



STATE OF IDAHO
DEPARTMENT OF
ENVIRONMENTAL QUALITY

1410 North Hilton • Boise, ID 83706 • (208) 373-0502
www.deq.idaho.gov

Brad Little, Governor
John Tippetts, Director

June 21, 2019

By e-mail: rulemaking@idl.idaho.gov

Idaho Department of Lands,
Attn. Eric Wilson - Rulemaking
300 N. 6th St., Suite 103
Boise, ID 83702

Subject: Rules Governing Exploration, Surface Mining, and Closure of Cyanidation Facilities – IDAPA 20.03.02; Docket No. 20-0302-1901

Dear Mr. Wilson:

The Idaho Department of Environmental Quality (DEQ) has reviewed the draft temporary rule text posted on the Idaho Department of Lands (IDL) rulemaking website for Docket No. 20-0302-1901. We offer the comments in the attached.

Thank you for the opportunity to provide comments on your rulemaking. If you have any questions, please contact me at 208-373-0188, or via email at Michael.mccurdy@deq.idaho.gov.

Sincerely,

A handwritten signature in blue ink that reads "Michael McCurdy".

Michael McCurdy, PE, CHMM
Waste Management and Remediation Division Administrator

Attachment

c: Lisa O'Hara, Deputy Attorney General
Mary Anne Nelson, DEQ Water Quality Division Administrator
Jerri Henry, DEQ Deputy Water Quality Division Administrator
Dana Swift, DEQ Remediation Bureau Chief

The comments provided herein provide general statements regarding suggested changes, or provide suggested edits to specific text within subsections of the rule. Deletions are shown in strike out in blue text, and additions are shown in underlined red text.

General comment. There may need to be an evaluation of the usage of ‘department,’ ‘director,’ and ‘board’ throughout the rule.

010.02. Best Management Practices. Practices, techniques, or measures developed, or identified, by the designated agency ~~and identified in the state water quality management plan,~~ as described in IDAPA 58.01.02, “Water Quality Standards ~~and Wastewater Treatment Requirements,~~” 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

010.XX. Discharge of a Pollutant. Any addition of any pollutant or combination of pollutants to waters of the United States from any point source. This definition includes additions of pollutants into waters of the United States from: surface runoff which is collected or channeled by man; discharges through pipes, sewers, or other conveyances owned by a state, municipality, or other person which do not lead to a treatment works; and discharges through pipes, sewers, or other conveyances, leading into privately owned treatment works.

010.12. Neutralization. Treatment of process waters such that discharge or final disposal of those waters does not, or shall not violate all applicable ~~standards and criteria rules and regulations,~~ including IDAPA 58.01.02, IDAPA 58.01.11, and IDAPA 58.01.25.

010.14. Permit. When used without qualification, any written authorization, license, or equivalent control document issued by the Department of Environmental Quality. This includes authorizations issued pursuant to the application, public participation, and appeal procedures in IDAPA 58.01.13, “Rules for Ore Processing by Cyanidation,” ~~governing the location, operation and maintenance, monitoring, seasonal and permanent closure, discharge response, and design and construction of a new cyanidation facility or a material expansion or material modification to a cyanidation facility~~ and those issued pursuant to the application, public participation, and appeal procedures in IDAPA 58.01.25.

010.16. Pollutant. Chemicals, chemical waste, process water, biological materials, radioactive materials, or other materials which, when discharged, cause or contribute ~~adverse effects to any beneficial use to water pollution,~~ or which, for any other reason, may impact the surface or ground waters of the state.

010.19 Reclamation. The process of restoring an area affected by a ~~surface~~ mining operation to its original or another beneficial use, considering previous uses, possible future uses, and surrounding topography. The objective is to re-establish a diverse, self-perpetuating plant

community, and to minimize erosion, remove hazards, and maintain water quality. Reclamation includes permanent closure for cyanidation facilities.

