

From: [Benjamin Davenport](#)
To: [Rule Making](#); [Amy Johnson](#); [Mick Thomas](#); [Eric Wilson](#); [Dave Schwarz](#)
Subject: IMA Comments to IDAPA 20.03.02 Draft 7, Mined Land Reclamation
Date: Friday, July 10, 2020 03:53:36 PM
Attachments: [IMA.Comments.IDAPA20.03.02 Draft rule 7.pdf](#)

All,

Attached re IMA's comments to the most recent draft of IDLs rule. I look forward to our next meeting. Have a good weekend.

Ben

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July 10, 2020

Idaho Department of Lands
Attn: Amy Johnson - Rulemaking
300 N. 6th St., Suite 103
Boise, ID 83702

**Re: Rulemaking for IDAPA 20.03.02
Docket No. 20-0302-1901
Draft Rule No. 7 dated June 30, 2020**

Dear Ms. Johnson:

The Idaho Mining Association (IMA) appreciates the opportunity to provide the following general and specific comments to the subject Rule Draft No. 7.

GENERAL COMMENTS:

IMA appreciates IDL's efforts in the most recent draft to address our concerns in regards to the agencies regulatory authority of water. This draft has taken positive steps to alleviate many concerns in that regard and IMA believes we are getting close to a rule that reflects best practices in the industry as well as what is appropriate and necessary to provide adequate financial assurances to the State for mining projects. The changes in HB141 were to provide a financial assurance mechanism that was modern, protective and achievable. Because of the nature of our regulatory structure, it will be imperative for IDL to enter into memorandums of agreements (MOAs) with other agencies to facilitate the sharing of information needed to calculate adequate financial assurances on a given project. Further, it is still our belief that by allowing the option to use industry recognized standardized cost estimator tools, many of the questions that remain with some in the department will be resolved. We believe this is also consistent with the legislative intent in HB141. There are a few remaining issues that need to be addressed as set forth below, but IMA is hopeful that these remaining issues can be resolved within the timeframe outlined at our June 30 rulemaking.

SPECIFIC COMMENTS:

IDL Proposed: IDAPA 20.03.02.10.02 (Definition)

The original rule included a definition for “Best Management Practices (BMP)” that mirrored statutory language in 39-3602. It has been IMA’s position that this definition should not need to be changed and there has been questions on why the department felt otherwise. The most recent draft language largely addresses our concerns and we appreciate the departments desire to model it after definitions in DEQ rule. That said, the question remains as to why we need to depart from a well-established law that the legislature specifically desired to define BMP’s in. We still believe it is appropriate to mirror statutory language and in light of the governor’s desire to cut the size of administrative code, a reference to 39-3602 could also be appropriate.

IDL Proposed: IDAPA 20.03.02.10.17 (Definition)

IMA suggests revising “impact to surface or ground waters of the state” to “waters of the state.” Including surface and ground waters of the state is redundant. The revision provides consistency and clarity.

IDL Proposed: IDAPA 20.03.02.70.04. c. (Reclamation Plan)

IMA’s Concern. While IMA’s appreciates the changes made by IDL, we believe the language in this subsection should mirror the language in Idaho Code 47-1506(a)(1)(vii) and should be slightly modified as suggested below.

IMA’s Suggested Change:

c. A description of foreseeable water quality impacts from mining operations and proposed water management activities to comply with water quality requirements. This may be met by including a summary overview of requirements from a SWPPP, IPDES Permit, groundwater point of compliance, BMPs and other permit or approvals related to foreseeable water quality impacts.

IDL Proposed: IDAPA 20.03.02.070.04,g

IMA’s Concern. Identifying expected post closure activities at the time of submission of a reclamation plan will be a challenge and likely will change over the life of a mining operation. Accordingly, we would suggest alternative language below.

070.04,g. A description of post closure activities that includes the proposed length of the post closure period and the following:

(i) A summary overview of procedures and methods for water management including any likely IPDES Permit, storm water permit and monitoring required for any groundwater point of compliance, along with sufficient information to support a cost estimate for such water management activities.

