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VIA EMAIL: paula.wilson@deq.idaho.gov

Ms. Paula Wilson
Idaho Dept. of Environmental Quality
1410 North Hilton
Boise, ID 83706

Re: DEQ Negotiated Rulemaking – Rules for the Design and Construction of Phosphogypsum Stacks, Idaho Docket No. 58-0119-2001 (Negotiated Rule Draft No. 2)

Dear Ms. Wilson:

The Idaho Mining Association (IMA) appreciates the opportunity to comment on the draft rule. We believe the draft Rule must be consistent with Idaho Code as amended in HB367. IMA and our phosphate producing members were instrumental in the creation and passage of HB367 in the 2020 legislative session. HB367 was a bill that was passed with overwhelming bi-partisan support in both legislative bodies and subsequently signed by the Governor with little to no opposition. We believe that HB367 was clear in its intent to create a regulatory frame work for the design and construction of phosphogypsum stacks located in Idaho and nothing more.

In review of the recent draft rule proposed by the Idaho Department of Environmental Quality (IDEQ), it appears that the scope has been expanded beyond the authority granted and legislative intent found in HB367. Idaho Code 39-176A (e) clearly states that the intent of the statue is to “develop a program to assure the proper design and construction of phosphogypsum stacks”. Further, the statue authorizes “a negotiated rulemaking consistent with the requirements of sections 39-176A through 39-176F, Idaho Code.” The inclusion of requirements that deal with siting, operation, potential remediation and closure of a phosphogypsum stack system (PSS) are unnecessary and unsupported by statute. IMA provides the following more specific comments.

HB367 does not support the inclusion of siting criteria which IDEQ has included in Section 110 of the draft rule. HB367 did not specify any siting criteria for a PSS and therefore the Rule should not include such criteria. The direction in the statute for PSS to be designed and constructed to protect water quality and the environment is sufficient to address any concern IDEQ may have regarding siting criteria.

The groundwater monitoring plan requirements (Section 160) go beyond what is required by the statute. HB367 does not support inclusion of ongoing and operational ground water reports as proposed in section 160 This is clearly an operations activity and goes well beyond the authority and scope granted in HB367 regarding the design and construction of a phosphogypsum stack. Section 160 also requires information related to remedial actions. Such activities are not part of a groundwater monitoring plan. Section 160 also contains duplicative language as to monitoring plan requirements, confuses “compliance” with groundwater and surface water standards. Furthermore, this section requires surface water monitoring including the determination of “statistical degradation” of surface waters. Surface water is not groundwater. Also, such a requirement is impractical because surface water quality varies considerably depending on seasonality and a multitude of factors. Finally, as written, Section 160 does not provide a logical, organized approach as to what needs to go into a groundwater monitoring plan. IMA believes a more streamlined, concise approach is needed to defining what needs to go into the groundwater monitoring plan.

Also HB367 does not support inclusion of monthly construction reports or the implication in the draft rule of IDEQ providing oversight in the construction of a PSS. IMA does not believe these requirements are necessary or appropriate. The fact that IDEQ may have utilized similar procedures in prior enforcement orders is not an appropriate basis to include these requirements in a rule governing design and construction of new PSS. We believe the rule should not go beyond the requirements of the statute related to IDEQ ‘s involvement in the review and approval of plans and specifications and subsequent submission of a construction completion report.

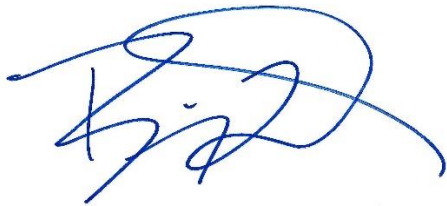
While HB367 does provide for a “fee sufficient for the review and approval of plans associated documents required”, the statute does not support the inclusion of an ongoing cost recovery program in which the department will be reviewing and monitoring many of the proposals we feel are not supported by statute and should not be included in a rule approved by the department. Rather, we believe that the statute is clear that the fee should be consistent with the cost of a plan approval.

IMA believes it is important to revisit the scope and applicability of the statute. Specifically, in regards to scope and applicability, IMA believes that the rule needs to acknowledge that it is part of IDEQ’s solid waste program consistent with the scope and applicability of Idaho Code Section 39-176B. Clearly the statute acknowledges that phosphogypsum and associated process water was exempted from hazardous waste regulation by EPA (and IDEQ) but is nevertheless regulated as a solid waste. (Unless in certain circumstances it is not a waste at all). We understand that IDEQ choose not to include the subject draft rule under the existing Solid Waste Management Rules at IDAPA 58.01.06. for administrative reasons. IMA believes the current exemption for phosphogypsum in IDEQ’s Solid Waste Rules at IDAPA 58.01.06.001.03.b.vi. needs to be revised to recognize this rule once it is adopted by the Board. Further, IMA believes it would be appropriate to reference the applicable federal regulations governing minimum design and construction criteria and practices for solid waste facilities under Subtitle D of RCRA.

Finally regarding the applicability of the Rule, Idaho Code 39-176B clearly states that “Nothing in this chapter is intended to supersede or modify any existing agreement with or approvals from the environmental protection agency or the department of environmental quality relating to the construction of a phosphogypsum stack, phosphogypsum stack system, or component thereof.” As these agreements are still being negotiated with EPA and DEQ among IMA members, it is possible or even likely that such agreements will not be finalized until after the subject rule is finalized and adopted by the Board, although a recent decree finalized in Wyoming may act as a template to avoid any inconsistencies. We would like further clarity and discussion on this issue to ensure that the subject rule does not impact future negotiations or final agreements with EPA and DEQ.

Thank you for the opportunity to comment on the draft rule, we look forward to further discussion on future drafts that align with HB367 and Idaho Code 39-176.

Kindest Regards,

A handwritten signature in blue ink, appearing to read "BJD", with a large, sweeping flourish above the letters.

Benjamin J. Davenport
Executive Director, IMA