . . . It is hardly conclusive, nor does it even attempt to suggest a standard that should be applied across the board to all fields in Idaho. . . . It is the position of IFBF members that there should not be a ‘hard trigger’ required since the current phosphorus indexing threshold (sic) is clear that phosphorus cannot be applied at a rate higher than crop uptake.

See id. While it is true Carey *et al.* does not mention the concept of a “trigger” requiring the curtailment of land application of nutrients in favor of a more environmentally protective method, the basis for the research was to evaluate the risk to the environment presented by the continued land application of dairy byproduct beyond the agronomic needs of a growing crop. The scientific topics reviewed and discussed in Carey *et al.* are central to the Rules being negotiated and the overall purpose of the regulatory oversight of the dairy industry performed by the the ISDA. See Idaho Code § 27-602(2) (Therefore, the purpose of this chapter is to authorize the department of agriculture to review, approve and enforce dairy environmental management plans to ensure that dairy environmental management systems are constructed, operated and maintained in a manner that protects the natural resources of this state.) Industry stakeholders advocated for a “trigger” set at 100 ppm. This level

represents 2.5 times the soil phosphorus levels that Carey *et al.* recommends staying below. Moreover, a 100 ppm “trigger” is not backed by any scientific research or standard justifying this level.

### Conclusion

The ISDA has carefully and completely reviewed the extensive rulemaking record. This negotiated rulemaking has included nine rulemaking meetings, extensive written outreach, a soil phosphorus variability experiment, with many written comments received for the rulemaking record and has spanned three years. It is evident that the participating stakeholders have varying and substantial differences of opinion on what a final rule should require. The correct interpretation and implementation of the governing statutes are in dispute and cannot be resolved by further discussion or negotiation. Therefore, the ISDA has determined that the appropriate next step is to suspend any further rulemaking under the existing petitions and will not proceed to formal negotiated rulemaking.

A handwritten signature in black ink, appearing to read "Brian Oakey", with a long horizontal flourish extending to the right.

Brian J. Oakey  
Deputy Director