

Mined Land Reclamation and Best Management Practices

This summary provides an explanation of best management practices for mining in Idaho, and why the current language in IDAPA 20.03.02.140 cannot revert back to what it was before the Temporary Rule took effect on July 16, 2019. In short, the pre-existing language was outdated and conflicted with current water quality standards established in 58.01.02. In keeping with HB 141's stated purpose of more accurately reflecting current industry and regulatory practices, and to bring IDAPA 20.03.02 into conformance with IDAPA 58.01.02, several changes were made to IDAPA 20.03.02.140 through 140.02.

Background

Best Management Practices, or BMPs, are defined in Idaho Code § 39-3602(3), as "Practices, techniques or measures developed, or identified, by the designated agency and identified in the state water quality management plan which are determined to be a cost-effective and practicable means of preventing or reducing pollutants generated from nonpoint sources to a level compatible with water quality goals."

The state water quality management plan is not a single document. As described by DEQ on their website, it is a compilation of the guidance and programs DEQ uses to implement the Clean Water Act. See more information at: <https://www.deq.idaho.gov/water-quality/planning/>

BMPs for surface and underground mining in Idaho are found in IDAPA 20.03.02.140. These standards are referenced in DEQ's Water Quality Standards rules for Idaho at [IDAPA 58.01.02.350.03.f](#). This gives IDL the responsibility for non-point source BMPs at mines.

IDAPA 20.03.02.140 Changes Over Time

The wording and organization of IDAPA 20.03.02.140 through 140.02 has changed a little from 1989 early July of 2019, but most of the wording has been consistent as shown below:

1996 Rules

140. Best Management Practices

The use of the word "shall" with respect to any practice, act, or result specified in this rule means that employment of such practice, doing of such act, or the attainment of such result is mandated by these rules. The use of the word "should" with respect to any act or result specified in these rules means that the utilization of such practice, the doing of such act, or the attainment of such result is advisable and will constitute compliance with these rules, but does not mandate utilization of such practice, the doing of such act, or the attainment of such result if other acceptable practices, acts, or results are available. Enumeration of a practice, act, or result in Section 140 shall not be construed to require its specific inclusion in a reclamation plan submitted for approval under Subsection 070.04. (11-1-89)

01. Nonpoint Source Sediment Control. (11-1-89)

a. Appropriate best management practices for nonpoint source sediment controls shall be designed, constructed, and maintained with respect to site-specific surface mining operations. Operators shall utilize best management practices designed to achieve state water quality standards and protect existing beneficial uses of adjacent surface waters, but shall not be required to do more than is

necessary to preserve the condition of water runoff from the affected land prior to commencement of the subject surface mining or exploration operations. These measures shall be among the first to be taken, if necessary, to protect water quality. State water quality standards including protection of existing beneficial uses, shall be the standard that must be achieved by best management practices unless the operator can show, and the director determines, that a lesser standard of surface water quality had existed, in the area to be affected, prior to the commencement of the subject surface mining or exploration operations. In addition to proper mining techniques and reclamation measures, the operator shall take necessary steps at the close of each operating season to assure that sediment movement associated with surface runoff over the area is minimized in order to achieve water quality standards, or to preserve the condition of water runoff from the mined area prior to commencement of the subject surface mining or exploration operations, whichever is the lesser standard. Sediment control measures refer to best management practices carried out within and, if necessary, adjacent to the disturbed area and consist of utilization of proper mining and reclamation measures, as well as specific necessary sediment control methods, separately or in combination. Specific sediment control methods may include, but are not limited to: (11-1-89)

2006 Rules

Enumeration of a practice or act in Section 140 shall not be construed to require its specific inclusion in a reclamation or permanent closure plan. (3-30-06)

01. Nonpoint Source Control. (3-30-06)

a. Appropriate BMPs for nonpoint source controls shall be designed, constructed, and maintained with respect to site-specific surface mining operations or permanent closure activities. Operators shall utilize BMPs designed to achieve state water quality standards and to protect existing beneficial uses of adjacent waters of the state, but shall not be required to do more than is necessary to preserve the condition of runoff from the affected land or the cyanidation facility prior to conducting any exploration, surface mining or cyanidation facility operations. These measures shall be among the first to be taken, if necessary, to protect water quality. State water quality standards, including protection of existing beneficial uses, shall be the standard that must be achieved by BMPs unless the operator can show, and the director determines, that a lesser standard existed in the area to be affected prior to the commencement of the subject surface mining or exploration operations. (3-30-06)

b. If the BMPs utilized by the operator do not result in compliance with Subsection 140.01.a., the director shall require the operator to modify or improve such BMPs to meet the controlling, water quality as set forth in current laws, rules, and regulations. (3-30-06)

