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

November 2, 2022

Re: Mine Tailings Impoundment Structures & Safety of Dams Rulemaking: Docket No. 37-0305-2201, Post Oct. 28th 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 24,000 members and supporters who have a deep personal interest in ensuring that our water quality and lands are protected throughout the state.

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
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General Comments

Scoping Meeting for Future Rulemakings

ICL respectfully requests that the Idaho Department of Water Resources (the Department) hold preliminary scoping meetings before engaging in future negotiated rulemakings. In a scoping meeting, the Department could lay the general framework for what stakeholders can expect in the negotiated rulemaking process and set the stage for a productive process. For example, if a scoping meeting was held for these rulemakings, stakeholders could have been made aware of the Department's intentions to combine the Mine Tailings Impoundment Structures & Safety of Dams rules and better "buy-in" likely would have been achieved.

IDAPA 37.03.06 – Safety of Dams

The Department's Role in Design of Dams

The proposed draft Safety of Dam rules contain substantial changes from the previous rule that now remove specific regulatory requirements for the Department (see ICL previous comment letter dated August 26th, 2022) and in general defer these requirements to either the Department's discretion or the professional engineer associated with the design of the dam. The Department has justified many of these changes by stating they do not have statutory authority to design dams and these matters are better left to professional engineers. While Idaho Code 42.1710 does not specifically include the supervising of dam "design" under the Department's responsibility, it does specify the supervising of "construction, enlargement, alteration, repair, maintenance, operation and removal of dams, reservoirs and mine tailings impoundment structures for the protection of life and property."

We do not know whether the Department's lack of authority to supervise the design of dams is of their own interpretation, or one that has legally been established by Idaho courts. In either case, ICL is concerned with this interpretation. If a dam is inherently flawed or lacking in its design and thereby threatens life and property, but the Department does not have the ability to step in, it undermines the Department's oversight of its construction and operation. Responsible and prudent oversight of a dam's construction and operation inherently must include design factors to protect public health and safety.

ICL requests that the Department clarify whether their stated lack of authority to regulate the design of dams is self-determined or if that has been determined by Idaho courts. If the former is the case, ICL requests that the Department carefully reconsider their revision of the existing rules and re-evaluate whether the relaxing of design regulations or deferring them to discretion is truly in the public's best interest.

Subsection 35.07: As noted in ICL's previous comments, the construction of dams is no longer contingent upon three previously specified construction milestones and is instead left to the Department's discretion. The Department has responded by stating this change of rule does not prevent the Department from carrying out the same previously prescribed inspections and now

allows for flexible inspections based on a dam's characteristics. While this flexibility and discretion does have its benefits, ICL believes the risk is too great to justify such discretion.

Under the current proposed rule, it appears there is no regulatory safeguard preventing a dam from going completely uninspected during its construction and commencement of full operations. If a lack of Department resources and staffing caused constraints on the number of inspections that could be conducted, it is likely the Department would have to make difficult decisions on which dams should forgo inspections.

Furthermore, Idaho Code 42-1717 states, "During the construction, enlargement, repair, alteration, or removal of any dam, reservoir or mine tailings impoundment structure, the director shall make or cause to have made continuous or periodical inspections at state expense for the purpose of securing conformity with the approved plans and specifications..." In this way Idaho Code gives the Department the **requirement** to make at least periodic inspections. The current draft version of the rules allows for the Department to fall short of this legal requirement. **ICL requests Subsection 35.07 be modified to require periodic inspection of dam construction and commencement of operations.**