June 30, 2019

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

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

Subject: Proposed rules for Docket No. 20-0302-1902 (IDAPA 20.03.02 – Rules Governing Mined Land Reclamation)

Dear Mr. Wilson:

The stated purpose and intent of the proposed rule is to ensure reclamation of land used for mining (subsection 001.02 of the proposed rule). The proposed rule appears to include provisions of mining activity that are already being managed by federal land managed agencies. This would suggest that the Idaho Department of Land (e.g. State) would like to provide oversight or visualizes a perceived need to add additional conditions to federal land management agency decisions for exploration and mining reclamation. It is my opinion that this proposed rule has the potential to result in some redundancy and could lead to a more complex environment for the State, federal land management agencies, and the exploration or mining operator.

The following are my personal recommendations, comments, and opinions, based upon how it would be implemented) and are not reflective of any organization or entity. My comments, for the most part, are limited to federal lands.

Recommendation 1: It is recommended that under subsection 001.05, Sand and Gravel (i.e., mineral material) operations located on federal lands and authorized by the appropriate federal land management agency be exempt from the State financial assurance provision.

> **Rationale:** It would not appear to be the intent of the State to require the Federal government to provide a reclamation financial assurance bond for community pits and other federal managed pits and quarries located on federal land in which they have federal authority to manage. The federal land management agencies have policies in place and meet financial assurance requirements without verification by the State. State oversight would appear to be redundant and not an effective use of state or federal resources.
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> This comment includes subsection 069.02 where there is a community pit on federal land, there is no specific operator, and mineral materials are authorized for removal by a federal land management agency on a case-by-case basis. Does this suggest that the

federal land management agency would be required to seek State approval of all pits and quarries that are not exclusively dedicated to meet that identified in subsections 001.05 (b) and 120.06? It is speculated that this is outside of the intent of the State and would create a significant challenge for the federal land management agencies to develop site specific mining and reclamation plans, submit to the State for review and approval (with a fee for each site) for something that is currently adequately being managed. This would likely result in a retraction in mineral material sources which could have a significant negative impact to rural communities without a clearly defined benefit.

Recommendation 2: Clarify subsection 010.08 (iv) of overall estimated reclamation costs by more than 15% to exclude increases that are a result of no change in the operation. This clarification should also exclude costs associated with changes in the operation due to upgrades in the operation to comply with other government required regulations. Further, clarify the timeline in which the increase occurs to be within one-year and a result of expansion beyond that previously approved.

Rationale: Reclamation costs are commonly not reviewed annually by government agencies. If a significant time lapses between reviews (the proposed rule has up to 3-years), it could exceed the 15% increase proposed threshold with no change in operation. During times of higher costs due to economic conditions the construction market alone could result in an exceedance of the threshold. Further, required changes in mine operation requirements, without expansion of an area of proposed mining, could also result in increased reclamation costs that could exceed the 15% threshold. It would appear that the State would not want to disincentivize or penalize compliant operators with additional requirements and oversight for operations on federal land.

Recommendation 3: Clarify that under subsection 070.01 that mining operations located on federal lands and operating under a current federally approved Plan of Operation (which includes a reclamation plan and adequate financial assurance), that it satisfies this subsection.

Rationale: This clarification would be consistent with the stated purpose in subsection 001.02 in that the protection of public health, and safety, and welfare are addressed. Federal land management agencies require a NEPA evaluation prior to authorization of a Plan of Operation. The NEPA evaluation is specific and detailed and the State has the opportunity to review and comment on that evaluation prior to a decision. The mining operation is not allowed to operate or expand without federal approval and an adequate financial assurance is provided. This process is consistent with the Stated intent as well as provides State participation. Further, it provides a measure of compliance, monitoring, and oversight at not cost to the State. Finally, State and Federal agencies commonly work together in ensuring the stated purpose of this proposed rule, however, if there is a need it would appear to be more efficient to keep the federal land management agencies as the lead with the State providing a supporting role for non-cyanidation facilities. With that said, mining operations with cyanidation facilities may benefit from an elevated role of the State.

Recommendation 4: Clarify reclamation or closure plans are not required for abandoned mines lands (AMLs) located on federal lands and actions performed by Federal Land Managed Agencies.

> **Rationale:** The assumption is that the health and safety of securing sites is highly important, and it will reduce the number of site closures and increase the timing to complete if the applicable federal land management agencies are required to submit plan for State review and approval. If a federal land management agency is required to submit a closure plans for AML (Abandoned Mine Lands) actions on federal lands, it will result in considerably fewer actions completed and likely significant delay in physical closure actions thus increasing the risk of health and public safety. This recommendation is provided as there appears that there could be some crossover over time in the interpretation of the provisions in the proposed rule.

