

Idaho Department of Environmental Quality

Docket No. 58-0119-2001

Rules for the Design and Construction of Phosphogypsum Stacks

December 15, 2020 Negotiated Rulemaking Meeting

Discussion Points

- **Timeline.** DEQ received a number of comments requesting that negotiated rulemaking for the Design and Construction of Phosphogypsum Stacks be postponed. Commenters requested postponing rulemaking until the discussions pursuant to EPA’s National Compliance Initiative for Mining and Mineral Processing between the Department of Justice, on behalf of EPA, and the phosphoric acid manufacturing facilities in Idaho are completed. DEQ would like to discuss how the draft proposed rule’s adoption could impact negotiations and the possibility of postponing rulemaking.
- **Siting criteria.** DEQ continues to receive comments that the siting criteria in Section 110 of the draft proposed rule are outside the scope of House Bill 367 (codified at Idaho Code §§ 39-176A – 39-176F). While siting criteria may not be specifically identified in House Bill 367, it is an important design component to ensure that phosphogypsum stack systems “meet critical safety standards” (Idaho Code § 39-176B(4)). Siting criteria is also considered part of “a program to assure proper design and construction of phosphogypsum stack systems” (Idaho Code § 39-176A(1)(e)).

Further, commenters have also requested acknowledgement that phosphogypsum stacks fall under solid waste regulation. In Idaho, phosphogypsum is a solid waste but it is exempt from regulation under the Solid Waste Management Rules. If it were not exempt, siting criteria applicable to either a Tier I or Tier II solid waste facility would apply. See IDAPA 58.01.06.012.01 and 58.01.06.013.01. Similarly, under the federal regulatory scheme, not directly applicable in Idaho but instructive nonetheless, the requirements in 40 CFR 257 Subpart A, classification of solid waste disposal facilities and practices, also include siting-related requirements in 40 CFR 257.1 through 257.4. Both the Idaho rules and the federal rules utilize the following criteria in reviewing the appropriateness of a site, along with other criteria not listed:

- Floodplain location
 - Endangered species that may be affected
 - Surface and ground waters that may be affected
 - Nearby wild and scenic areas, national monuments, wilderness areas, historic sites, recreation areas, preserves and scenic trails
- **Design criteria for cooling ponds and surge ponds.** DEQ received a request to discuss the requirement of a composite liner design standards for cooling ponds and surge ponds, stating that neither type of pond was addressed in House Bill 367. The definition of “Phosphogypsum Stack System” in Idaho Code § 39-176C includes both cooling and surge ponds as components of the phosphogypsum stack system. Therefore, DEQ finds it appropriate to include design standards for cooling and surge ponds as part of the overall design and construction plan for a phosphogypsum stack system. DEQ would like to further discuss the most appropriate type of liner requirement for cooling and surge ponds.

- **Groundwater monitoring plan components.** DEQ continues to receive comments that portions of the groundwater monitoring plan pertain to facility operations or corrective action instead of design and construction. Recognizing these concerns, DEQ is revising the groundwater monitoring component requirements in Section 160. However, DEQ does think that if applicable, remedial action components of groundwater monitoring at an existing stack may be an important aspect of establishing background conditions for a lateral expansion of that stack or for new stacks at such facilities. DEQ would like to discuss how to address the issue of establishing background at existing facilities within the groundwater monitoring plan components in Section 160.
- **Fee versus cost recovery:** DEQ received a number of comments addressing the inclusion of cost recovery instead of a fee in Section 180. Commenters noted that House Bill 367 allows for a fee, not a cost recovery agreement. DEQ is looking into language similar to that provided in the Solid Waste Management Rules, IDAPA 58.01.06, Section 994, Commercial Solid Waste Siting License Fee.
- **Construction completion report.** DEQ received a comment that a construction completion report is not required by the statute. However, Idaho Code § 39-176F(6) requires a construction completion report be submitted to DEQ within 90 days of completion of construction requirements. Further, the provision states that “The report shall include final record drawings and conformance of construction to the approved design and construction plan.”

In order to determine whether the operator has met this requirement, DEQ has an implicit duty to review the construction completion report and assess conformance. This is not an approval of the construction completion report by DEQ, but a review to verify that construction is in conformance with the approved plan. This is similar to what occurs for solid waste facilities, cyanidation facilities, and wastewater facilities. If there are construction issues that need to be resolved, DEQ would identify those issues and the operator would need to correct or otherwise address those issues prior to operation. DEQ anticipates proposing language in Subsection 190.03 that is similar to what is included in Rules for Ore Processing by Cyanidation, IDAPA 58.01.13.500.03.

DEQ can remove the second sentence in Subsection 190.03 stating that construction is considered complete at the issuance of notice of substantial completion letter. However, while DEQ recognizes that issuance of notice of substantial completion letter is not included in the statute, we would like some discussion with facilities regarding when construction should be determined to be complete and trigger the 90 day timeframe for submittal of the construction completion report and how DEQ is informed that construction is complete.

- **Monthly construction reports and final inspection.** DEQ continues to receive comments that the requirements for monthly construction reports and a final inspection are outside the scope of House Bill 367. DEQ does recognize the concerns of stakeholders that periodic reporting is not required in the statute or in other rules governing construction of similar facilities. DEQ will remove the monthly construction report and final inspection requirements from Subsections 190.01 and 190.02 of the rule. However, it is important to note that DEQ does have general inspection authority under Idaho Code § 39-108. DEQ retains the ability to periodically inspect phosphogypsum stack systems during construction and to request documentation during those inspections to verify ongoing conformance to the approved plan in accordance with the statutes and rules.