

**From:** [Benjamin Davenport](#)  
**To:** [Rule Making](#)  
**Cc:** [Mick Thomas](#); [Scott Phillips](#); [Eric Wilson](#)  
**Subject:** IMA Comments on Omnibus 20.0000.2000F Docket 20.03.02  
**Date:** Wednesday, October 07, 2020 04:58:11 PM  
**Attachments:** [IDAPA 20.03.02. Mined Land Reclamation Comments.Omnibus.20.000.2000F.pdf](#)

---

See our comments attached.

Thank you again for the hard work in undertaking this rule update.

Ben

Benjamin J. Davenport  
Executive V.P.  
Idaho Mining Association  
[\(208\)342-0031](tel:(208)342-0031)  
[bdavenport@mineidaho.com](mailto:bdavenport@mineidaho.com)  
<http://mineidaho.com>



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

October 7, 2020

Idaho Department of Lands  
Attn: Director Miller  
300 N. 6<sup>th</sup> St., Suite 103  
Boise, ID 83702

**Re: Rulemaking for IDAPA 20.03.02  
Docket No. 20-0000-2000F Omnibus**

Dear Director Miller:

The Idaho Mining Association (IMA) appreciates the opportunity to provide the following regarding Docket 20-0302-2001.

**GENERAL COMMENTS:**

IMA appreciates IDL's efforts over the past 20 months to engage stakeholders on this rulemaking. It appears to us that we are very close to having a rule that reflects legislative intent of HB 141, best practices in the industry as well as what is appropriate and necessary to provide adequate financial assurances to the state for mining projects. Further, throughout the last few meetings and the public hearing, it has been expressed that HB 141 and the subsequent rulemaking may not adequately address the concerns of "individual" or "small" miners. IMA does not believe that this was the intention of the legislature in the passage of HB 141 and we hope that the department can address the concerns that they have expressed by defining what a small miner is and including language in the rule that will help those that mine for recreation or hobby feel comfortable with the new regulations. IMA looks forward to working with the department on implementing these new standards and financial assurance tools. The few remaining areas of importance for IMA are outlined below.

**SPECIFIC COMMENTS:**

**IDL Proposed: IDAPA 20.03.02.001.02 Purpose**

IMA believes that the reference to executive order 88-23 and the subsequent language should be stricken as the order has expired over 30 years ago and IDEQ amended its anti-degradation procedures a number of years ago making reference to the E.O. unnecessary and confusing. Further, if the department feels that it is necessary to reference executive orders, IMA believes that reference to *Executive Order 2019-02 Red Tape Reduction Act* requiring the department to cite "a business/competitiveness impact statement that identifies the impact the proposed rule will have on individuals and small businesses" as well as referencing

*Executive Order 2020.01, Zero Based Regulation, stating “Whereas, excessive regulation at all levels of government can impose high costs on business, inhibit job growth, and impede private sector investment”.*

**Section 001.05a** Strike the 1997 date as it is obsolete and confusing. This section should mirror the language in Idaho Code Sections 42-1512(h) and 42-1518 (d) related to previously approved reclamation plans prior to July 1, 2019.

**Section 010.09 Definition of material change.** The definition should be linked to changes causing increased financial assurance obligations or potential water quality impacts. We recommend revising b. as follows :

b. Substantially modifies surface water management or a water management plan in a way that significantly increases the potential to cause degradation of waters of the state.

**Section 010.10 Definition of material modification or material expansion.** This definition should only apply to cyanidation facilities that were permitted prior to July 1, 2005. See Idaho Code Section 47-1518(b). Moreover we request striking section 10.a.ii.. “Significant change” is not defined and is not connected to any change in a cyanidation facility which could potentially impact water quality or increased closure costs and therefore is not necessary.

**IDL Proposed: IDAPA 20.03.02.070 Application procedure and requirements for other mining operations including hardrock, underground and phosphate mining.**

A phased approach to providing financial assurance is important to IMA for all mining operations subject to Section 070 of the Rule. We realize that the department has attempted to capture this by referencing all of section 069 in 070 but in order to avoid any confusion in the future on the applicability of phased financial assurance to mining operations subject to Section 070, we request identical language in this Section as specified in Section 069.i.

**Sections 070.03 and 05** – Reference is made to “process fluid ponds” in these subsections. It is unclear what is intended by use of this undefined term.

