

THIRD RULEMAKING PUBLIC MEETING REGARDING IDAPA 37.03.05 – MINE TAILINGS IMPOUNDMENT STRUCTURE & IDAPA 37.03.06 – SAFETY OF DAMS

Unofficial Public Meeting Transcript

Friday, 8/19/2022 at 9:05 AM

Garrick Baxter 00:13

Good morning, everybody. It is 9:05. Now we've waited a little bit. Today is August 19, 2022, at nine, a little after 9am. My name is Garrick Baxter. I'm an attorney for the Idaho Department of Water Resources. Normally you have Mat Weaver up here but he called me a little bit after eight this morning and indicated that he had gone out for a mountain bike ride this morning and took a spill and needed to go seek medical attention. So, you have me here today in his stead, he did tell me though, that he's going to be okay. Just needed to get into go see the doctor. So, I'm stepping in for him today.

Garrick Baxter 00:53

We are here today in fulfillment of the governor's zero-based rulemaking initiative as set forth in executive order 2020-01. Today's public meeting is the third public meeting, negotiated rulemaking meetings, and associated with promulgating a new dam safety rule and mine tailings impoundment rule, as required by Idaho Code Section 42-1714, which mandates that the Idaho Water Resource Board adopt and revise from time to time such rules, as may be necessary for carrying out the provisions of Idaho code Sections 42-710 through 1721. IDWR published its notices of intent to promulgate these rules on May 4, 2022, in Idaho Administrative Bulletin Vol. 22-5 under Docket No. 37-0305-2201.

Garrick Baxter 01:50

I'd like to start today by discussing the significant changes to IDWR'S proposed approach to this rulemaking. Initially, this promulgation was a combination of two former rules IDAPA 37.03.05, which is the mine tailings impoundment structures rules and IDAPA 37.03.06 the dam safety or safety of dams rules, both of which had been repealed as part of the ZBR process. Now, at the last meeting, IDWR and participants discussed a reoccurring comment that IDWR received regarding the rulemaking which asked IDWR not to combine the mine tailings impoundment structures and safety of dam rules into a combined rule. Reasons put forth for not combining the rules included 1) technical differences between MITs and other dams, 2) difficult in finding consensus with a diverse combined stakeholders' group, 3) merging the rule creates uncertainty in the mining community, and current timeline doesn't afford enough time to work through all of the issues associated with the combine, with combining the rules. After considering whether to publish a combined proposed rule or separate proposed rules, IDWR has decided to move forward with two separate rules and not combine the rules. In final response to this question, the rulemaking team prepared a document entitled EO 2020-01 recommendation memo dated August 1, 2022, for the Idaho Water Resource Board, which formally recommends that the board not combined the rules. This document was published to our web page and email to stakeholders, and it summarizes our considerations for this recommendation.

Garrick Baxter 03:44

Now, the new MTIS strawman rule is identical to the old IDAPA 37.03.05 except for changes to Rule 10.13, which is the definition of certificate of approval, and rule 40.01, which is filing of bond. Both changes address the same issue of correcting the "two year" certificate approval period, which is no longer established in Idaho Code. The safety of dam rule, well with regards to that one, the second draft of the safety of dam rule is a revision to the first draft rule. It has been modified to remove the mine tailings impoundment considerations and respond to stakeholder comments where appropriate. Now, I'm not inclined to go through the rules line by line today but simply open the record for public comment on the latest draft rules. And if there's questions with regards to the change, we have IDWR staff here, that will, able to help answer any questions that you might have.

Garrick Baxter 04:52

So, before I do open the record for public comment, I'd like to discuss a few things. First thing is etiquette, please be civil in your conduct, conduct and both your comments. And also, if you are participating online, please ensure that your phone is muted, except when you're speaking, we don't want to have to mute folks, or kick people out of the virtual meeting, but we will if there is too much disruption. So we will go through introductions, we'll go through IDWR staff here, and then I'll have, ask Sarah to do roll call of folks who are in the, start here in the conference room with the folks who are in the conference room. And then we'll go online and do a roll call with the folks online. And then at that point in time, or actually when we do the roll call too, I'll also ask Sarah to ask folks if they intend to offer public comment today. And that will help us in, in aiding us having an efficient processing of comment time.

Garrick Baxter 06:05

I think that is it. John or Cory or Sarah, before we do introductions, is there anything that I missed that you guys think we need to cover?

Garrick Baxter 06:21

John, if you're gonna speak, why don't you take the, yeah, yeah.

John Falk 06:28

To answer your question as to whether there's anything else to comment on before we take public comment. I don't believe so. Most of the information for the proposed safety of dams rule change has been placed online and it's the, the information is out there. And the changes to the mine tailings impoundment structures rules are very minor because we've, we've bifurcated the proposed combination. So that won't occur.

Garrick Baxter 07:07

Thank you, John. And I will say we do have the capability of pulling up the rules if folks as they're commenting would like us to pull up the rules. We can do that. So, introductions, let's go from my left to right, Sarah, why don't we start with you?

Sarah Tschohl 07:25

Sarah Tschohl, legal assistant for the Department.

Garrick Baxter 07:28

And again, my name is Garrick Baxter, attorney for the Department.

John Falk 07:32

My name is John Falk, I'm the Dam Safety Program Manager.