Comment 1: The generalized sideboards to financial assurance outlined in section 120 are not fully consistent with that required by all federal land management agencies. Further, federal land management agencies utilize a higher labor rate (Davis-Bacon rates) in their calculations, as well as add other administrative costs specific to their agency. It appears, from information provided in subsection 120.04 (a-i), that the BLM financial administrative indirect costs were used and listed as mandatory. This comment leads to my recommendation 5 below.

Recommendation 5: Clarify percentages of indirect costs, how they are calculated, and make it allowable for a percentage to be zero. Further, there should be a clear and direct link from that required by the State and that which could be utilized by the State in the event it needs to utilize the bonded amount for reclamation activities on federal land.

> **Rationale:** The BLM periodically adjusts the administrative percentages utilized in financial assurance calculations and there is some discretion by local federal land management agencies in the percentage utilized. As some of the costs are directly associated with contract administration, they may appear to be appropriate. However, all of BLMs contract administration calculated costs are commonly not directly available for local contract administration, thus may not be appropriate for State purposes. Additionally, the BLM rules in calculating the bond indirect costs exclude labor in some of the calculations and not in others. Finally, other federal agencies are not required to include some of the listed indirect costs and thus there could be zero percent included. If the operation is located on federal land and the oversight of reclamation would be management by a federal land management agency, then it would appear to be appropriate for the State to defer to the appropriate land management agency on the adequacy of those costs. This is manifested in that the State does not pick up any costs if federal financial assurance bonding is not adequate for federal actions on federal land. Considering that federal agencies are required to utilize Davis-Bacon wages in financial assurance calculations and the State does not, it matters which governmental entity manages a reclamation contract in the event the bond is needed for reclamation activities. Subsection 120.09 (a) suggests that the State would contract for reclamation and does not appear to allow for involvement of the federal land management agencies. Federal land

management agencies, per the indirect bond calculations, incorporate the intent of federal contract management into financial assurance calculations in the event the bond is needed for reclamation activities as assumed that the federal agency will implement the contract.

There should be an agreement in place as to how the State and federal land management agencies would work together in managing mining activity located on federal land and that understanding should be reflected in the proposed rule. That agreement or MOU should consider who holds the financial guarantee, and who manages the needed reclamation in the event of forfeiture. It becomes a bit more complicated when you have mining activities spread across federal, state, and private land ownership. Financial assurance for the federal land would be calculated using Davis-Bacon wages and the State and private land would not. Contracting for reclamation should take this into consideration. I can assume that the State is not fully equipped to comply with 29 CFR Part 5 for reclamation activities, whereas the federal land management agencies are better equipped. If there is non-compliance in contracting on federal land by the State, is the State willing to accept the risk of that non-compliance? Further, is the State willing to accept the risk of managing a reclamation contract on federal land this is in compliance with federal rules, laws, and standards? A proposed rule that requires increasing the complexity of a project or contract by adding an interagency (e.g., federal and State) component does not appear to be efficient, especially when it can be avoided with no degradation of the intent.

Comment 2: The reclamation standards in developing the financial assurance bonding amount may differ between the State and federal land management agencies for operations on federal land. What provision is there for the different government agencies to come to an agreement, who will be the lead agency, and who performs the monitoring and compliance to determine completion? As the new information and techniques for reclamation are developed and implemented nationally, will the State expend the resources to keep staff current and will they be consistent with that used on federal land?

Comment 3: In subsection 120.12 (c) it discusses a civil penalty above that in subsection 160.06 in the amount estimated to be reasonable reclamation of the affected area. It is not clear how this will work if a financial guarantee is held by a federal land management agency and reclamation is under the direction of that federal land management agency.

Comment 4: Subsection 121.06 suggests that the State will review all reclamation financial assurance calculations and plans to determine adequacy. If the State determines that financial assurance is inadequate, they will require an additional financial assurance amount independent of that required by a federal agency? How does this fit in with the earlier comment on who is the lead agency, and who contracts the reclamation activity? Is there a cost to the State in the event the bond is inadequate if on federal land and managed by a federal land management agency? If there is not a cost, what would the additional financial assurance be used for? Further, a federal NEPA document discusses specific actions. The Plan of Operations (PoO) approved by the federal land management agency is based upon that NEPA evaluation and authorizes the work to begin only after the federal land management agency receives the financial assurance. If

additional reclamation work is to be done by the State that was not covered under NEPA, it would require additional NEPA. Is the State going to pay for that additional NEPA or is the intent to pass the financial and resource evaluation burden onto the federal land management agencies? This also is important as NEPA can take time to complete and does not appear to be factored into the mechanics of how it will work. It would appear to be less complicated if the State was a contributor to the initial NEPA document such that the financial assurance required by the federal land management agencies incorporates the needs of the State and the financial assurance can meet the needs of the State.