**Section 070.04 Geotech analysis report.** We believe such a report should not be required if a geotechnical analysis has already been undertaken or evaluated by another agency such as a federal agency under NEPA.

**Section 070.06. Monitoring Data.**

As discussed throughout the rulemaking process, IMA understands that IDL needs the authority to require the collection of monitoring data “during the life of the project” for certain mining operations when such data would not otherwise be required by IDEQ or other federal agencies. Most large mining operations are subject to extensive requirements from IDEQ and other federal agencies to collect monitoring data during the life of a project and during any post closure. We understand that IDL does not intend to impose additional monitoring requirements or frequency of reporting on such large mining operations, nor does the department have the expertise to impose additional requirements beyond IDEQ’s obligations. IMA believes that the rule as currently drafted leaves the potential for IDL to require the collection of additional data beyond DEQ requirements.

**Section 111.02. Permanent Closure Report.** We believe only one state agency should be responsible for a “determination” that post closure is complete. Under state law, that determination should be made by IDL. Other than consulting with IDEQ, any reference to IDEQ making a “determination” of permanent closure in this rule should be deleted. We have made similar comments to IDEQ’s proposed cyanidation rule.

**Section 091.01. Amending a Permanent Closure Plan.** The cause for amending a permanent closure plan should be confined to a “material change”. See Idaho Code Section 47-1508(f). As noted above, “material modification” only applies to that portion of a facility with an existing permit prior to July 1, 2005. As we are not aware of any operating cyanidation facility in Idaho, it is not necessary to include the reference to “material modification” in this section. Also we would recommend striking 01.b as that should be adequately covered by reference to “material change”.

**IDL Proposed: IDAPA 20.30.02.120** We understand that IDL prefers a timeline for the provision of financial assurance for mining operations and cyanidation facilities for administrative convenience as outlined in section 120.03, even though there is no such deadline in the applicable statutes. IMA recognizes IDL’s concern and appreciates including the ability to request of the Director an extension of the timeframe provided. We also appreciate the inclusion of an appeal process in section 120.22 for plan cancellation, financial assurance reduction, or financial assurance release. However, we believe that the department, in listing many of the decisions proponents know to be appealable, has left out what IMA members believe to be an important decision that should also, without question, be included in such list. A decision by the Direct or denying an extension request, should also be subject to appeal procedures to the Board and ultimately to a court pursuant to Idaho Code Section Idaho Code Section 47-1514. In order to address these concerns, we propose adding “denial of a financial assurance extension request” to the list of appealable decisions outlined in section 120.22.

**IDL Proposed: IDAPA 20.03.02.122.05 Trusts.**

**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).

#### **122.05.e.i**

IMA appreciates IDL’s recognition in this subsection that payments into a trust can be phased in a payment schedule agreed to between the operator and IDL in a memorandum of agreement. We think such an approach is consistent with the direction of the Legislature and prior comments made by IMA. In order to better clarify this subsection to capture this concept we propose the following language:

IDL’s Proposed IDAPA 20.03.02.122.05.e.iii. Post Closure. As pointed out in earlier comments, IMA believes a phased funding approach to post closure is also appropriate similar to our comments in subsection i. as the Legislature made no distinction on payments into a trust covering reclamation, permanent closure or post closure. IMA continues to believe that the RCRA regulations covering payments into a trust should be used for post closure financial assurance also. We appreciate IDL’s recognition in the last draft rule that

such payments into the trust to cover post closure should be negotiated in the Memorandum of Agreement, however the requirement that all post closure costs must be fully funded by the time post closure period occurs is contrary to the statute's provision of an agreed upon "payment schedule" Since the post closure period may be lengthy (thirty or more years) along with various obligations that occur during that time period, we would suggest the following revision to this subsection that is more in keeping with the Legislature's intent in Idaho Code Section 47-1512 and as compromise from IMA we offer the following language:

**Section 122.05.e.iii.** When used to cover post closure costs, including long-term water management, a payment schedule will be created in the memorandum of agreement. The trust fund must be initially funded in an amount to cover the liability for the first five (5) years of post-closure. Annual payments into the trust will increase incrementally with the addition of post closure liability through the post closure period.

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", with a large, sweeping flourish extending to the right.

Benjamin J. Davenport  
Executive V.P., Idaho Mining Association