Garrick Baxter 07:37

And John, I'm gonna ask that you move that mic a little bit closer to you, because I can hear you well but I'm not sure about the folks online. Thank you.

John Falk 07:45

Again, my name is John Falk, I'm the Dam Safety Program Manager.

Corey Skinner 07:51

Corey Skinner, I'm the Southern Region Manager in Twin Falls.

Garrick Baxter 07:55

All right, next why don't we move to people who are here in the state office today.

Will Tiedemann 08:01

This is Will Tiedemann with the Idaho Conservation League.

Garrick Baxter 08:03

Thank you, Will.

Kaycee Royer 08:09

Kaycee Royer, I am with Thompson Creek Mine as outside counsel.

Garrick Baxter 08:13

Thank you, Kaycee. All right, Sarah, why don't you do a roll call of everybody else?

Sarah Tschohl 08:21

So as in prior meetings, I have a stakeholder roll call and I'm going to go through and list the entity and your name. And if you could let me know you're here. And also at the same time, if you can identify whether or not you intend on providing testimony today, that would be much appreciated.

Sarah Tschohl 08:35

And real quick, I'm just going to ask, Will, do you intend to provide testimony today? Yes. Okay. Kaycee, how about you? Okay. Thank you.

Sarah Tschohl 08:44

All right, I'm gonna go ahead and get started. So with that I have Ada County, Lorna Jorgensen.

Sarah Tschohl 08:59

Arrowhead Water District Gary Loosin...Leusinger...Loosinger, sorry.

Garrick Baxter 09:06

It's Leusinger,

Sarah Tschohl 09:07

Leusinger.

Garrick Baxter 09:08

I did a lot of work with him on some water rights previously.

Sarah Tschohl 09:13

Okay, Big Lost River Irrigation District, Lucas Yockey.

Sarah Tschohl 09:23

Bilbao and Company, Martin Bilbao.

Sarah Tschohl 09:30

Bilbao and Company, Nico Lostra.

Sarah Tschohl 09:40

City of Bonners Ferry, Mike Klaus.

Sarah Tschohl 09:51

DeLamar Mining Company, Ryan Foy.

Sarah Tschohl 10:01

DeLamar Mining Company, Robert Mullener.

Sarah Tschohl 10:11

DeLamarr Mining Company, Mike Spicher.

Garrick Baxter 10:19

Sarah, it looks like Mike might be online. See, see the name showing up online.

Sarah Tschohl 10:27

I do see Mike Spicher online, you're right.

Garrick Baxter 10:30

Mike, you're on mute if you're speaking right now, we can't hear you.

Sarah Tschohl 10:38

Since I see your name identified, I'm gonna go ahead and mark you present.

Garrick Baxter 10:42

Well actually, I probably started, should have started by saying I assume that folks online could hear us because I'm, on the web link is showing up as me speaking at this point in time, but I should have probably confirmed that. Can somebody online give me a hands up or say that?

Gene Bosley 11:02

I hear you.

Sarah Tschohl 11:03

Thank you Gene.

Garrick Baxter 11:04

Thank you.

Sarah Tschohl 11:08

Okay, so with that, we'll go ahead and keep going, with the Environmental Defense Institute, Chuck Broscious.

Sarah Tschohl 11:20

With the Environmental Defense Institute, Tami Thatcher.

Tami Thatcher 11:24

Yes, I'm here, and I would like to comment, and I have some questions too.

Sarah Tschohl 11:31

Thank you, Tami.

Sarah Tschohl 11:35

With Hecla Limited, Melissa Arnold.

Sarah Tschohl 11:42

With Hecla, Lance Bolan.

Sarah Tschohl 11:49

With Hecla, Clay Thomas.

Sarah Tschohl 11:56

With the Idaho Department of Environmental Quality, Michael McCurdy.

Michael McCurdy 12:00

Yes, I'm here.

Sarah Tschohl 12:04

Thank you, do you intend to provide testimony today?

Michael McCurdy 12:07

I have one comment on the tailings impoundment rule.

Sarah Tschohl 12:13

Okay, thank you. Also, with the Idaho Department of Environmental Quality, Dana Swift.

Dana Swift 12:20

I'm here no comment today. Thank you.

Sarah Tschohl 12:23

Thank you

Sarah Tschohl 12:25

With the Idaho Office of the Governor, Jamie Neill.

Sarah Tschohl 12:34

With Idaho Power, Alex Brekke.

Sarah Tschohl 12:41

With Idaho Power, Chris Edwards.

Sarah Tschohl 12:48

With Idaho Power, Paul Walz.

Paul Walz 12:52

Yes, I'm here and I don't plan on providing comments.

Sarah Tschohl 12:56

Thank you Paul.

Sarah Tschohl 13:00

With Integra Resources, Timothy Arnold.

Sarah Tschohl 13:08

With Itafos, Carlyle Miller.

Carlyle Miller 13:13

Here, no comments today.

Sarah Tschohl 13:15

Thank you.

Sarah Tschohl 13:21

With J.R. Simplot Company, Lori Lusty.

Sarah Tschohl 13:30

With J.R. Simplot Company, Alan Prouty.

Sarah Tschohl 13:39

With J.R. Simplot company, Adam Wadsworth.

Sarah Tschohl 13:47
With Jenkins Creek Ranch, John Hoff.

Sarah Tschohl 13:55
With Lamb Weston, Mark Lynn.