02. Sediment Control. In addition to proper mining techniques and reclamation measures, the operator shall take necessary steps at the close of each operating season to assure that sediment movement associated with surface runoff over the area is minimized in order to achieve water quality standards, or to preserve the condition of water runoff from the mined area prior to commencement of the subject surface mining or exploration operations, whichever is the lesser standard. Sediment control measures refer to best management practices carried out within and, if necessary, adjacent to the disturbed area and consist of utilization of proper mining and reclamation

measures, as well as specific necessary sediment control methods, separately or in combination. Specific sediment control methods may include, but are not limited to:

2019 Changes Implemented Through the Temporary Rule

In response to comments received during the negotiated rulemaking in 2019, and to bring IDAPA 20.03.02.140 through 140.02 into compliance with IDAPA 58.01.02.350, the following changes were made in the 2019 Temporary Rule, which was extended at the end of the 2020 legislative session.

~~Enumeration of a practice or act in Section 140 shall not be construed to require its specific inclusion in a reclamation or permanent closure plan. These are the minimum standards expected for all activities covered by these rules. Specific standards for individual mines may be appropriate based on site specific circumstances, and must be described in the plan.~~ (3-30-06)()

01. Nonpoint Source Control. (3-30-06)

a. Appropriate BMPs for nonpoint source controls shall be designed, constructed, and maintained with respect to site-specific ~~surface~~ mining operations or permanent closure activities. Operators shall utilize BMPs designed to achieve state water quality standards and to protect existing beneficial uses of adjacent waters of the state, ~~but shall not be required to do more than is necessary to preserve the condition of runoff from the affected land or the cyanidation facility prior to conducting any exploration, surface mining or cyanidation facility operations. These measures shall be among the first to be taken, if necessary, to protect water quality.~~ State water quality standards, ~~including protection of existing beneficial uses~~ as administered by DEQ, shall be the standard that must be achieved by BMPs ~~unless the operator can show, and the director determines, that a lesser standard existed in the area to be affected prior to the commencement of the subject surface mining or exploration operations.~~

(3-30-06)()

b. If the BMPs utilized by the operator do not result in compliance with Subsection 140.01.a., the director shall require the operator to modify or improve such BMPs to meet the controlling, water quality standards as set forth in current laws, rules, and regulations. (4-11-19)

02. Sediment Control. In addition to proper mining techniques and reclamation measures, the operator shall take necessary steps at the close of each operating season to assure that sediment movement associated with surface runoff over the area is minimized in order to achieve water quality standards, or to preserve the condition of water runoff from the mined area prior to commencement of the subject ~~surface~~ mining or exploration operations, whichever is the ~~lesser~~ more appropriate standard. Sediment control measures refer to best management practices carried out within and, if necessary, adjacent to the disturbed area and consist of utilization of proper mining and reclamation measures, as well as specific necessary sediment control methods, separately or in combination. Specific sediment control methods may include, but are not limited to: (3-30-06)()

Explanation of 2019 Changes

The language stricken at the start of Section 140 could be interpreted to mean that nothing in this section needed to be followed. This is in contrast to how other nonpoint source rules implement minimum standards, such as IDAPA 37.03.07.055 for Stream Channel Alterations; IDAPA 20.02.01.040

for road construction done under Forest Practices; and IDAPA 20.03.01.040 for Dredge/Placer Mining. The former language could also limit the ability of IDL to require BMP standards and maintenance in a post-closure plan. This is contrary to the wording and intent of IDAPA 58.01.02.350. The revised rule does allow other BMPs to be proposed by an operator in their reclamation plan due to site specific circumstances. This flexibility is important due to the varied types of mining, climatic conditions, and topography in Idaho.

The former language in 140.01.a and 140.02 largely dated back to 1989, and nonpoint source regulation has changed significantly since that time. Those changes resulted from implementation of the current Total Maximum Daily Load (TMDL) program as required by Section 303(d) of the Clean Water Act, the Idaho Supreme Court in ASARCO, Inc. v. State of Idaho (69 P.3d 139(2003), 138 Idaho 719), and rule changes to IDAPA 58.01.02. The former language in 140.01.a and 140.02 conflicts with the current IDAPA 58.01.02.350 rule language, in part because the IDL Director cannot establish water quality standards. Water quality standards as administered by DEQ are the standards that must be met. As stated in 140.01.b, and as further described in IDAPA 58.01.02.350, if BMPs do not achieve water quality standards then the operator needs to adjust BMPs in an effort to meet water quality standards. The effectiveness is then reevaluated, with the possibility that more adjustments may be needed. Coordination between IDL and DEQ will occur in these situations, as required by IDAPA 58.01.02.350. Lastly, IDAPA 58.01.02.350.01.1 does state in the final sentence that “In certain cases, revision of the water quality standards may be appropriate.” As affirmed by the Idaho Supreme Court in ASARCO v. State of Idaho, revisions to water quality standards must go through the rulemaking process.