(ii) Care and maintenance for facilities after mining has ceased

IDL Proposed: IDAPA 20.03.02.070.05. Operating plan requirements

IMA's concern. It is unclear why the proposed rule imposes additional requirements beyond the existing rule and statute. IMA Suggests deleting this subsection and replacing with the following language: If required, an operating plan shall be consistent with Idaho Code 47-1506 (b)(1)

IDL Proposed: IDAPA 20.03.02.070.06. Monitoring Data

IMA's Concern: This subsection gives the Department of Lands authority to request information on ground water and surface water monitoring data without a clear understanding of how the data will be utilized or what the department intends on doing with the data. IMA believes this authority lies within IDEQs regulatory role. For whatever reason this provision may have been included in IDL rules in the past it no longer seems necessary or appropriate and therefore IMA suggests striking this subsection entirely.

IMA PROPOSED NEW SUBSECTION: IDAPA 20.03.02.070.07. Phased Approach

IMA appreciates IDL's recognition that financial assurance can be phased over the period of a mining operation under subsections 069 and 071. We believe it would be appropriate to include a similar provision in section 070 as follows:

070.07. If construction, reclamation and post closure will be completed in phases, a description of the tasks to be completed in each phase, an estimated schedule and proposed adjustments of financial assurance related to each phase.

Section -071. Should only limit operation not construction of a cyanidation facility. (See also comment to Section 120.02

IDL Proposed: IDAPA 20.03.02.080.05,a

IMA would suggest deleting this subsection. Recent changes to Idaho Code 39-118A authorized IDEQ to issue a cyanidation permit upon submission of a permanent closure plan to IDL to better coordinate the activities of IDEQ and IDL. It may be difficult for IDL to comply with deadlines for approval of a permanent closure plan if it waits until IDEQ issues a permit.

IDL Proposed: IDAPA 20.03.02.080.05,b and c

IMA suggests striking references to IDEQ including additional requirements to a permanent closure plan. IDL and not IDEQ approves a permanent closure plan.

IDL Proposed: IDAPA 20.03.02.120.02

IMA Suggests rewording the subsection to strike the word “construction” to be consistent with Idaho Code 47-1506(f) and (g) and to remove the 90 day deadline for providing financial assurance and be revised as follows:

Prior to operation of a cyanidation facility after approval of a permanent closure plan, an operator will submit to the director on a Department approved form financial assurance meeting the requirements of 47-1512(a)(2). The financial assurance will be in an amount and form equal to the total estimated costs under subsection 071.02,k , section 120 and section 121 of these rules.

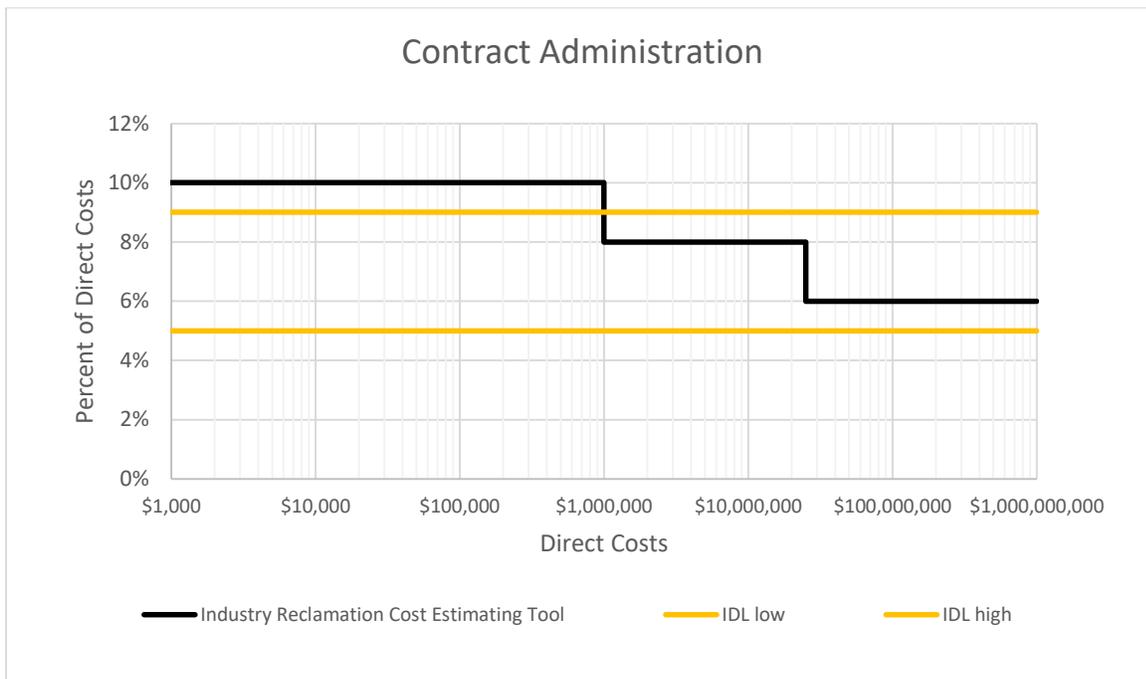
IDL Proposed: IDAPA 20.03.02.120.03 Phased Financial Assurance.