Sarah Tschohl 14:02
With Meadowlark Ranches, Brent Hoffner.

Sarah Tschohl 14:10
Idaho Mining Association, Benjamin Davenport.

Benjamin Davenport 14:16
Yes, I'm here. I don't intend on providing any prepared comments. But I do want to express our appreciation for the path that we've decided to take with two separate rules. So thank you on that, and happy to try to respond if needed.

Sarah Tschohl 14:33
Thank you, Benjamin.

Sarah Tschohl 14:35
With Montpelier Irrigation Company, Mark Ipsen.

Sarah Tschohl 14:43
With Nez Perce Tribe Department of Fisheries Resources Management, Robyn Armstrong.

Sarah Tschohl 14:52
With the Nez Perce Tribe Legal Counsel, Michael Lopez.

Sarah Tschohl 15:00
With, oh, it looks like Robyn just popped up. Robyn, I see your name identified, do you intend to provide testimony today?

Garrick Baxter 15:19
If you're speaking Robyn, you're on mute. We can't hear you.

Sarah Tschohl 15:29
I'm gonna go ahead and move on.

Sarah Tschohl 15:31
With Perpetua Resources, Gene Bosley.

Gene Bosley 15:36
I'm here, I do not intend on testifying today.

Sarah Tschohl 15:40

Thank you.

Sarah Tschohl 15:41

With Perpetua Resources, Alan Hanslome, Haunslam.

Gene Bosley 15:47

It's Haslam and he's, I don't think he's...

Sarah Tschohl 15:49

Sorry.

Gene Bosley 15:49

...attending today.

Sarah Tschohl 15:51

Thank you.

Sarah Tschohl 15:56

With Perpetua Resources, Mckinsey Lyon.

Sarah Tschohl 16:03

With Perpetua Resources, Jordan Nielson.

Gene Bosley 16:09

I think I'll be the only one, this is Gene. Jordan won't be here either.

Sarah Tschohl 16:13

Okay, thank you.

Sarah Tschohl 16:14

Pitchfork Ranch LLC, Rod Gonsales.

Sarah Tschohl 16:26

Save the Southfork Salmon, Fred Coriell.

Sarah Tschohl 16:35

With SBS Associates, Suzanne Budge.

Sarah Tschohl 16:43

with Sun Valley Resort, James South.

Sarah Tschohl 16:51

With Thompson Creek Mine, Erika Malmen.

Sarah Tschohl 16:59

With Welsh Hagen Associates, John Welsh.

Sarah Tschohl 17:06

With Westerberg and Associates, Will Smith.

Sarah Tschohl 17:09

That is the end of the roster that I have for the stakeholders. Is there anyone that we missed or that is new here and needs to identify themselves?

Sarah Tschohl 17:27

Okay, thank you.

Lori Lusty 17:30

Oh, this is Lori Lusty, I'm with the J.R. Simplot Company. I don't intend to provide testimony.

Sarah Tschohl 17:35

Thank you, Lori.

Garrick Baxter 17:45

Let's just double back to, to Mike Spicher. Mike, you're on mute if, you're still on mute if you're participating here today. I see you up on the screen. Nope, still nothing. And I think it was also, we see Robyn Armstrong come in after we started roll call, roll call. Robyn, do you intend to offer comment today? If your speaking we can't hear you.

Garrick Baxter 18:20

Okay, we'll take that silence as a no for now. All right. And one, one last time, is there anybody else who'd like to make a record of their appearance here?

Garrick Baxter 18:39

Hearing nothing, let's go ahead and open up the comment period. First, let's open up the oral comment period for the mine tailings rule 37.03.05. My plan is to go rule by rule. You might have comments that apply to both. But we'll start with that rule first and kind of go through there specifically and we'll since you were the first person identified today, why don't we take your comments first?

Sarah Tschohl 19:21

Real quick, I'm gonna interject. I'm gonna read into the record that Robyn responded with chat and said "Sorry about my muting problem, no testimony".

Garrick Baxter 19:29

Thank you, Sarah and thank you, Robyn.

Will Tiedemann 19:31

Sure, thank you, this is Will Tiedemann with Idaho Conservation League. I've been out the office for about a week and a half. So, kind of a little catching up with this on a personal manner. So, I've reviewed some of the new materials but not a full deep dive, but I did have some comments. When it comes to the mine tailings impoundment structures. I just want to kind of have a question, to get some clarification, that they're, the first strawman with the combined rules I believe had additional content

changes, compared to now, the separate strawman one for the mine tailings impoundment structure. That's correct?

John Falk 20:09

That is correct. Those...

Sarah Tschohl 20:12

John, if you would turn your mic on.

John Falk 20:16

That is correct, Will. The proposed combination required changes to both sets of rules. The bifurcation that we've agreed to pursue, the changes to the mine tailings impoundment structures rules, as Garrick previously mentioned, there are only two changes, and they affect the, how often the bond may be updated.

Will Tiedemann 20:48

So were there any, with separating the rules, were there any technical changes that were, for whatever reasons decided not to be, I guess, pursued? I guess?

John Falk 21:00

No. There are no additional changes at this time to the mine tailings rules.

Will Tiedemann 21:07

And could you give some context on this? You said that changing from the two-year recert. and rebonding was kinda done due to statute changes? Do you have any context on how the wording maybe of the statute changed to interpret that, that that was required?

