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By Email

Ms. Paula J. Wilson
Hearing Coordinator
Idaho Department of Environmental Quality
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RE: Design and Construction of Phosphogypsum Stacks: Docket No. 58-0119-2001 Negotiated Rulemaking

Dear Ms. Wilson:

This correspondence comprises supplemental comments of Nu-West Industries, Inc. (Nu-West) respecting the Idaho Department of Environmental Quality's (DEQ) above-referenced negotiated rulemaking, Docket No. 58-0119-2001.

Nu-West is the former owner and operator of the Conda Phosphate Operations (CPO) facility, located near Soda Springs, Idaho. Although the CPO plant is now owned and operated by Itafos Conda LLC, Nu-West is jointly managing ongoing projects related to the phosphogypsum stack system (PSS) and is actively negotiating resolution of issues impacting the CPO facility PSS with the DEQ and the U.S. Environmental Protection Agency (EPA). Nu-West, therefore, has a current and ongoing interest in the CPO facility, in this rulemaking's impacts on the CPO facility PSS, and its potential adverse impacts to Nu-West's ongoing DEQ and EPA negotiations.

As noted in our comments submitted April 28 and June 9, 2020, Nu-West generally supports the comments submitted by the Idaho Mining Association (IMA). As also noted in Nu-West's June 9 comments, during the May 28, 2020 public meeting many affected stakeholders raised concerns with this rulemaking because industry negotiations with DEQ and EPA directly related to Idaho PSS facilities are ongoing, and the details of those proceedings cannot be discussed publicly at this time.

The enabling legislation governing this rulemaking provides DEQ authority to adopt a PSS rule at its discretion; however, that legislation does not mandate adoption of such a PSS rule in Idaho, nor does it specify a timeline for adopting any such rule. On the contrary, the statute specifically directs that any PSS rule which may be adopted by DEQ must not supersede nor modify those settlement agreements with or approvals by DEQ and EPA – agreements and approvals which are still under negotiation. Therefore, continuation of this rulemaking is premature until those negotiations and resulting settlements are completed.

For these reasons Nu-West reiterates that we concur with the unanimous position of the stakeholders who spoke at the May 28 public meeting, urging DEQ to cease and defer the rulemaking until these settlements have concluded, to allow their entry into the rulemaking

docket for consideration by DEQ and affected stakeholders. As DEQ is aware, no Idaho phosphoric acid facility has yet entered into settlement with DEQ and EPA; therefore, Nu-West objects to DEQ's decision to re-initiate this rulemaking proceeding, and once again respectfully submits that it is inappropriate to continue with this rulemaking at this time.

Nu-West also objects to DEQ's failure to address in the agency's most recent revisions to the proposed rule comments previously submitted by IMA and other affected stakeholders. Thus, although Nu-West fundamentally urges cessation of this rulemaking pending completion of DEQ and EPA settlement negotiations at affected PSS facilities in Idaho, we respectfully submit the following comments given DEQ's decision to issue another draft rule contrary to the intent of the statute and despite a lack of supporting information in the rulemaking record.

1. Proposed Rule Comments

Subsection 000 – Legal Authority

This section originally cited only **Idaho Code (IC) sections 39-105** (authorizing IDEQ to propose environmental protection rules, including solid waste management standards), **39-107** (general rulemaking delegation), and **39-176A through -176F** (newly adopted legislation authorizing adoption of a PSS facility rule, with emphasis on protecting groundwater quality). The revised draft rule now cites only **IC Title 39, Chapter 1**.

Nu-West supports the IMA's recommendation DEQ acknowledge the proposed rule falls within the Department's solid waste program, consistent with **IC § 39-176B**. In particular, **IC § 39-7401** (Idaho Solid Waste Facilities Act) should be added to the cited legal authority. The Proposed Rule references the Bevill exemption set forth at **40 CFR 261.4(b)(7)** and **IDAPA 58.01.06**, which in turn define phosphogypsum and process wastewater from phosphoric acid manufacture as "solid waste" exempt from RCRA Subtitle C, but subject to the provisions of **RCRA Subtitle D**. Thus, any rule governing management of phosphogypsum and process wastewater in a PSS must reference authority to adopt standards for management of solid waste.

By adoption of **IC § 39-7401 et seq.**, the Idaho Legislature recognized this need for consistency with federal law, and specifically authorized adoption of solid waste facility management rules consistent with RCRA Subtitle D. To date this authority has been implemented by Idaho's Solid Waste Rules (**IDAPA 58.01.06**), which among other things exempt from regulation phosphogypsum from production of phosphate fertilizer, although it appears the Solid Waste Rules may have neglected to clearly exclude process wastewater from phosphoric acid production (**IDAPA 58.01.06.001.03.b.vi.**).

