



P.O. Box 1660 • Boise, ID 83701
208.342.0031 • mineidaho.com

April 28, 2020

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

Paula Wilson
Idaho Department of Environmental Quality
1410 N. Hilton
Boise, ID 83706

**Re: DEQ Negotiated Rulemaking – Rules for the Design and Construction of Phosphogypsum Stacks
Docket No. 58-0119-2001 – Draft No. 1**

Dear Ms. Wilson:

The Idaho Mining Association (IMA) appreciates IDEQ's efforts in promptly moving forward with the subject draft Rule. We believe the draft Rule must be consistent with Idaho Code Sections 39-176A through 39-176F. We have suggested additions and revisions to the draft Rule to be consistent with the statute. We look forward to working with IDEQ on the next draft Rule. IMA's proposed changes to the subject draft Rule appear below.

Application of Idaho Code 39-107D

It was brought up at the rulemaking meeting that IDEQ would be obligated to comply with Idaho Code 39-107D because apparently IDEQ believes that aspects of the rule are more stringent than requirements under federal law or the rule will regulate an activity not regulated by the federal government. It is important to note that federal law pursuant to RCRA, Subtitle D and implementing federal rules do impose requirements on the design of solid waste facilities such as phosphogypsum stack systems (PSS) to ensure such systems do not present risks to human health and the environment. IDEQ's current Solid Waste Management Rule at IDAPA 58.01.06 (Solid Waste Rule) imposes similar requirements for the types of solid wastes regulated by this rule. It is also important to note that the design, construction, operation and closure of PSS is an activity that is currently regulated by the federal government as evidenced by the reference in the legislation (and the draft Rule) regarding agreements with EPA. Finally, we question the application of Idaho Code 39-107D to aspects of the draft Rule that the Legislature clearly covered in the statute. We do not believe Idaho Code 107D was intended to apply to findings and directives made in

subsequent state legislation. The application of Idaho Code 39-107D should only apply to the adoption of human health based numeric criteria (such as drinking water standards) that depart from minimal federal requirements or standards. The application of peer reviewed science, identification of receptor populations and the setting of upper and lower bound risks only makes sense if the subject of the rulemaking is setting human health-based criteria. The application of such factors to construction plans, quality assurance plans and even design plans in the draft Rule appears to be a waste of resources and will lead to unproductive disputes on what is best available science.

000. LEGAL AUTHORITY

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.

001. TITLE, SCOPE AND APPLICABILITY.

02.b. Agreements with EPA and IDEQ

As recognized in the statute and the subject draft rule, the rule is not intended to effect enforcement agreements with EPA and IDEQ related to the construction of a PSS. 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. We would like further clarity and discussion on this issue to ensure that the subject rule does not impact those negotiations or final agreements with EPA and DEQ.

02.d. SCOPE

Consistent with our comment above, it would be appropriate to reference the applicable federal regulations governing minimum criteria and practices for solid waste facilities under Subtitle D of RCRA. Therefore, we would recommend the following language:

001.02.d. "These rules are intended to achieve the criteria and practices for solid waste facilities at 40 CFR Part 257, Subpart A so that phosphogypsum stack systems do not present risks to human health and the environment consistent with the scope and applicability of Idaho Code Section 39-176B."

010. DEFINITIONS

x. “Stored” IMA believes this proposed definition is not appropriate and is contrary to the statute. Clearly the statute described storage of both phosphogypsum and process water in a PSS. Storage was not limited to just process water. Whether and under what circumstances phosphogypsum may be reused in the future is well beyond the subject rulemaking which only applies to the design and construction requirements for a PSS. IMA notes that the rule itself allows for the use of phosphogypsum in the construction of a liner at Section 140.02. Therefore, IMA recommends striking this definition because it is contrary to the statute.