John Falk 21:28

Well, the statute doesn't really address mine tailings impoundment structures, it just says all water storage dams shall be inspected every five years or more frequently. So, the maximum length of time before we're, we are allowed to not inspect the dam would be five years.

Will Tiedemann 21:54

Okay. And I think I saw in the current language references that, like the redline strikeout I was talking about, removes the language about two years and says, will be done according to the hazard classification system. But hazard classification system is not defined in the mine tailings rule. And it's not referenced out. I assume it's referring to the classification system in the dam safety rules, but it's not defined in the rules or referred out to.

John Falk 22:19

No, but it is defined in statutes, in Idaho Code.

Will Tiedemann 22:23

Okay. And my interpretation that that is left to discretion, that the Department will determine how often dams should be, mine tailings impoundment structures should be inspected and potentially rebonded,

taking into consideration their hazard classification, and then some year with it, no less than five. Based on that discretion.

John Falk 22:45

That's correct.

Will Tiedemann 22:46

That's correct. Okay.

John Falk 22:49

Typically, we try to inspect mine tailings impoundment structures more frequently, because many of them are under a, a constant or a perpetual rate of construction. They're always being modified.

Will Tiedemann 23:10

And then maybe a more nebulous question was, you know, my understanding of ZBR statute is that it talks about reducing regulation, where the benefit of such regulation can be otherwise realized through other means. So was there any kind of discussion of you know, obviously, doing a mandatory recertification inspection, at least every two years provides a benefit of, you know, like you said, maybe they're under constant state of change, so it is capturing those, you know, making sure those changes are inspected upon. Is there, was there discussion within the Department about how that, you know, benefit, you know, whether the pros and cons of that benefit of more regulation can be realized elsewhere?

John Falk 23:50

I'm not completely sure I understand your question. We're, you know, we're mandated to adhere to the language in code and rule, and anything outside that we start getting into an area that really may not be part of our responsibility in terms of fulfilling the requirements in statute and rule.

Will Tiedemann 24:20

I guess that another way, it could, at some point it was determined, including in the regulation, you know, mandating two year inspection and rebonding. And that was done presumably for a reason, for a purpose, right? Is, does the Department have context on why, yes, the statute doesn't, doesn't say you can't do that or just says a minimum of five years right? But the Department could go further and decide it's prudent to keep that two year rule. Is there a reason as to why the Department believes it is no longer prudent to keep that two year minimum?

John Falk 24:54

I'm not sure that discussion came into, we discussed that in a lot of detail. We're trying to be, we're trying to reduce some of the regulation that we don't, we, in our opinion, complicates interpretation of the rule. I hope that answered your question. Anybody else want to chime in?

Garrick Baxter 25:29

John, I just will ask, can you move your microphone a little closer. I just wanna ensure that folks online can you hear you okay. Thank you.

John Falk 25:38

Sure.

Will Tiedemann 25:39

Yeah, that adds context. I guess, you know, just in general, when it comes to ZBR, you know, there is obviously pressure to quote unquote, "reduce regulation". I just, you know, part of my role as a watchdog is to make sure where it is being reduced, it makes sense, and if it isn't going to be retained in any proposal, that it's justified. So just looking for context on how that, hopefully that decision wasn't made lightly.

John Falk 26:05

Sure, really, Will, one of the big differences, and maybe the only difference between an embankment dam and a mine tailings dam, is that the state requires mine tailings dams to be bonded. And you're probably aware in this current economic cycle, inflation is on a tear. So, a project that was bonded a couple of years ago, may not, it may not be appropriate, given the economic climate we're in right now. So that, we might want to review the amount of the bond to make sure it's consistent with current estimated costs for reclamation.

Will Tiedemann 26:54

Right. Agreed. And I think that's prudent, I guess where, you know, my interests would be seeing and would lean to having that two year requirement retained for that reason. I can see it, there could be, without it, with discretion, it could be any number of things that there could be some mine tailings impoundments that do not get reviewed as much as they should for rebonding. Due to say, staffing issues, there's just not enough people. Whereas if that language is retained, it can be used as justification to go to the legislature and say, "hey, we need to get this money to hire inspectors, because we have, we are required, we have determined it is appropriate by rule to be inspected every two years." So, just one of many examples and when discretion can be useful and many times, but it can also, sword that cuts both ways.

John Falk 27:40

Well, it also allows us to be, to be consistent with Department of Lands, which require a bond review for the projects that they regulate. No less than five-year period.

Will Tiedemann 27:58

Gotcha. Okay, I think that's all I have right now for this rule. Thank you.

Garrick Baxter 28:06

Thank you, Will. All right. And Kaycee, do you still, no comment? Okay. Sarah, who was the first individual on our list there who indicated they were going to comment? Was it. Tami Thatcher?

Sarah Tschohl 28:22

I believe it is Tami Thatcher from the Environmental Defense Institute.

Garrick Baxter 28:25

All right. Tammy, the floor is yours.

Tami Thatcher 28:31

Okay, regarding the mine tailing rule. I don't know if you have put that up on the board. The changes.

Garrick Baxter 28:44

Give us one second, and Sarah can get that up.