010.23. Treatment. With regard to cyanidation facilities, any method, technique or process, ~~including neutralization,~~ designed to change the physical, chemical, or biological character or composition of a waste for the purpose of disposal.

060.02 When Exploration is Mining. The subsection reference to 010.46 will need to be changed or omitted depending on how IDL handles the deletion of various definitions within the rule.

060.06.d Exploration Reclamation (Less Than Two Acres). If water runoff from exploration causes siltation of surface waters in amounts more than normally results from runoff, the operator shall reclaim affected lands and adjoining lands under his control as is necessary to ~~re-establish runoff conditions that existed prior to starting exploration, or as is necessary to~~ meet state water quality standards, ~~whichever is the lesser standard. It shall be presumed that state water quality standards will be the applicable standard unless baseline data is provided to rebut the presumption.~~

069.01 and .02. Subsection 069.01 states “approval by the Department” and 069.02 states “approval by the director”. Should these be consistent? Similar comment for 070.01.

069.05.a Reclamation Plan Requirements. Where surface waters are likely to be impacted ~~and or~~ when requested by the director, documents identifying and assessing foreseeable, site-specific ~~nonpoint~~ sources of water quality impacts ~~upon adjacent surface waters and the BMPs the operator will use to control such impacts during surface mining and reclamation~~ from mining operations and proposed management activities to comply with water quality requirements ~~and IPDES permit conditions; (3-30-06)~~

070.01 Reclamation. Same as above, approval by Department and approval by director both included. “Performance bond” should be changed to “financial assurance” in last sentence.

070.02.c. There is no subsection 070.06; this reference should be omitted.

070.04.b. Should more factors go into setting cost estimate for reclamation or should this section refer to section 120?

070.04.f.iii. Plan for managing mine impacted water to comply with Idaho water quality standards and ground water quality standards, including IPDES permit, IPDES permit application or certification of no exposure.

071.02 Permanent Closure Plan Requirements. Are terms like “long term care” defined somewhere?

080.02.a Agency Notification and Comments. There may be instances when it is necessary for IDL to forward confidential materials to the other state agencies identified in this subsection to allow a thorough and complete review of those materials. This should be clarified in the rule.

The second sentence should state “... if the director determines in consultation with other state agencies the impacts of the proposed activities are minor and do not involve surface waters of the state.”

080.05. Nonpoint Source Pollution. As long as nonpoint source pollution is not meant to refer to storm water runoff, DEQ has no concerns with this section. It is not clear what a ‘nonpoint source’ would be from mining specifically. Typically this is applied to agricultural runoff, drains and other returns.

090.03. ~~Minor Amendments~~ Adjustments. ~~Minor amendments~~ Adjustments to an approved reclamation plan may be made by agreement between the director and the operator, if the ~~amendment~~-adjustment is consistent with the overall objectives of the approved reclamation plan and so long as water quality standards and ground water quality standards will be met ~~and existing beneficial uses will be protected~~. Adjustments are due to changes that are smaller than material changes.

091.01.c. Reference to subsections 010.20.b.i and 010.20.b.ii. will need to be updated.

091.04. ~~Minor Amendments~~ Adjustments. ~~Minor amendments~~ Adjustments to an approved reclamation plan may be made by agreement between the director and the operator, if the ~~amendment~~-adjustment is consistent with the overall objectives of the approved reclamation plan and so long as water quality standards and ground water quality standards will be met ~~and existing beneficial uses will be protected~~.

110.05.a.i. Publication of Notice. The potentially significant surface water quality impacts from the proposed ~~surface~~ mining operation and the operator’s description of the measures that will be used to prevent degradation of adjacent surface and ground waters from ~~nonpoint~~ sources of pollution; or

120.01 Submittal of Financial Assurance Before Mining. The language is not the same in section 201.01 as is in section 121.01. For example, the end of the first sentence in section 120.01 reads “...financial assurance meeting the requirements of this rule.” However, the first sentence in section 121.02 reads “...financial assurance meeting the requirements of Section 47-1512(a)(2). One refers to the rule and the other refers to the statute.

