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208.345.6933 • PO Box 844, Boise, ID 83702 • www.idahoconservation.org



Save the
South Fork
Salmon River

IDWR Rules Review Officer
Idaho Department of Water Resources
PO Box 83720
Boise, ID 83720

June 17, 2022

Re: Mine Tailings Impoundment Structures & Safety of Dams Rulemaking: Docket No. 37-0305-2201

Dear Idaho Department of Water Resources:

Thank you for considering our comments on the Mine Tailings Impoundment Structures & Safety of Dams Rulemaking: Docket No. 37-0305-2201.

Since 1973, the Idaho Conservation League has had a long history of involvement with water quality and land issues. As Idaho's largest state-based conservation organization we represent over 35,000 supporters who have a deep personal interest in ensuring that our water quality and lands are protected throughout the state.

Save the South Fork Salmon is a community-based citizens' organization, headquartered in Valley County, ID, dedicated to protecting the outstandingly remarkable natural values of the South Fork of the Salmon River watershed. SSFS's members and supporters have a strong interest in protecting the area's natural resources, maintaining recreational opportunities and access, and ensuring that future generations can enjoy the benefit of these resources and opportunities of the South Fork of the Salmon watershed, all of which require appropriate safeguards to protect water quality and ensure adequate water quantity.

We thank you for the opportunity to submit comments. Please feel free to contact us if you have any questions or require additional information.

Sincerely,

Will Tiedemann
Conservation Associate
Idaho Conservation League
wtiedemann@idahoconservation.org
208.286.4445

Fred Coriell
Board Member
Save the South Fork Salmon, Inc.
savethesouthforksalmon@gmail.com

Lack of Clarity on Proposed Rule Changes.

The Idaho Conservation League (ICL) and Save the South Fork Salmon (SSFS) understand that by combining IDAPA 37.03.05 & IDAPA 37.03.06 into a single chapter, a more succinct version of the rules may be achieved, thus fulfilling one of the goals of the Zero-Based Regulation (ZBR) rulemaking process. However, by doing so, the Idaho Department of Water Resources (IDWR) has failed to adequately outline the technical and material changes of the new proposed rule compared to the two existing rules, thereby severely limiting the public from effective participation.

The ZBR Executive Order No. 2020-01 highlights the requirements for public involvement in the ZBR process several times, including “ (holding) *two public hearings that are designed to maximize public participation in the rulemaking process.*” In other ZBR rulemakings by other Idaho State Agencies, a redline strike-out version of the existing rule with proposed edits has been publicly posted to aid in public understanding of the proposed rule changes. While the combining of two rules into one makes an effective redline strike-out process difficult and possibly impractical, the matter of adequately conveying the proposed rule changes to the public is no less important. As such, ICL and SSFS request IDWR prepare a public document summarizing the technical and material changes of the proposed rule compared to the two existing rules. Where technical or material changes to the existing rules are reflected in the proposed rule, the document should provide justification for such changes.

It is ICL’s and SSFS’s assumption that the numerous rule changes (primarily creating less restrictive language) are intended to meet the requirements of the ZBR executive order, specifically parts of Section 4.a, “*The agency must perform a retrospective analysis of the rule chapter to determine whether the benefits the rule intended to achieve are being realized, whether those benefits justify the costs of the rule, and whether there are less restrictive alternatives to accomplish the benefits*” (emphasis added). Presumably, IDWR has concluded that the numerous less restrictive rule changes can still accomplish the benefits of the existing rule. However, IDWR has given no specific analysis, justification, support, or explanation for how these less restrictive rule changes will still accomplish the benefits and ultimate goal of the existing rules and what “alternatives” will be in place to ensure this.

While not exhaustive due to the lack of clarity on proposed rules changes noted above, the following comments have been provided below in order to give examples of notable, less restrictive proposed rule changes with no IDWR commentary.

Mine Tailings Impoundment Structures Certificate of Approval

Under the existing Mine Tailings Impoundment Structures Rule (MTR) a Certificate of Approval requires recertification every 2 years. Under the proposed combined rule the definition of Certificate of Approval no longer carries this requirement and appears to be valid indefinitely.