Tami Thatcher 28:47

But I noticed that the title has changed. From mine tailings impoundment structures rules to mines tailings impoundment structures rules. I don't know if that was intentional. Just to note, I guess I, I'm pretty concerned about the fact that the selected minimal changes only are being made to the mine tailings rule. So effectively, there are two changes which lengthen the time of the certificate and make it more ambiguous and that's really odd given John Falk's comments that mine tailing structures need, often you know, usually need frequent inspections. So why they would choose to eliminate the two year requirement and allow it to be stretched to five, when they're probably already doing inspections that frequently it doesn't really make sense to me. But effectively, they're lengthening the time between these, that's allowed for these reviews and changes. But importantly, seismic design criteria that are decades out of date, that we're actually, the updates were already drafted and prepared in the, in the June strawman have been withdrawn. And so now we're back to using this boundary line that's somewhere close to the 114th meridian. And any structure west of that line is excluded from having to have seismic criteria by the rule here, and that's way out of date and inappropriate. We've had, you know, for over 10, for about 10 years anyway, updates by the US Geological Survey continue to find higher seismicity. It spread all around the mountain regions throughout Idaho. And it, it makes no sense. And it's unsafe to continue with out-of-date design requirements in the rule, and then, and then to choose to update the rule, but to leave out all of the updates needed for ensuring appropriate selection of design earthquakes for new construction. And for modifications to a structure. It, boy it's, it's, it's mind blowing to me that all those changes were already prepared and written down and submitted to the public and then withdrawn. So, I, I do want to say that, you know, deciding to not update the mine tailings rule for seismic criteria and leaving in the, what is, you know, like, 1970s vintage zone two, zone three verbiage. And leaving out all of the structures west of that line is, I just, it's unsafe, and it's really odd. And then, of course, mine tailings do feed into, various things do feed into the safety of dams rule. And so, I won't discuss those now. But, oh, and I guess I wanted to say, regarding the mine tailings rule, I understand now that John Falk is saying that the hazard classification will just be as defined in the statute. And if I understand that correctly, what that means is, life and property only will be considered and no matter the prolonged environmental damage caused, that will not be considered. Is that what you're saying?

John Falk 33:29

No, no, I don't believe that. Correct. I don't believe that's a correct statement, you know, property...

Tami Thatcher 33:37

Okay, so..

John Falk 33:38

...does include environmental consequence to property. So, that does fall under that classification.

Tami Thatcher 33:49

So property refers to publicly held property as well as privately held property?

John Falk 34:06

Well, of course, we didn't think it was necessary to define property. We interpreted that as being a common definition. So, yes, it does include public and private property.

Tami Thatcher 34:22

Okay. Well, I, it's really, it's really confusing because the hazard classification that's proposed in the dam safety rule includes specific, you know, there's, there's damage to structures, economic damage, loss of life, and there is specific verbiage to prolonged environmental laws. And so it was, you know, more distinctly described in what had been proposed in the combined rule and is now in just the dam safety rule. It's a lot more descriptive than what's in statute, isn't it?

Garrick Baxter 35:16

This is Garrick. Tami, I think the, I'm gonna take your statement really as a comment, I think the rules speak for themselves. But I think I understand the point that you're making that the...

Tami Thatcher 35:30

Okay, okay, the mine tailings rule, my comment is that you're pointing to hazard classification in the mine tailings rule. You're not pointing to where that's defined, in the statute or in another rule, and it is ambiguous, because so oftentimes, there is this overlap between the mine tailings and the dam safety rule. And so, I assumed you meant look at the hazard classification table in the dam safety rule. It's completely ambiguous. And it doesn't tell a person reading it trying to comprehend it, where they would look for the hazard classification criteria. And if it's only in the statute, and it's excluding what's in the dam safety rules, it is far less specific and far more ambiguous. There is no delineation of low significant or high in the statute that I'm aware of, but maybe I'm wrong.

Garrick Baxter 36:48

I understand your comment. I, your comment makes sense to me.

Tami Thatcher 36:54

Okay, okay, that's, those are my only comments on the mine tailings. I do have comments on the safety of dams.

Garrick Baxter 37:06

Sounds good. We'll, we'll come back to those.

Tami Thatcher 37:09

Okay.

Garrick Baxter 37:12

Thank you, Tami. All right, Sarah, who was next on our list?

Sarah Tschohl 37:17

We noted that Michael McCurdy with Idaho Department of Environmental Quality wanted to make a comment.

Garrick Baxter 37:24

All right, Michael, the floor is yours.

Michael McCurdy 37:27

Oh, thank you. This is Michael McCurdy, I'm the waste management and remediation division administrator with DEQ. And my comment was actually has been addressed. It was related to the hazard, hazard classification discussion that's been happening.

Garrick Baxter 37:46

Okay. Thank you, Michael. Sarah, did we have anybody else?

Sarah Tschohl 37:56

I did not note anyone else that wanted to make a comment.

Garrick Baxter 38:00

Based on the existing comments that have come through, is there anybody else who'd like to provide additional comment? Going once.

Benjamin Davenport 38:11

This is Ben, this is Ben Davenport with the Idaho Mining Association. And I don't really have much to add. But, and frankly, I don't, I couldn't speak to why the two-year review was changed other than it tracks with statute. A reminder that there was no requirement to review any of the bonding requirements at any mine site for any time period, before we change this statute three years ago, and added the every, up to every five years. So, I do feel like the up to every five years allows the discretion for the Department to, to review the bonding mechanisms that are in place at these sites. So, I guess my comment is, I don't know why we, were not going to inspect every two years. But the five-year thing wasn't a thing until 2019. So, we certainly appreciate tracking the statute on that.

