

Negotiated Rulemaking Summary

IDAPA 20.03.01, Rules Governing Dredge and Placer Mining Operations in Idaho

Docket No. 20-0301-2301

Following Executive Order 2020-01: Zero-Based Regulation, this rule chapter is scheduled to be repealed and replaced in 2023 for review during the 2024 legislative session.

The Idaho Department of Lands (IDL) administers these rules under the authority of the Idaho Dredge and Placer Mining Protection Act (Title 47, Chapter 13, Idaho Code). Dredge and placer mining is the extraction of minerals from a placer deposit left by a stream and containing particles of gold or other valuable minerals. A placer deposit can be in a natural watercourse or an ancient stream channel high above an existing stream. Extraction is done using motorized earth-moving equipment, including suction dredges with an intake nozzle over 8 inches in diameter. IDAPA 20.03.01 allows responsible resource extraction while protecting the lands, streams, and watercourses of the state.

Negotiated rulemaking for these rules was approved by the Land Board on November 15, 2022. The Notice of Intent to Promulgate Rules – Zero-Based Regulation Negotiated Rulemaking was published in the Idaho Administrative Bulletin on April 5, 2023.

Stakeholder Outreach

The IDL's outreach for negotiated rulemaking included the following:

- Published the Notice of Negotiated Rulemaking in the Idaho Administrative Bulletin
- Created a rulemaking webpage to post documents, scheduling information, and comments (<https://www.idl.idaho.gov/rulemaking/docket-20-0301-2301/>)
- Posted meeting information on social media
- Posted rulemaking notices to Townhall Idaho
- Mailed postcards to 13 customers

Negotiated Rulemaking Public Meetings

Negotiated rulemaking meetings were held on April 19, April 26, May 4, and May 10, 2023 to discuss draft changes to the rules and receive comments from interested parties. A total of 13 non-Department affiliated people attended these meetings.

Much of the discussion centered around the applicability of the rules to suction dredges with an intake diameter of eight (8) inches or less, especially if that dredge affects more than one-half (1/2) acre. IDL is relying on the language in the existing rule that excludes these suction dredges, as well as the definition of "Motorized earth moving equipment" in Idaho Code § 47-1313(e) that excludes suction dredges with an intake diameter of 8 inches or less. In addition, the Idaho Department of Water Resources issues permits under the Stream Channel Protection Act for these smaller dredge sizes, and their rules have specific minimum standards for these dredges. These dredges are also not able to move large volumes of rock encountered while suction dredging. Rocks that cannot be sucked up must be removed by hand while underwater. This is very time consuming and becomes more time consuming with depth. IDL is not aware of any suction dredges in Idaho that have disturbed more than one-half (1/2) acre. No one

else at the public meetings could identify if this had occurred. The next period of spring runoff would effectively reclaim the dredged area, so no reclamation would be required.

Several discussions also touched on whether definitions and other language from the statute should be removed from the rule. The guidance given under Executive Order 2020-01 was specific about eliminating redundant language in the rules. A follow up conversation with staff at the Division of Financial Management affirmed this response.

Requests were made for the completed Prospective Analysis Form and a summary of the requirements from other states. Research was still ongoing at that time and the fully completed form is not required until later in the rulemaking process.

Potential changes to bonding amounts were discussed. IDL stated that a statutory change was needed first. The current limit of \$1,800 per acre is not sufficient to cover the cost of reclamation. Actual cost bonding, similar to that in the Mined Land Reclamation statute and rules, is needed.

The term “reclamation plan” was also discussed. The term “plan of operations” is now used in Section 021 to describe this portion of the application. The term “reclamation plan” has created confusion in the past because that is the term used in the Mined Land Reclamation rules. The United States Forest Service and Bureau of Land Management use the term “plan of operations”, so this change should also reduce confusion for permittees working on federal lands.

Written Comments

No written comments were received.

Concluding Negotiated Rulemaking

The applicability of these rules to suction dredges with an intake diameter of 8 inches or less was left unresolved. IDL kept language in the rule to exclude IDL’s regulation of these smaller suction dredges. The removal of redundant language from the rule was also left unresolved. IDL continues to follow the guidance given for complying with Executive Order 2020-01.

IDL concluded the negotiated rulemaking process and submitted the rule changes for publication as a proposed rule in the September 6, 2023, edition of the Idaho Administrative Bulletin. Key documents from the rulemaking record are available at <https://www.idl.idaho.gov/rulemaking/docket-20-0301-2301/>, including written public comments, research materials, and the proposed rule text in legislative format to allow the reader to easily identify changes.