The Solid Waste Rules also exclude solid waste *facilities* accepting only solid waste excluded by **Subsection 001.03**; however, although likely an oversight, as currently worded process wastewater from phos acid manufacture is not clearly excluded by **Subsection 001.03 (IDAPA 58.01.06.001.04.a.)**.

As DEQ is aware, phosphogypsum is mixed with process wastewater when slurried to a PSS. As a result, revisions to the Proposed Rule *and* to Idaho's existing Solid Waste Rules are necessary to ensure consistency between the Proposed Rule and **IDAPA 58.01.06**. As discussed further below, conforming amendments also may be necessary to **IDAPA 58.01.06** to clarify its coverage and consistency with EPA's Bevill exemption – *i.e.*, 40 CFR

261.4(b)(7). In sum, Nu-West respectfully submits the following recommended Proposed Rule revision:

- Proposed Rule legal authority: Add citation to **IC Section 39-7401**, to ensure clarity that the Proposed Rule implements IDEQ’s legal authority to address solid waste management facilities falling within the scope of RCRA Subtitle D.

Subsection 001.02 – Scope & Applicability

Revised draft Proposed Rule **Subsection 001.02.a.** now simply references **IC Section 39-176B**. However, given the legislative intent to exclude any PSS covered by settlement agreements or other authorizations resulting from negotiations between DEQ, EPA and industry, this applicability provision will require clarification if the Proposed Rule is adopted prior to conclusion of these ongoing settlement negotiations. In particular, **IC Section 39-176B(2)** states as follows (emphasis added):

“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.”

At a minimum, the italicized phrase would require clarification to ensure it will encompass settlement agreements entered after rule adoption, given no Idaho phosphoric acid facility currently has reached settlement with DEQ and EPA. Presumably the phrase “or approvals” was intended to have a broader scope than “existing agreements” and hence to provide DEQ authority to clarify that the Proposed Rule excludes any PSS subject to a settlement agreement with or other authorization issued by the DEQ or EPA whether in force prior to or after rule adoption.

As previously noted, Nu-West urges that this rulemaking be postponed until the conclusion of DEQ and EPA settlement negotiations at all Idaho phosphoric acid facilities. However, if the rule is adopted prior to conclusion of those settlements a definition will be necessary to clarify the phrase “existing agreement with or approvals from,” as elaborated below.

- Subsection 010.XX, “Existing Agreements With or Approvals by the Department or EPA”: As described above, we recommend proposing inclusion of a new definition of Existing Agreements or Approvals, worded as follows: “For purposes of **Subsection 010.02.b.**, the phrase “**existing agreement with or approvals from**” includes consent decrees, consent orders, unilateral orders, settlement agreements, permits, and other similar legally binding and enforceable agreements with the U.S. Environmental Protection Agency or the Department, whether adopted prior to or after the effective date of this Chapter 58.01.19.”

2. Solid Waste Rules Conforming Amendments

Subsection 000 – Legal Authority: Although the specific provisions of **IC Chapter 74** apply only to municipal solid waste landfill (MSWLF) units (see **IDAPA 39-7402**), **IDAPA 39-7401** indicates a broader intent to establish a solid waste management program compliant with **40 CFR Part 258**. As noted above, we therefore suggest inclusion of a reference to **IDAPA 39-7401** in the citation to legal authority for the Proposed Rule given

phosphogypsum and process wastewater from phosphoric acid manufacturing are defined as solid waste subject to RCRA Subtitle D. A similar conforming amendment to **IDAPA 58.01.06** also may be justified.

- IDAPA 58.01.06 (Solid Waste Rule) legal authority: Consider adding reference to **IC sections 39-176A through 176F** if the Solid Waste Rule exemption is amended to cross-reference the Proposed Rule, as elaborated below.

Subsection 001.03 – “Wastes Not Regulated Under These Rules”:

- 001.03.a. – Add an Exemption for Wastes Managed Consistent with the Proposed Rule: As described above, Nu-West recommends addition of a specific exclusion for **solid wastes managed, stored or disposed in accordance with the Proposed Rule** (similar to the phrasing of existing Solid Waste Rules **Subsection 001.03.a.v**).
- 001.03.b.vi. – Amend to Conform with Federal Law (RCRA Bevill Exemption): As described above, Nu-West recommends amending this provision to conform the Solid Waste Rules’ exemption with federal law, by adding specific reference to **wastewater from phosphoric acid manufacturing**. Currently, this exemption references *only phosphogypsum*, an oversight inconsistent with federal law, which could inadvertently subject Idaho PSS facilities to both the existing Solid Waste Rules and to the Proposed Rule.

Thank you for your consideration of Nu-West’s comments. We appreciate the DEQ’s efforts to shepherd this proceeding in a manner affording an opportunity for participation by Nu-West and other interested stakeholders.

Sincerely,

Nu-West Industries, Inc.



Jeff Grussing
Vice President

cc: Scott Burton, Hunton Andrews Kurth