Garrick Baxter 39:17

Sounds good. Thank you, Benjamin. All right. I'm gonna take that as the end of the comments for the mine tailings rule. Let's circle next to the dam safety or safety of dam rules. Make sure I get the order of that right. And, once again, Will, why don't we start with you?

Will Tiedemann 39:44

Alright, thank you. Again, I have not had a full chance to go through all this. There's more substantial changes to this rule compared to the mine tailing impoundment structures, but we did intend to submit written comments. But I did have some questions that, it looks like there are more substantial, numerous technical changes in this rule compared to the previous rule. And I was curious, on some of the background of that. Are some of those done for statute reasons as well, to come in place, to be more in line with statute?

John Falk 40:20

Yes. The rules were changed to be consistent with statute, which was revised in 2016. And we've been out of sorts for that period. But also, changes were made because standards of, engineering standards have changed. Items that were prescribed in rule do not apply. In fact, they've been found to be detrimental in design of water storage dams. So, they've been eliminated. And, of course, we attempted to reduce any duplication or what we considered to be confusing language.

Will Tiedemann 41:08

Gotcha. And you mentioned that some revisions were made to, due to update construction standards/design standards. You know, again, I haven't done enough homework as I need to. But as Tami had mentioned, you know, that the mine tailing impoundment structure rules are potentially 30 years old. And it might be reason to believe there are also outdated construction standards and design standards. Is there a reason why the dam safety rules, there was a decision made to update, you know, the rules to meet standards and construction practices, and that maybe wasn't done for the mine tailings impoundment structure rules?

John Falk 41:50

Given the time frame, and the opposition that we received from many, many different groups about making the combined set, it was decided to pull them apart. And to address the dam safety rules, as there was much less, there was much less protest or opposition to making the changes in the dam safety rules at this time.

Will Tiedemann 42:21

And I think maybe I saw in the Department's kind of summary comments that there was, you know, if it seemed prudent that the mine tailings impoundment structure rules could be opened for negotiated rulemaking, to update.

John Falk 42:35

Yes, that's, that's correct.

Will Tiedemann 42:37

Okay. Gotcha. Then I guess the only kind of final comment I was, would have on the dam safety is that I think, you know, during last comments' period, that the ZBR statute also talks about trying to maximize public participation. And I asked if, you know, if the Department had looked at, or would be willing to provide context, a summary of, you know, of the changes, technical changes that are happening. A context document saying, you know, the flood design event is changing from 500 years to 300 years, or whatever, and here's why we deem that's appropriate. I guess I was a little disappointed this time to not see a document like that, giving context and justification to the rule changes. I think that helps add and aid in public participation, the public can understand why these rules are changing, and the justification for them. So I would continue to still, to push for that and ask for that, that I think that would make this process smoother. So instead of maybe, debating what's changed, and if it changed or not, we can have the Department's justification and discuss the merits of that, to kind of maybe get to the point quicker.

Garrick Baxter 43:49

Sounds good, Will. We heard that comment, that as I understood it, you'd like to see a context document that highlights the changes that have been made. So, we'll take that back and consider that if we can do that within the timeframes that have been, that we have for this year.

Will Tiedemann 44:04

Right. And I know there's a lot of ZBR, a lot of rules to get, get done. But I guess, as much as time allowed, if it's worth doing, it's, you know, it's worth doing right. So, I would, I'm sure the Department wants to do it right as well, but time considerations are always difficult as well. So, that's, like I said, I

might submit, will likely submit more, maybe more detailed written comments, but that's kind of the general, oral comments I have right now.

Garrick Baxter 44:26
Perfect.

Garrick Baxter 44:27
Thank you, Will. Kaycee, just once again, because you're here in person, I'll give you the opportunity. No? Okay.

Will Tiedemann 44:27
Thank you.

Kaycee Royer 44:34
Nope, I'm good, thank you.

Garrick Baxter 44:35
All right. So I think last time we started with Tami. Tami, why don't we start with you again, online? The floor is yours.

Tami Thatcher 44:44

Okay. Okay, so for the safety of dams rule regarding the selection of the design earthquake. There are, there are pretty significant changes between the June strawman and the August draft, as well as changes from the existing rule to this August draft. And actually, more dams were requiring or going to be required to do stringent seismic evaluation in the June draft than are required now in the August draft. I guess, it's, it's a struggle to keep up with the changes. Because again, while we have a redline strikeout of the June draft to this August draft, we do not have a redline strikeout of the existing, the current rule to this set of proposed changes. And I know the response has been, "well that would be hard to provide and difficult" and all of that, but I just want to echo that there have been many, many changes made throughout this dam safety rule. And, they're, they're not explained. Why the change is being, is made, is not being explained. And then it flip flops, from June to August 9. It's a, it's a little mind boggling, but at least the dam safety rule did update various language regarding seismic criteria, but in ways that were confusing to me. And so, in some places it's requiring the maximum credible earthquake for large dams, or high hazard structures, when in the past both significant hazard and high hazard structures would have required that. So, you have a situation like that, you have no explanation, you have to wonder, you know, did you make this change on purpose, or just leave something out? I, it's very difficult because of the lack of documentation between the current rule and the proposed changes. And we had again, we had four existing dams, I think there had been, you know, requiring this sweeping requiring of seismic evaluation. And then now that scaled back to all this is only for high hazard structures. Why not significant hazard structures too? So, it's, that's a little baffling. So, the language got updated in the mine tailing, or in the dam safety rule, but not in the mine tailings rule regarding seismic criteria. And that makes it I think, even doubly more confusing. And there are places where the rule is, is stating that simply, they have to select the seismic event recurrence interval and evaluate that. Well, you've got 1 in 500 years, you've got 1 in 100 years, you've got 1 and 10,000 years, which recurrence interval are you supposed to select? And that isn't specified. And, so, I have you know, more detail in my written comments, but I still find the treatment of the seismic design criteria, the wording isn't clear and the way