IMA suggests striking the phrase “any construction” and replace with “operation” in the last sentence.

IDL Proposed: IDAPA 20.03.02.120.09 Indirect Costs.

IMA has concerns regarding the vastness of the proposed indirect cost percentage ranges being placed in the rule. Indirect cost ranges proposed are from 30-52% of total direct costs with no consideration of the relative project costs. As written the proposed rule does not provide the ability to standardize the criteria for where in the range a proponent would fit. There is concern from within industry that this will result in the Department defaulting to the highest end of the range. IMA believes the rules should be revised to alternatively allow the use of industry recognized reclamation cost estimation tools and the use of indirect cost values therein. These tools have been developed using industry data and are relative to the reclamation direct costs. Use of a standardized reclamation estimation tool results in discrete indirect costs commensurate with the cost ranges proposed by IDL and facilitates upfront agreement by the proponent and IDL.

An example of how indirect costs would compare using the IDL percentages versus a reclamation cost estimation tool is provided below:



IMA’s Suggested Change:

120.09 Indirect Costs for Reclamation Cost Calculations.

Reclamation and permanent closure cost calculations shall include the following indirect costs. Indirect costs should be established within the percentages given. Alternatively, an operator may propose the use of an industry recognized standardized reclamation cost estimation tool for use in reclamation and/or permanent closure cost estimates and the use of the tool’s associated indirect costs which are established using the project direct costs as identified.

IDL Proposed IDAPA 20.03.02.120.12 Annual Financial Assurance Review for Reclamation Plans.

IMA suggests IDL consolidate the obligations to review and adjust the Financial Assurance obligation to no more than 5-years, or as agreed to by IDL and the proponent. This change would align the proposed rules with the draft IDAPA 58.01.13 Rules for Ore Processing by Cyanidation and reduce the burden of recurring financial assurance reviews on separate one, three- and five-year cycles as currently proposed.

IMA proposes to consolidate the content of sections 120.12, 120.18 and 155.01 into a single location, recommended in Section 120.12, which would result in the obligation to perform a comprehensive review of added reclamation lands, updates to permanent closure plan, and modification to the proponents complete mining Operations and Reclamation plan at a frequency of at least once every 5 years or as agreed between the proponent and IDL.

To read as follows:

120.12 Financial Assurance Review

The operator shall review the financial assurance cost estimate for the reclamation plan and/or permanent closure plan on a frequency as determined by the operator and IDL but, not to exceed 5-years. The operator shall notify the director of any increase in acreage of affected land, which will or has resulted from any significant change to the mine Plan of Operations, Reclamation Plan or Permanent Closure plan. Any additional financial assurance required shall be submitted on the appropriate form within ninety (90) days of operator's receipt of notice from the Department that an additional amount is required. Any reduction in financial assurance required shall be released to the operator within ninety (90) days of the operator's receipt of notice from the Department of such a reduction.

- a. The Department may conduct an internal review of the amount of each financial assurance annually to determine whether it is adequate to complete reclamation and/or permanent closure.
- b. The Department may employ a qualified independent party to verify the accuracy of the reclamation plan and/or permanent closure plan cost estimate as described in Subsection 071.05.b of these rules.
- c. When the director determines that there has been a material change in the estimated reasonable costs to complete reclamation or permanent closure: (3-30-06)
 - i. The director will notify the operator in writing of his intent to reevaluate the financial assurance amount. Within a reasonable time period determined by the Department, the operator will provide to the Department a revised cost estimate to complete permanent closure and/or reclamation plan as approved by the Department. ()
 - ii. Within thirty (30) days of receipt of the revised cost estimate the director will notify the operator in writing of his determination of financial assurance adequacy. ()
Within ninety (90) days of notification of the director's assessment, the operator will make the appropriate adjustment to the financial assurance or the director will reduce the financial assurance as appropriate. ()