Response to Comments on Negotiated Rule

IDAPA 20.03.01, Rules Governing Dredge and Placer Mining Operations in Idaho

Comment	Rule Section	Response
<p>Idaho Department of Lands (IDL) should require permits for the use of suction dredges that are 8 inches or less in diameter when their disturbance exceeds ½ acre.</p>	<p>001</p>	<p>1. The rules currently state in Subsection 013.06 that these rules do not apply to suction dredges with an intake diameter of eight (8) inches or less. This requirement has been carried forward into subparagraph 001.02.c.iv of the draft rules. IDL does not believe that the intent of Idaho Code § 47-13 is to regulate these smaller suction dredges. The definition of motorized earth moving equipment in Idaho Code § 47-1313(e) excludes suction dredges with an intake diameter of 8 inches or less. The Idaho Department of Water Resources (IDWR) regulates the use of these smaller suction dredges through their Stream Channel Alteration program. They issue Small Scale Mining permits on specific streams during specific seasons for dredges five (5) inches or less in diameter. These permits can be filled out from their website. Larger suction dredges require a normal Stream Channel Alteration permit. IDWR has not issued any permits for suction dredges larger than five (5) inches over the last 25 years.</p> <p>IDL is unaware of any instance when an individual with a suction dredge and an IDWR permit disturbed over ½ acre. No one else participating in the rulemaking meetings could find an example. The operational limitations of these smaller suction dredges prevent them from disturbing this much area, which is a square approximately 147 feet on a side. Lastly, spring runoff will effectively reclaim the disturbance every year.</p>
<p>Suction dredge mining on navigable rivers occupies public trust resources and therefore Idaho Code 47-13 should apply to suction dredges with an eight (8) inch or smaller intake.</p>	<p>001</p>	<p>2. IDL believes this statute only applies to suction dredges with intake diameters over 8 inches. It was suggested that the negotiated rulemaking meeting for IDAPA 20.03.05 would be a better opportunity to discuss operations on navigable rivers.</p>

Comment	Rule Section	Response
Definitions should not be eliminated from the rule because this may impact operators preparing permit applications.	010	3. Guidance for Executive Order 2020-01 specifically states that rule language repeated from the authorizing statute should be eliminated where possible. This includes definitions. IDL believes that other changes to the permit processing sections will make the permit processing easier to understand. Operators in the future will need to look at both the statute and the rules when preparing applications.
Why was the “reclamation plan” language removed?	021	4. The title of Subsection 021.01 removes this term and just refers to the “permit”. A “plan of operations” is now used in Section 021 to describe this portion of the application. The term “reclamation plan” has created confusion in the past because that is the term used in the Mined Land Reclamation rules. The Forest Service and BLM use the term “plan of operations”, so this change should also reduce confusion for permittees working on applications that cover these federal lands.
Are changes to bonding amounts being considered?	035	5. No changes are proposed in the rule because the bond amount is set in statute. The current limit was put in place around 1993 or 94 and it was to match the bond limits in the surface mining rules at the time, which was \$1,800 per acre. That limit was based on the most expensive reclamation task for surface mining when those rules were first approved around 1974. \$1,800 per acre was the cost to push down a waste rock dump at a phosphate mine from angle repose to a three to one slope. IDL knows that that is not enough to get the reclamation done, it is more like \$5-6,000 per acre. Bonding should reflect the actual reclamation costs similar to what the Mined Land Reclamation statute and rules currently have. If IDL does not have enough money for reclamation then reclamation may not be completed if a bond forfeiture occurs. IDL does not believe that the taxpayers of Idaho should have to pay for an operator’s failure to reclaim.
How is IDL involved in monitoring, oversight, or enforcement regarding potential violations?	051	6. IDL is in communication with staff at IDWR and the Idaho Department of Environmental Quality (IDEQ). IDL does get notified when applications are submitted and when there are potential violations. The agencies are coordinating and most of it occurs behind the scenes.

Comment	Rule Section	Response
Why were the withdrawn streams in Section 060 removed?	060	7. These withdrawals are repeated from statute, so the withdrawal does not need to be repeated in the rule. A list of all state lands withdrawn from mineral entry is posted on the IDL website.
The fully completed Prospective Analysis form is needed.	N/A	8. Only questions 1, 2, and 5 need to be filled out for negotiated rulemaking. The remaining questions will be filled out prior to entering the Proposed Rulemaking stage.
How do other states manage dredge and placer mining?	N/A	9. Research was still ongoing during negotiated rulemaking. The completed Prospective Analysis form contains this information.
IDL has a regulatory gap by not regulating smaller suction dredges.	N/A	10. No gap exists because of the IDWR Small Scale Mining and regular Stream Channel Alteration permits for suction dredges 8 inches or less in diameter. IDL has been coordinating with IDWR and other state and federal agencies for 30 years to avoid stream reaches and periods of time when spawning occurs.
A public trust analysis of the impacts associated with suction dredging is needed for IDL to justify transferring authority to IDWR.	N/A	11. Idaho Code § 47-13 and these rules cover more than just navigable rivers that are managed under the Public Trust doctrine as defined in Idaho Code § 58-12. Idaho Code § 47-13 also covers smaller streams and upland areas adjacent to streams. In addition, IDL looks to IDWR to regulate the smaller sized suction dredges because their regulations are more specific to that activity and Idaho Code § 47-13 does not apply to that activity.
How did the state gain ownership of navigable waters?	N/A	12. Under the Equal Footing Doctrine Idaho obtained ownership to the beds and banks of all navigable rivers and lakes at statehood.
Can an operator use the state's Bond Assurance Fund to satisfy the federal bonding requirements in the Section 228 regulations?	N/A	13. No. The United States Forest Service (USFS) does not recognize state bond pools as a valid form of financial assurance, so a different type of financial assurance would be required.
Is the Bond Assurance Fund mandatory or optional?	N/A	14. The Bond Assurance Fund rules were modified a few years ago to allow operators to opt out if they provided sufficient bonding.

Comment	Rule Section	Response
What is purpose of an MOU signed between agencies?	N/A	15. These documents have no legal authority, but they are valuable to help direct agency staff when they coordinate with each other.