that it's, has always been spread out throughout the rule for new dams. The documents for, for new dams and for existing dams, three places. It's, it's pretty confusing to follow and it's not, it's not certain that some of the changes made are even being made consciously.

Tami Thatcher 49:21

Okay, now on to release capability for existing dams, proposed Rule 60.01. This is something that I really didn't catch in the first go round. Just how much the change in 01, 60.01 is putting in place an even firmer "Don't Ask Don't Tell Policy" for existing dams. The current rule required documentation of the release capability and the seismic evaluation for both significant and high hazard dams, that's been deleted. So now for existing dams, it's a "Don't Ask, Don't Tell". "We don't want to know your release capability". "Do you flood at a 10-year recurrence interval flood or, or a 1000 recurrence interval flood?" "We don't want to know." "Did you do a seismic evaluation?" "We don't want to know". So, that is a change that I find very disturbing, that this codifies a "Don't Ask, Don't Tell" for all existing dams. And this will apply whenever a mine tailings dam is, you know, has that loop back around and comes into the dam safety rule or release capability if they have the spillway, etc.

Tami Thatcher 49:21

Let's see, we, there's still the, most there's another one. The, the release capabilities. Let me see, just a second. There's, there's been deletions, there have been a number of rules deleted from the current rule to this proposed rule 60 for existing dams. And these things that were deleted, I, they do try, it does, it is troubling to me, they've been deleted with no explanation. And if the, if the thing was that they were just confusing and hard to understand, and I think you could delete a lot more from this rule. So, I would like to know the reasons why certain sections/subsections were deleted from Rule 60 that had been in place.

Tami Thatcher 52:12

Okay. Now, back to Rule 50.11, which provides a table of the inflow design floods, that would be chosen for a new design or for a modification that affected the release capability. The new changes for a large, high-risk dam, what had then the probable maximum flood is now a range; a range from the 500-year flood to the probable maximum flood. And no verbiage was, you know, provided to explain that change. But I want to explain to folks that for the Mackay Dam, for example, the probable maximum flood would be something like 82,000 cubic feet per second, a 500-year flood, less than 6000 cubic feet per second. That's a, that's a pretty big change, right? Over an order of magnitude. And the reason given justifying the 500-year flood. The reason given in the previous response to comments was that there was no consensus on how to reduce or take a fraction of the PMF, like point five PMF, there was no consensus on how to do that. So, they chose the 500-year return flood interval. And so, the, the 500 year is a tremendous reduction in the design requirement. And there are others, not just for large high hazard dams. There were other significant reductions in the release capability requirements for the dam. But even more, as important as that it's, it's, it's great to have in the guidelines, "here's how you would choose the design value for the release capability," but what seems to be decades of practice, by the IDWR is to never confirm it by calculations anyway in any, in any manner, the release capability of the structure. So, they have a table that says what the ideal would be, but there's no, there's no going, there's no meeting their rule for existing structures. They never go back around and say, "here's what this dam can actually release." And that's an odd, that's kind of an odd practice. Never, never reviewing what a dam can actually release. Because it does affect the safety of the dam when you have earthen embankment dams if you overtop the dam, it'll fail, you fail the dam and you're talking about, you know,

60,000 to 100,000 CFS from the Mackay Dam, if you fail the dam versus of normal flooding 3,000 cubic feet per second. Failing the dam is more than a small incremental change in the flood depths. And the timing of the flood wall and the number of people that are going to die. And I am not seeing anywhere a written analysis of the incremental change that makes it you know, acceptable for the dam to fail at, at 35,000 CFS versus failing at the PMF, which was to be 80,000 CFS. And you know how you do an incremental damage to say that, "it just doesn't matter that the dam fails and wipes out the town in minutes," versus flooding that is extensive and progresses, you know, through hours, hours or days and does flood some property, I really need to see the incremental analysis that is supporting the acceptance of these dam release capabilities that are so far below what is stated in the rule.

Tami Thatcher 57:27

So I guess, I did, I have identified a number of errors in the rules, I asked questions about a few of them for clarification. There are still, there is still an error in Rule 65 for new or existing mine tailings impoundment structures intended to store 50 feet or more. This is in the dam safety rule. It includes this mine tailing stuff. And it's going on to say it'll meet the requirements specified in Rules 35, 45, and 60. And it seems to have left out Rule 50. And we kind of went through a series of errors on this, the last go round. Alright, so again, as I go through this, and I have no documentation explaining why changes are being made. I just, I have to scratch my head sometimes to ever figure, try to wonder "was this intentional, or was this an error?" but I believe this is an error and it was, it has removed Rule 50 inadvertently, and on top of that Rule 65 verbiage changes now don't match the analogous rule in the tailings, mine tailings rule, for reasons I don't understand at all. So again, I have written comments, I will be submitting them, and I appreciate this chance to comment. Thank you.