Comment 5: It appears that subsection 121.07 (a) was modeled after BLM financial assurance guidelines. The review of the plan and costs do not appear to have a fee, yet likely will require State staff time, and could be redundant if performed by the federal land management agencies per their requirements. If the Federal Land Management agency utilizes the official software (i.e., BLM official software is SHERPA) to perform its calculations, will the State also be trained to utilize SHERPA and maintain a software license or will the State use an alternative approach that may or may not be compatible? Reviewing reclamation plans and financial assurance can be complicated on larger mining operations. Will the State maintain trained staff, and will that training be consistent with that in the federal land management agencies? Further, labor turnover often results in different interpretations of those looking at the same information, especially when it is not well documented. If there is a difference of opinion between the federal land management agency and the State, how or will that dispute be resolved? Finally, the 30-day timeline of a complicated reclamation plan or amount may not be adequate for a quality review and time to resolve possible conflicts or allow time to fully understand and interpret.

Comment 6: It is not uncommon for the operator and mineral staff in a federal land management agency to sit down and work together in calculating financial assurance for more complicated reclamation plans. This is important and often results in tweaks to the reclamation plans, but most importantly both understand the plan. If the State is only provided with the end product for review, it will clearly result in uncertainty on the part of the State. This uncertainty will likely result in unnecessary delays and increased time of all involved.

Comment 7: Subsection 121.08 suggests that the State may release some of the financial assurance as determined by the director. Please note that this may not be consistent with policies of the federal land management agencies. This issue has caused federal land management agencies concern outside of Idaho and thus common for federal land management agencies to have a preference to hold the bond rather than held by the State. This comment could expand to include the need for a structured State accounting system\database in maintaining the financial assurance amount. This would be important and any change in the bond amount should be in coordination and agreement with the applicable federal land management agency.

Comment 8: There is a BLM website that lists approved bonding companies for mineral projects. It may be of value to the State to consider utilizing the BLM experience, as it has in other sections of this proposed rule, to provide operators with a list of approved bonding sources. It would be a benefit to the mining community as well as the State as few bonding companies bond mineral projects and thus a small operator may have a problem in finding a bonding

company that meets both the needs of the State and the federal land management agency for a mineral project.

Comment 9: It should be noted that a common requirement in a federal land management agency in approval of a NEPA evaluation, Plan of Operation, and Reclamation Plan include revegetation requirements that include a specific mixture of seed to be used on federal land. It is my understanding that the State would not determine that mixture and thus this should be retained by the federal land management agency with jurisdiction of the land that they manage. This is just another example of possible conflicts between the State and federal land management agencies in how reclamation activity is managed. If the State introduces an incorrect mixture or requires\authorizes weed spraying that is not consistent with that approved by the federal land management agency it could create non-compliance issues in the NEPA decisions for weed spraying as well as the federal land management agencies reporting requirements.

Comment 10: Revegetation efforts on federal lands should be consistent with federal land management agencies land use plans as well as consistent with cumulative effects in other NEPA evaluations. Any State actions on federal land should clearly be consistent with federal land management agencies plans, regulations, rules, and policies as well as consistent with other NEPA projects in the general area of the mining operation as it relates to cumulative effects. I would suspect that the State would not independently determine what is required by a federal agency just as the federal agency should not interpret those of the State.

Comment 11: Section 155 requires mining updates every 5-years and the proposed rule also provides for financial assurance updates every 3-years. Consistent with other comments above, it would be more productive and efficient to work with (i.e., joint reviews) the federal land management agencies for operations on federal land. If the two are not working together it will create confusion for all parties, including the operator.

Comment 12: Subsection 180.01 suggests that information submitted to the State is considered public information, however, subsection 180.02 and 03 suggest that there may be some confidential information obtained, however, does not outline how that information will be treated. Federal land management agencies have a provision to obtain and keep confidential information and personally identifiable information (PII) confidential. Thus, this would suggest that federal land management agencies may not be able to share or provide all information to the State.

Comment 13: In reviewing Idaho Code 47-1503 (7) it defines “mining operations” and includes criteria of when exploration activities would be considered mining operations. There should be some understanding, agreement, or MOU between the State and federal land management agencies in which the State can provide input into exploration activities even through the State may not have authority to require some provisions. This could be important as it would allow the State to provide valuable input if the proponent were to apply for a mining plan of operation (PoO) on federal lands at a future time. It would appear that rather than the State duplicating federal efforts that working more collaboratively and starting during the exploration phase could

be more efficient and effective in evaluating current and future mineral operations for compliance to the stated purpose of the proposed rule.

Comment 14: I question how the implementation of the proposed rule will mesh with the Mining Law of 1872, the National Environmental Policy Act, and other federal regulations that govern actions on federal land.

Based upon the above, it is my opinion that it would reduce the complexity of mineral and mine projects and meet the intended purpose of the proposed rule to maintain a separation of federal and non-federal land projects while increasing cooperation and coordination between the two.

Sincerely:

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