

Recommendation Memo

State of Idaho

Department of Water Resources

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Date: March 7, 2025

To: Idaho Water Resource Board

Thru: Mat Weaver, Director; Erik Boe, Water Compliance Bureau Chief

From: Aaron Golart, Stream Channel Protection Section Manager

Subject: Memorandum re: IDWR's Stream Channel Alteration Rules, IDAPA 37.03.07 with Retrospective Analysis and Recommendation

Executive Order 2020-01

Executive Order No. 2020-01 (the "EO") requires the Idaho Department of Water Resources ("IDWR") and the Idaho Water Resource Board ("IWRB") (collectively "Agencies") to review all rule chapters under the Agencies' purview by 2026. The review must be a critical and comprehensive review.

Pursuant to the schedule already determined by the Division of Financial Management ("DFM") and the Agencies, IDWR's *Stream Channel Alteration Rules* ("Stream Channel Rules" or "Rules"; IDAPA 37.03.07) must be analyzed in the fifth year of the review process.

In 2021, IDWR conducted negotiated rulemaking related to Stream Channel Rules, specifically Rule 61. Rule 61 defines minimum standards to permit Small Scale Mining with Suction Dredges, Powered Sluices, or Non-Powered Equipment ("Small Scale Mining") in Idaho. Additionally, the rulemaking process included changes to the Stream Channel Rules, Definitions Rule 10, subsections .09, .11, and .13 and the Exemptions Rule 25, subsection .05. Rule 10.10 defines Human Life Support System, Rule 10.11 defines Non-Powered Equipment, Rule 10.13 defines Powered Equipment, and Rule 25.05 exempts permitting for Mining Operations Using Non-Powered Equipment, all items commonly used during Small Scale Mining. Rule 61, Rule 10, and Rule 25 were all promulgated on March 18, 2022. Small scale mining operations meeting these minimum standards and exemptions are not subject to the more stringent procedural permit requirements described by law but receive expedited permit approval when permits are required. 2025 negotiated rulemaking will address the remaining Stream Channel Rules and whether they should be maintained, replaced or removed.

Therefore, the EO requires the Agencies to review the remaining Stream Channel Rules to determine whether they should be repealed altogether or re-promulgated. If the Agencies desire to re-promulgate the Stream Channel Rules, the Agencies must retrospectively analyze the Rules and determine whether the Rules need to be re-promulgated, and, if so, recommend an approach. *Id* at 3.

This Recommendation Memorandum ("Memo") provides analysis and recommendations for the Director and Board.

Retrospective Analysis

1. What are the benefits of the current rule?

A primary benefit of the Stream Channel Rules is they establish minimum standards for the alteration of stream channels in Idaho and govern the permitting of stream channel alterations that are of a common type, which do not propose alterations which will be a hazard to the stream channel and its environment. Per the legal authority of this Rule; public health, safety and welfare requires that stream channels and their environments be protected against alteration for the protection of fish and wildlife habitat, aquatic life, recreation, aesthetic beauty, and water quality.

Benefits of the current Rules include:

- Sets forth minimum standards for common alteration activities and allows expedited approval for minimum standard projects,
- Describes exemptions where stream channel alteration permits are not required,
- Establishes application review and decision process, including proposed alterations which do not follow minimum standards,
- Establishes guidelines for enforcement of unauthorized stream channel alterations,
- Establishes criteria for emergency permitting.

2. Do the benefits of the rule justify the costs of the rule?

Idaho stream channels are vital to support Idaho's large agricultural economy, as well as the commercial, domestic, municipal, recreational, and economic sectors of the State, including fish and wildlife. The Rules add clarification to statutes and implement practical methods and standards necessary to protect stream channels. The Rules are therefore important to the public interest of the State.

The Rules state that applications shall be submitted to IDWR not less than 60 days before the applicant proposes to start construction. One of the benchmarks established by IDWR in the current Strategic Plan (Plan) is for 80% of minimum standard applications be processed within 60 days. The established minimum standards allow IDWR to expedite the review and approval of projects where applicants intend to follow the minimum standards. This allows IDWR to expedite approvals and consistently meet or exceed the benchmark in the Plan.

Stream channel alterations that meet the minimum standards with the Stream Channel Rules require less staff time to review, process, and approve. These Rules therefore minimize IDWR costs for administering and permitting the proposed activity relative to projects that do not meet the Stream Channel Rules' minimum standards, which commonly take considerably more time to process.

Stream Channel Alteration permit fees are nominal (\$20 per permit application), and are established by statute, Idaho Code § 42-221(M)(3). Rule modifications will not include new fees or changes to fees set by statute. Potential Rule modifications should not result in added costs or time necessary for permitting or inspection of stream channel alteration

activities. IDWR employs four full-time employees to manage the program across the state and only approximately 1-2 percent of the cost of the program is offset by Stream Channel Alteration permitting fees.

Based on the information summarized above, IDWR concludes that the benefits of the Rules justify the costs of the Rules; protection of stream channel resources in Idaho afforded by these Rules justifies the costs attributed to minimum standards imposed by the Rules.

3. Are there less restrictive alternatives to accomplish the benefits of the rule?

The current Stream Channel Rules add clarification to statutes captured in Chapter 38, Title 42, Idaho Code, and establishes minimum standards for the alteration of stream channels in Idaho. IDWR will propose removing certain sub-rules that are unnecessary or obsolete, including sub-rules that reiterate current statutes. The negotiated rulemaking process will determine whether the Rules are necessary or require substantive modification. The negotiated rulemaking process is an opportunity for IDWR to consider all suggested alternatives or other recommendations related to these Rules.

4. Recommendation

Idaho Code § 42-3803 requires that the alteration of streams be authorized by permit issued by the Director. Given this statutory mandate, IDWR staff recommend the Rules, excluding Small Scale Mining Rule 61, be repealed and replaced through the negotiated rulemaking process.

Pursuant to the negotiated rule process, IDWR staff will seek comments on whether any non-regulatory measures can be implemented in lieu of the Stream Channel Rules. IDWR will propose some minor rule changes or updates for the purposes of clarification and consistency with current statutes.