IDL Proposed: IDAPA 20.03.02.120.15 Financial Assurance Release

IMA suggests rewording the introduction to be consistent with Idaho Code 47-1512(h) as follows:

Upon substantial completion of reclamation, post closure or permanent closure, or a portion thereof, the operator may notify the Director of operator's desire to secure release from financial assurance or a portion of financial assurance. When the director has verified the reclamation plan, post closure or permanent closure, or portion thereof, has been substantially completed the

financial assurance amount will be released. Any action or inaction by the Director in this subsection is appealable to the Board. Any decision by the Board will be considered a final order under Idaho Code 47-1514

Section 120.15,b Similarly, IMA suggest rewording this subsection as follows:

If the Director finds that a specific portion of reclamation, post closure or permanent closure has been substantially completed, the financial assurance shall be reduced to the amount required to complete the remaining reclamation, post closure and permanent closure.

IDL Proposed: IDAPA 20.03.02.122.05 Trusts.

IMA has identified how a trust agreement should be funded consistent with HB 141 at prior meetings. When HB 141 was under review by the Idaho Legislature, IMA assured the Legislature that that the types and forms of financial assurance provided in Idaho Code 47-1512 were based upon well-established financial mechanisms under existing federal and state laws, including IDEQ's hazardous waste rules. The concept of a trust fund in HB 141 was taken from these hazardous waste rules See 40 CFR 264.143 and 145, IDAPA 58.01.05.008. A formula is specified in the hazardous waste rules for making periodic payments into a trust fund. The option of utilizing a trust fund to provide for financial assurance and to provide periodic payments into a trust fund was specifically authorized at Idaho Code 47-1512(l)(ii). If an operator chooses to use a trust fund a payment schedule should be authorized for reclamation, post closure or permanent closure. Similarly, a payment schedule over the life of a mine, post closure and permanent closure should be allowed consistent with the payment schedule formula set forth in the above cited hazardous waste regulations. IDL's proposal to limit trust funds to only post closure and to require full funding is contrary to the intent of HB 141. Accordingly, IMA suggests revising as follows:

121.05,ii When used to cover reclamation, post closure or permanent closure a payment schedule to provide financial assurance for such activities will be specified in the memorandum of agreement.

Section 122.05.a. Disbursements from the trust. We are not clear what is intended in this subsection. If the partial release of funds by the trust is due to substantial completion of portions of either a reclamation plan or post-closure, it should be governed by Idaho Code § 47-1512(h).

Section 122.05.c. Please clarify that "individual stocks" applies to the operator's company or parent company and not any other individual stock similar to the language regarding "direct investment".

Section 122.05.d. We believe bonds held by a trust can be rated less than "AAA" or "AA" as the rate of return on such bonds can be higher. Similarly, it is unclear on whether or not money market funds are rated in the same method as bonds. This type of decision should be left to the trustee

and not IDL Rules. We suggest striking this subsection or at the very least using the term “investment grade” rather than specific ratings.

Section 122.05.e.i. Please clarify that this also applies to permanent closure cost not just reclamation costs. We suggest adding permanent closure costs after reclamation costs.

Section 122. 05.e.ii. When used to cover reclamation, post closure or permanent closure, a payment schedule will be created in the memorandum of agreement.

IDL Proposed IDAPA 20.03.02.140.01 Introduction and 01 Nonpoint Source Control.

IMA’s Concern. As noted above, this section should not be revised from the current version. IDL’s authority over nonpoint source controls at mines was not changed by HB.141.

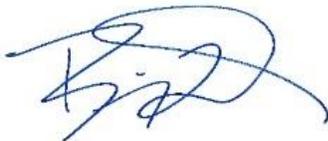
IMA’s Suggested Change. Leave existing text in place.

IDL Proposed: IDAPA 20.03.02.200 Compliance of Existing Reclamation Plans

IMA is unclear why this section is needed as Idaho Code 47-1518 addresses the applicability of the changes made in HB141. IMA suggests deleting this section entirely.

Thank you for the opportunity to comment on the subject draft Rule and we look forward to further negotiation of a proposed rule.

Kindest Regards,

A handwritten signature in blue ink, appearing to read "B. J. Davenport", written over a light blue circular stamp or watermark.

Benjamin J. Davenport