This carries additional significance for bonding. For the existing MTR, bonding was required to be reevaluated every two years in conjunction with recertification of the Certificate of Approval. Under the proposed combined rule, it appears once an initial bond is submitted it is valid for the life of the mine tailings impoundment. It is presumed that the requirement to recertify a mine tailings impoundment structure every two years was originally included to ensure that any physical or economic conditions that were critical to establishing the amount of the bond will be reevaluated. IDRW has given no explanation for how the benefit of recertification biennially will still be met.

New Mine Tailing and Impoundment Structures (Rule 55)

For proposed Rule 55, the corresponding existing MTR rule is Rule 45. In comparing the existing Rule 45 to the proposed Rule 55, several instances of less restrictive language can be found with no supporting justification by IDWR. For example:

- Existing Rule 45.01.g corresponds to proposed Rule 60.01.f and g. The existing rule states *“instrumentation of the embankment and/or foundation **will be required to insure that the structure is functionally satisfactory**”* (emphasis added). However, the proposed rule only states, *“instrumentation of the embankment or foundation **may be required to ensure the structure is functioning safely and in accordance with the approved design**”* (emphasis added).
- Existing Rule 45.02.a and b corresponds to proposed Rule 60.02.a. The existing rule gives a specific formula for developing a dam’s top width embankment, **in the absence of a separate stability analysis** and, at the least, requires a minimal top width for a tailings embankment of at least ten feet. The proposed rule simply requires a minimum top width for any embankment of twelve feet.

Existing Dams and Existing Mine Tailings Impoundment Structure (Rule 60)

For proposed Rule 60, a corresponding section within the existing rules only exists for IDAPA 37.03.06 Safety of Dams Rule 55. In comparing the existing Rule 55 to the proposed Rule 60, several instances of less restrictive language can be found with no supporting justification by IDWR. For example:

- Existing Rule 55 requires all dams classified as large, significant, or high risk to comply with the existing Rule 50.11. The corresponding proposed Rule 60 includes no similar condition
- Existing Rule 55.01.g corresponds to proposed Rule 60.01.g. The existing rule requires the requisite studies and any subsequently required hydraulic or seismic modifications be completed within 10 years. However, the proposed rule now gives IDWR the ability to set a “compliance schedule” with no specific time limits or period.

Dams Storing Tailings and Water (Rule 65)

Compared to the existing Safety of Dams Rule for Dams Storing Tailings and Water (Rule 65), the first sentence of subsection 01 of the proposed Rule 65 has now been modified to remove mine tailings dams that are **likely** to store fifty acre-feet or more of water in addition to tailings to comply with Rule 40, 45, 50, and 55 and now only includes mine tailings dams that are **intended** to.

While this may seem like an innocuous change in language, including mine tailings dams that are only **intended** to store fifty acre-feet or more of water leaves considerable leeway or error for dam constructors and designers. The word **intended** emphasizes a good faith effort to achieve an outcome, but despite their best intentions, dam constructors and designers do not always appropriately rate a dam's water storage capacity (any dam failure in the history of dam construction can help illustrate this point). Inclusion of the "likely" to store fifty acre-feet or more of water language in the existing Rule 65 provides a factor of safety to account for non-intended circumstances that may lead to a water storage capacity that is beyond intended quantities. IDWR has given no explanation for how the benefit of this additional factor of safety will still be met.

Statement of Support for Public Comments Provided by Tami Thatcher

ICL and SSFS endorse and incorporate by reference the questions and comments submitted by Tami Thatcher on June 10, 2022. Ms. Thatcher's comments raise many of the same concerns over proposed language changes as well as provide an informative specific case study on the inadequacy of the existing and proposed rules as they relate to the Mackay Dam.

Summary

As noted above, the provided examples are not an exhaustive list of the unexplained and unsupported loosening of restrictions from the existing rules to the proposed rule. Instead they illustrate the need for IDWR to explain and support the full list of rule changes that have been made. Failure to do so disadvantages the public in providing maximum participation. In order for a transparent, fair, and effective negotiated rulemaking to be conducted, IDWR must provide specific analysis and justification for all existing rule restrictions it is relaxing or removing within the proposed rule and how it proposes the benefit of these restrictions will still be met with alternative measures.