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

August 26, 2022

Re: Mine Tailings Impoundment Structures & Safety of Dams Rulemaking: Docket No. 37-0305-2201, Post August 19th Public Meeting

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 50,000 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,

A handwritten signature in black ink that reads "Will Tiedemann".

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

A handwritten signature in black ink that reads "Fred Coriell".

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

General Comments

Lack of Clarity on Proposed Rule Changes

In previous comments, ICL and Save the South Fork Salmon (SSFS) requested the Idaho Department of Water Resources (IDWR) prepare a public document summarizing the changes of the proposed rule(s) compared to the two existing rules. Specifically, we requested that where technical or material changes to the existing rules are reflected in the proposed rule, IDWR should provide a document with the context and justification for such changes.

The numerous proposed rule changes—which mostly result in less restrictive language—are primarily intended to meet the requirements of the ZBR executive order. Specifically, section 4(a) states that “[t]he 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 still given no specific analysis, justification, support, or explanation for how these changes to make the rule less restrictive will still accomplish the benefits and ultimate goals of the existing rules.** See Exec. Order 2020-01 § 4(b); see also Idaho Code § 67-5220(3)(c).

Despite multiple rulemaking meetings, there still appears to be a fair amount of public confusion regarding the proposed rule changes. **Therefore, ICL and SSFS again request that IDWR prepare a rule change justification/analysis document for the public.**

IDAPA 37.03.05 – Mines Tailings Impoundment Structures

Mine Tailings Impoundment Structures Inspection and Certificate of Approval

Under the existing Mine Tailings Impoundment Structures Rule (MTIS) inspection and Certificate of Approval/bonding reissuance must be completed every two years for applicable facilities. Under the proposed MTIS rule, the Certificate of Approval and bond no longer carry this requirement and appear to be valid indefinitely. Furthermore, MTIS structure inspections are now proposed to be conducted based on hazard classification and at the discretion of IDWR (though at least every five years as required by Idaho law).

ICL and SSFS are concerned that this new allowance fails to accomplish the intent of Idaho Code § 42-1714.. That law requires IDWR to “assure that the site will be in a safe maintenance-free condition upon completion of a mining operation.” See also Idaho Code § 42-1710. It is our understanding that current IDWR policy (Dam Safety Memo 1, May 11, 2018) states the target inspection rate is every two years for High Hazard dams, three to four years for Significant Hazard dams, and five years for Low Hazard dams. However, should budget or resource

constraints become an issue for IDWR, there is no assurance that these target inspection goals will be met.

If it can be shown through historic MTIS inspection records that a two-year inspection and Certificate of Approval/bonding cycle for some MTIS is redundant and has not provided compliance correction value, then an update to the existing two-year cycle may be warranted. However, without any justification, jettisoning the existing two-year cycle may not be sufficient “for the protection of life and property.” *Id.*. Currently, IDWR has given no justification for how the benefit of a two-year inspection and Certificate of Approval/bonding cycle will still be fulfilled according to the ZBR standard. Uncertainty related to climate change, inflation, mining economics, and mine operations can all affect whether the condition of a MTIS and its current Certificate of Approval and bond are appropriate. **As such, the currently proposed five-year inspection interval and indefinite Certificate of Approval and bonding may create an unacceptable risk to public safety and must be removed from the proposed rule.**

IDAPA 37.03.06 – Safety of Dams

In general, the proposed Safety of Dams rules have significant alterations compared to the existing rules. These changes share a common theme of eliminating specific dam design, construction, and operations requirements and leaving those important items to the discretion of dam operators and IDWR. The following subsections of the proposed Safety of Dam rules highlight these alterations.

Subsection 25.02: The applicability of Low Hazard dams to design, construction, and operating plan standards (Subsections 35, 45, 50, 55, and 60) is unclear. Subsection 25.02 requires Significant and High Hazard class dams to comply with Subsections 34, 45, 55, and 60 but implies Low Hazard class dams do not.

Subsection 35.07: The construction of dams is no longer contingent upon three previously specified construction milestones and is instead left to IDWR’s discretion.

Subsection 35.12.d.i: Specific requirements for seismic evaluation and their applicability are now generalized under IDWR discretion.

Subsection 45: Instead of requiring an Operational Plan for certain categories of dams (as the existing rules do), the proposed rule requires only an Emergency Plan for Significant and High Hazard dams. Under the existing rule, the Operational Plan requires monitoring of normal operating conditions in addition to emergency situation planning. The proposed Emergency Plan is a more narrow document covering operation only during emergency situations.

Subsection 50.1: The required maximum downstream slope of dams is increased from 2:1 in the existing rule to 2.5:1 in the proposed rule.

Subsection 50.2: The required dam minimum top width is now simply proposed at 12 feet instead of being governed by a more specific formula in the existing rule.

Subsection 50.3.c: The proposed cutoff wall trench design criteria are now less-specified and covered under discretion compared to the existing rule.

Subsection 50.4: The proposed dam core materials criteria are now less-specified and covered under discretion compared to the existing rule.

Subsection 50.5: The proposed drain design criteria are now less-specified and covered under discretion compared to the existing rule.

Subsection 50.06: The proposed wind wave design criteria are now less-specified and covered under discretion compared to the existing rule.

Subsection 50.07: The proposed outlet design criteria are now less-specified and covered under discretion compared to the existing rule.

Subsection 50.11: The proposed specified release capacity of dam outlets are now less conservative for many Dam Hazard classifications compared to the existing rule.

While some of these rule alterations may be valid considerations, **IDWR has given no specific analysis, justification, support, or explanation for how these less restrictive rule changes are justified and will not threaten public safety, property, and the environment.** While the ZBR Executive Order gives IDWR the ability to reduce rule regulations, it also requires IDWR to justify the changes.

Idaho's Teton Dam has already been the scene of a catastrophic and fatal dam failure. Should one occur again, any reduction in dam safety regulations surely would play a role. Loosening dam safety regulations in any cases, nevertheless without proper justification, should not be conducted simply to further the claim that Idaho is the "least regulated State in the county." Furthermore, the ZBR executive order does not mandate that rules must be made less restrictive. Rules are permitted to remain neutral, as compared to the previous rule chapter. Exec. Order 2020-01 § 4(c). Indeed, any rulemaking "should be guided by the legislative intent articulated in the statute . . . giving the agency authority to promulgate the rule." That intent is "to provide for the regulation of construction, maintenance and operation of all dams, reservoirs and mine tailings impoundment structures exclusively by the state to the extent required for the protection of public safety." Idaho Code § 42-1710. **As such, the proposed rule changes cited above must be modified or eliminated unless proper analysis and justification by IDWR are provided.**