100. DESIGN AND CONSTRUCTION PLAN SUBMITTAL

f. Seepage Test procedures. IMA does not believe this is an appropriate requirement in the draft Rule. The statute (and the Rule) is limited to the design and construction of a PSS. Seepage testing procedures are not required in the statute and clearly are related to operation of a PSS facility. Apart from the technical issues and concerns related to seepage testing for PSS, it is not appropriate to have this requirement in the rule. Operational limitations on a PSS are outside the scope of this rulemaking. Moreover, current IDEQ rules (Wastewater Rules) specifically exempt industrial facilities from seepage testing as compared to municipal wastewater facilities. See IDAPA 58.01.16. 401.06 and 493. Accordingly, please remove seepage testing requirements from the draft rule.

i. Seismic Study A requirement for a seismic study was not addressed in the statute. IMA would like greater clarity as to what IDEQ believes is required for such a study.

110. SITING CRITERIA.

The phosphogypsum legislation did not specify any siting criteria for a PSS. Therefore, IMA does not believe it is appropriate or necessary to specify any siting criteria in the subject draft Rule. 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.

130. RUN-ON AND RUN-OFF CONTROL

IMA assumes this section would not preclude an operator of a PSS to discharge storm water runoff from a PSS if such discharge was in accordance with a IPDES Permit. It may be appropriate to include language in this section acknowledging that fact.

140. LINER AND LEACHATE CONTROL SYSTEMS

The statute specified that certain components of a PSS should be constructed with a composite liner. Other provisions of the statute either specified that a synthetic liner be installed (auxiliary holding pond), or more generally a “liner” be installed (process water conveyances) or in some

instances a liner is not specifically required (perimeter dikes). It appears that the draft Rule is requiring composite liners for all components of a PSS. IMA questions whether this is consistent with the statute and believes that additional discussion around this issue is necessary at the next rule-making meeting. Moreover, the legislation specifies numerous times that an operator may utilize an alternative liner for various components of a PSS so long as such alternative has equivalent hydraulic conductivity. IMA believes this equivalency language should be authorized for all liner systems addressed in this section.

160. GROUND WATER MONITORING PLAN

Similar to our comments above, IMA is concerned that portions of this section regulate operation of a facility rather than focusing on approval of design and construction of a PSS as directed by the statute. We are particularly concerned about Section 160.03, reporting and corrective action requirements as this section clearly imposes obligations long after a PSS is constructed and in operation. These requirements are beyond the scope of the statute and the draft rule.

180. COST RECOVERY.

The statute authorized a fee for the review of plans. There was no reference to an agreement between the operator and IDEQ for payment of fees. We understand that IDEQ has reviewed and approved plans for PSS in the past. IMA believes the rule should specify a specific fee for review of plans for a PSS. IMA would like to have further discussion around this issue at the next meeting.

190. CONSTRUCTION REPORT AND FINAL INSPECTION

01. Monthly Construction Report.

IMA does not believe this requirement is necessary or appropriate. The statute only required a construction completion report. We recommend this section be removed from the Rule.

02. Final Inspection. IMA believes a final inspection by the operator can be addressed as a component of the Construction Completion Report. However, the statute does not specify a “notice of substantial completion” by IDEQ before commencing operation of the PSS. We do not believe such a requirement is appropriate or necessary. A construction completion report requirement meeting the requirements of the rule is all that should be required prior to operation. Thus, we recommend striking the reference to a “substantial completion report” in the rule (including section 190.03).

200. DEVIATIONS FROM APPROVED DESIGN AND CONSTRUCTION PLAN SPECIFICATIONS

IMA is concerned about this section. The statute does not provide for procedures for IDEQ to stop work for deviations from the plans that IDEQ determines are not “minor” (an undefined term). A

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construction completion report is all that is required. IMA would like to have further discussion with IDEQ about how deviation from approved plans should be addressed.

We look forward to working with IDEQ on the subject rulemaking.

Sincerely,

A handwritten signature in blue ink, appearing to read "B. J. Davenport", written in a cursive style.

Benjamin J. Davenport