120.03. Include a reference to subsections where the amount of financial assurance comes from: 070.04.b and 120.04.

121.03. Since section 121 is for cyanidation facilities, the term “reclamation” should be changed to “permanent closure.” Include a reference to subsections where the amount of financial assurance comes from: 070.04.b and 120.04.

121.04. Since section 121 is for cyanidation facilities, this should be renamed “Indirect Costs for Permanent Closure Cost Calculations” and the first sentence should similarly be changed. “Closure” and “closure costs” are not defined terms.

121.04.a, g. Since section 121 is for cyanidation facilities, the term “reclamation” should be changed to “permanent closure.” The term “mines” in section 121.04.g should be changed to “cyanidation facilities.”

121.08.d. Since section 121 is for cyanidation facilities, the term “mine” should be changed to “cyanidation facility.”

122.01.e: Remove “surface” and add “or permanent closure” after “reclamation.”

122.02 Collateral Bond: Collateral bond is made payable to Department of Lands but corporate surety bond (122.01) is made payable to state of Idaho. Under 122.04, first lien security interest in real property is in favor of Department of Lands. Should these be consistent?

122.06.a. Add “permanent closure” costs in addition to reclamation costs for clarification. There are several other instances throughout the rule where ‘permanent closure’ would need to be included with reclamation to ensure cyanidation facilities are appropriately included. An option to handle this is to add ‘permanent closure’ to the definition of reclamation in section 010.

122.06.c-d. RCRA Subtitle C (regulations for Financial Assurance Requirements for Hazardous Waste Treatment, Storage and Disposal Facilities) and Subtitle D (regulations for Financial Assurance for Municipal Solid Waste Landfill Units) differentiate between a “financial test” when an owner/operator satisfies the criteria on its own and a “financial test and corporate guarantee” when a parent company satisfies the financial requirements and submits a written guarantee.

122.06.c. The financial test/corporate guarantee requirements under RCRA Subtitle C (40 CFR 264.143) for hazardous waste treatment, storage and disposal facilities require the company (either operator/owner OR parent company if doing a corporate guarantee) satisfy one of these two tests:

- Alternative 1:
 - Net working capital equals six times current closure, post-closure, plugging and abandonment cost estimates.
 - Tangible net worth is greater than \$10 million.
 - Ninety percent of total assets are located in the United States, or at least six times the current closure, post-closure and plugging and abandonment cost estimates.
 - Owners and operators must satisfy two of the following three ratios:
 - Liabilities to net worth ratio less than 2.
 - Current assets to current liabilities ratio greater than 1.5.
 - Net income (plus depreciation, depletion and amortization) to liabilities ratio greater than 0.1.

- Alternative 2:
 - Tangible net worth at least six times current closure, post-closure, plugging and abandonment cost estimates.
 - Tangible net worth is greater than \$10 million.
 - Ninety percent of total assets are located in the United States, or at least six times the current closure, post-closure and plugging and abandonment cost estimates.
 - The current bond rating for the most recent bond issuance is AAA, AA, A, or BBB as issued by Standard & Poor's, or Aaa, Aa, A, or Baa as issued by Moody's.
- If parent company is doing a corporate guarantee, it must be the direct corporate parent company - a corporation that directly owns at least 50 percent of the voting stock of another corporation or subsidiary.
- Corporate grandparent - a corporation that indirectly owns over 50 percent of a company through a subsidiary.
- Sibling corporation - a corporation that shares the same parent corporation.
- Firm – must have a “substantial business relationship” with the owner/operator.

122.06.c.i could read as follows:

Tangible net worth of at least ten million dollars (\$10,000,000); ninety percent of total assets are located in the United States, or at least six times the current closure, post-closure and plugging and abandonment cost estimates; and two of the following three ratios 1) a ratio of total liabilities to net worth of two and fifty one-hundredths (2.50) times or less; and 2) a ratio of current assets to current liabilities of one and twenty one-hundredths (1.25) times or greater; 3) net income (plus depreciation, depletion and amortization) to liabilities ratio greater than 0.1.