Garrick Baxter 59:26

Excellent, thank you, Tami. All right. Let's see. Mike McCurdy, I'm assuming because your previous comments were given, do you want to add anything additional?

Michael McCurdy 59:46

No, I didn't have anything on the dam safety rules.

Garrick Baxter 59:54

Sounds good.

Garrick Baxter 1:00:01

Does anybody else wish to provide comment on the dams, Safety of Dam Rule?

Garrick Baxter 1:00:13

Hearing none, oh, Will. I'm sorry, Will, let's come back to that.

Will Tiedemann 1:00:17

Just wanted to follow up with one last comment and just kind of reinforce my other comment about providing a context sheet of what changes were made and justifying them. You know, I, I come from an engineering background, I worked in industry, I wrote permits for IDEQ for a year, I know the process of trying to make rules efficient, it's kind of an elegant art to make them and there is benefit in reducing rules. I, you know, I do understand that. But I just, there's a difference between just reducing rules to quote unquote "reduce regulation", and making them more efficient, more streamlined and more

effective. And so, I'm not against reducing rules, you know, I'm just wanting to make sure that they're done for the right reasons. And so, I think a context document needs to be, needs to be issued to help justify those. That these rules are being reduced for the right reasons. And it will take time, but I think it would, would definitely be worth it to the process so we can understand what changes are being made, and why. I have to do my own homework, like I said, more detailed, and look over those changes, and I can build that list, but what I can't build is the Department's justification for, if there are, you know, reductions in technical standards and such. I need, only, only the Department can provide that. So that's, that is my ultimate and kind of my biggest ask that I think needs to be done. So, but thanks everyone for commenting, and for the time and for the work. It's not an easy process. It is a long one. So, but as I've, optimism, we can reach something at the end of the day that is agreeable for all parties. So, thank you again.

Garrick Baxter 1:01:56

Excellent, thank you Will. All right, with that, we will go ahead and close the oral comment period for both the mine tailing rule and the safety of dam rule. Let's next talk a little bit about next steps. So, it's my understanding the deadline to submit additional comments has been set for August 26, that's a Friday. August 26 by the end of the day, so 11:59 pm. Sarah has, did Mat indicate how folks are to provide written comments?

Sarah Tschohl 1:02:37

The Department will accept written comments via the rulemaking email that you are all familiar with at this point. And we will also accept them via mail, just mailed to the Department state office.

Garrick Baxter 1:02:55

All right, any questions about the written comment deadline? Hearing none, we'll talk about next steps after that. So, it's my understanding there are no additional public meetings currently scheduled before we publish the proposed rule. So, IDWR will collect and review all comments and I'm sure Mat will listen to the presentation here today and, and take the comments that have been provided here and will consider them. IDWR will modify the current drafts based upon the comments as appropriate. IDWR and Board staff will prepare a draft proposed rule, both Rule 37.03.05 and 37.03.06 and present them to the Board, Idaho Water Resource Board that is. And request that they adopt them and authorize their publication in the State of Idaho's October Administrative Bulletin. So, keep an eye out for the October Administrative Bulletin. IDWR will post the draft proposed rules to the rulemaking webpage on or around Wednesday, September 7, following the Board's meeting on, I'm trying to remember, I think the Board's meeting is on the day before? Yeah, Tuesday, September 6, assuming the Board authorizes their publication. Then, if authorized by the Board, the proposed rules will be published again in that October Administrative Bulletin.

Garrick Baxter 1:04:39

And many of you are aware, but then after, but we'll go ahead and talk about it. Once the proposed rules are published in the bulletin the public will have an opportunity to submit written comments again regarding the rules and request a public meeting to submit oral comments, pursuant to Idaho Code Section 67-5222(1). the public has 21 days to submit written comments and the written comment period, which, based upon our calculations should expire on or about October 26. Then pursuant to Idaho Code Section 67-2222(2), IDWR is required to host a public meeting to provide an opportunity for oral presentation if requested within 14 days by 25 persons, or a political subdivision, or an agency. The

period to request the public meeting expires on, by our calculations, October 19, 2022. IDWR will then collect and review comments and IDWR will then modify proposed rules based on comments as appropriate. Then in December, IDWR and the Board will publish those rules with any changes as pending rules in the December publication of the Administrative Bulletin. The pending rules will then be submitted to the legislature for review and adoption during the 2023 session. Again, that's all assuming the Board approves the rules. And, again, the recommendation is still to move forward with the rules. So. Those are the next steps in the publication process. Any questions with regards to those next steps?

Garrick Baxter 1:06:32

Hearing none, then I believe we are to the last step of adjournment. Are there any comments? Did I, anything else that I might have forgotten before we go ahead and adjourn for today? Looking to you, John and Corey, anything else, Sarah?

Sarah Tschohl 1:06:53

No.

Garrick Baxter 1:06:53

Anything online or in the room that you might want to address? Okay, hearing nothing, we will go ahead and adjourn today's meeting. I want to say thank you again to everybody for participation, for participating. We will, as indicated, take your comments, and consider them here today. There were some very good comments that I think are appropriate for consideration and so we will do so. And the Department will work forward consistent with kind of the outlines that I laid out here today. So, thank you everybody for your participation. Have a good day.