122.06.c.iii could read as follows:

Tangible net worth of at least ten million dollars (\$10,000,000); ninety percent of total assets are located in the United States, or at least six times the current closure, post-closure and plugging and abandonment cost estimates; and operator has an "A" or higher bond rating as issued by either Moody's Investor Service or Standard and Poor's Corporation.

RCRA Subtitle D (40 CFR 258.74) for municipal solid waste landfills requires the owner/operator's tangible net worth must be greater than the sum of the current closure, post-closure care, and/or corrective action cost estimates test plus \$10 million; they must have assets located in the United States amounting to at least the sum of current closure, post-closure care,

and/or corrective action cost estimates; and they must satisfy one of the following three conditions:

1. A current rating for its senior unsubordinated debt of AAA, AA, A, or BBB as issued by Standard and Poor's, or Aaa, Aa, A or Baa as issued by Moody's.
2. A ratio of less than 1.5 comparing total liabilities to net worth.
3. A ratio of greater than 0.10 comparing the sum of net income plus depreciation, depletion, and amortization, minus \$10 million, to total liabilities.

The parent company, if doing a corporate guarantee, must satisfy the above plus must be either the parent corporation or principal shareholder of the owner/operator (i.e., a corporate parent or grandparent), a company whose parent company is also the parent company of the owner/operator (i.e., a corporate sibling), or another related or nonrelated company with a "substantial business relationship" with the owner/operator (including subsidiaries of the owner/operator). The guarantor also must meet the conditions of the corporate financial test described above. With a corporate guarantee, the guarantor promises to pay for or perform the required activities on behalf of the owner/operator if the owner/operator fails to meet its obligations.

122.06.f.ii. At the end of the sentence, add the term "or closure" following reclamation.

140.01.a Nonpoint Source Control. Discharge permitting does not provide the exemption (see underlined/italicized text below) to any discharge, storm water runoff or otherwise. This would leave a mine site potentially open to third party lawsuits claiming non-compliance with the Clean Water Act.

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 of DEQ determines, that a ~~lesser~~ *different* standard existed *and is more appropriately protective* in the area ~~to be affected~~ prior to the commencement of the subject ~~surface~~ mining or exploration operations.

140.02 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

June 21, 2019

Department of Environmental Quality comments on Rules Governing Exploration, Surface Mining, and Closure of Cyanidation Facilities – IDAPA 20.03.02; Docket No. 20-0302-1901

methods, separately or in combination. Specific sediment control methods may include, but are not limited to:

140.03 Water Management or Treatment. Mine impacted waters that contain metals or other contaminants subject to the ~~water quality~~ standards in IDAPA 58.01.02 or 58.01.11 must be captured on the mine site and segregated from storm water to the maximum extent practicable. Any mine impacted waters that are discharged to, or reach, a water of the U.S., are subject to discharge permit authorization as required by IDAPA 58.01.25. Specific water management or treatment methods may include, but are not limited to:

180.03 BMPs. An operator shall not unreasonably designate as confidential portions of reclamation or permanent closure plans which detail proposed BMPs to meet state water quality standards and ground water quality standards ~~protect existing beneficial uses of waters of the state.~~

Add sentence: “Confidential portions of reclamation or permanent closure plans may be shared with DEQ in its coordinating or consulting role under these rules, as reasonably necessary.”

Also suggest renaming this to something other than BMPs because there are various things other than BMPs that DEQ may be consulting with IDL on in reviewing the plans. For example, parts of the Rule that involve DEQ consultation or coordination include: 069.05.a, f (DEQ is not specifically mentioned); 071.03; 080.02.a; 080.05; 080.06.c; 091.03; 110.01.b; 110.02; 111.02; 121.08.b; 150.02.