

MEMO

State of Idaho

Department of Water Resources

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Date: January 27, 2020

To: Senator Crabtree

Cc: Representative Marc Gibbs

From: Gary Spackman, Director
Idaho Department of Water Resources (IDWR)

Subject: Response to Suction Dredge Questions

On January 15, 2020, you met with IDWR Stream Channel Protection Coordinator Aaron Golart and me to discuss an email you received from a constituent about IDWR's rules for suction dredge mining. You asked IDWR to address, in writing, the constituent's suggestion that certain IDWR rules be held or deleted from IDWR's fee rules docket. Specifically, you asked IDWR to address potential impacts resulting from deletion of the certain rules. You also asked IDWR to explain the basis for the five (5) inch diameter nozzle and 15 HP limits described in IDAPA Rule 37.03.07.61.01.

IDWR's response to your questions follow below. This memo also presents additional facts and comments regarding IDWR permitting of small scale suction dredge mining in Idaho, and any related state laws and rules. A copy of the constituent's email is attached for reference. This response is copied to Marc Gibbs, Chairman of the House Resources and Conservation Committee because very similar questions were raised and discussed during the House Committee's hearing of IDWR's fee rules docket on January 15, 2020.

1. Basis for Rule 61.01

IDWR reviewed its records and could not find information that clearly documents the basis for the 5 inch nozzle diameter and 15 HP standard listed in Rule 61.01. Prior to adoption of the current Stream Channel Alteration Rules (IDAPA 37.03.07) in 1993, the minimum standard in IDWR rules applied to suction dredges "capable of moving two (2) cubic yards of material per hour or less." IDWR believes the rule changed from "2 cubic yards of material per hour or less" to the "5 inch diameter nozzle and 15 HP" standard for the following reasons:

- a. It is difficult to measure and monitor movement of 2 cubic yards of material per hour or less from a suction dredge;
- b. The 2 cubic yard per hour rate was generally viewed as a maximum or upper limit for dredges with nozzle diameters of 5 inches and power sources of 15 HP;
- c. Most of the suction dredge mining activity in the state was limited to the use of dredges with nozzle diameters of 5 inches or less and power sources with 15 HP or less;
- d. The suction dredge mining community or user groups at the time generally defined commercial suction dredge mining operations as those moving or processing more than 2 cubic yards of material per hour; and

- e. IDWR completed negotiated rulemaking in 1992 for the current Stream Channel Alteration Rules. The 5 inch nozzle diameter/15 HP standard was a consensus agreement between IDWR, the dredge mining community, state and Federal agencies, and other interested stakeholders.

2. State Laws and Rules Related to the 5 Inch Diameter/15 HP Standard

The constituent's email suggests that there is no support for the 5 inch/15 HP standard in State law, so the eight (8) inch standard found in Idaho Code § 47-1313(e) should be used. Contrary to the constituent's statement, IDWR notes that several Idaho statutes and rules define a category of dredge mining using suction dredges with nozzle or intake diameters of 5 inches or less or 15 HP or less, including the following:

- a. Idaho Code § 47-703A (6) (a), administered by the Idaho Department of Lands ("IDL"). Section 47-703A (6) (a) states in pertinent part as follows:
Casual exploration means "entry and/or exploration which does not appreciably disturb or damage the land or resources thereon. Exploration using suction dredges having an intake diameter of five (5) inches or less shall be considered casual exploration when operated in a navigable river."
- b. IDL Rules 20.03.05.015.04 and 05.
IDL Rule 15.04 defines "recreational mining equipment" on navigable rivers as "suction dredges with an intake diameter of 5 inches or less with attendant power sources rated at 15 HP or less, pans, rockers, hand tools, hand operated sluices and other similar equipment." IDL Rule 15.5 requires miners to obtain an IDWR permit for use of "recreational mining equipment" on navigable rivers and that such permit constitutes waiver of bond, royalty and written approval by IDL "to engage in recreational mining under Section 47-704(6), Idaho Code and Title 47, Chapter 13, Idaho Code."
- c. Idaho Code § 42-1734A.
Section 42-1734A authorizes the Idaho Water Resource Board ("IWRB") to adopt State Water Basin Plans and designate selected waterways as protected rivers. The IWRB has designated a number of protected rivers that restrict suction dredge mining to the 5 inch/15 HP minimum standard limit described in Rule 61.01.

3. Basis for Rule 61.03

Again, IDWR has reviewed its records and could not find information that clearly documents the basis for Rule 61.03. This sub-rule is one of several applicable minimum standards when suction dredging with nozzle diameters of 5 inches or less and motorized power sources of 15 HP or less. If an applicant adheres to this and other minimum standard sub-rules, IDWR will issue the applicant an expedited IDWR authorization or "Letter Permit." The letter permit can be acquired online or by stopping at an IDWR office. The rule was promulgated to ease the burden of more rigorous permitting required for larger dredging operations.

If an applicant wants to dredge with a suction dredge having a nozzle diameter greater than 5 inches or use mechanized equipment below the mean high water mark, the applicant submits a Joint Application for Permit (Joint Application) to IDWR. The Joint Application requires more detailed information regarding the location, size and type of stream channel alteration. Joint Applications also require detailed diagrams and plans. IDWR Joint Application decisions are typically issued within 30 to 90 days depending on the size, location and complexity of a proposed alteration.

4. Rules 61.01 and 61.03 Do Not Directly Affect Constituent's Riverbed Mineral Lease

The constituent states that IDWR Rules 61.01 and 61.03 conflict with IDL rules and laws governing his IDL riverbed mineral lease. IDL Rule 20.01 prohibiting use of suction dredges with intake diameters larger than 5 inches or attendant power sources rated greater than 15 HP, “*except under lease,*” simply means one cannot use a suction dredge greater than 5 inches unless the state lands are under lease.

IDWR understands the constituent has a ten year IDL Riverbed Mineral Lease for the term March 1, 2017 through February 28, 2026. The constituent had a conditionally approved IDWR permit with minimum standard limits (5 inch nozzle diameter, 15 HP and no additional mechanized equipment). The IDWR permit was reviewed by IDL when they approved his lease. His lease was approved with the 5 inch limit. IDL does not consider a lease application “complete” until the applicant has an IDWR stream channel alteration permit in hand. The constituent can propose use of an 8 inch dredge during the term of the lease upon submittal of a Joint Application to IDWR. IDWR would then seek comment from IDL, and other state agencies having an interest in the stream channel regarding likely effects upon the stream and aquatic resources. *Idaho Code § 42-3804*. IDWR may, or may not approve an 8 inch diameter dredge. Approval depends on the facts of the proposed dredge mining activity, comments from IDL and other state agencies.

Additional Facts and IDWR Comments:

1. IDWR's Expedited Permitting for Suction Dredges Meeting Minimum Standard Rules

Idaho Code § 42-3803(d) states that “the [Idaho Water Resource] Board may, by regulation, dispense with procedural requirements for permit application and approval contained in this chapter for projects and activities which, in all respects, at least meet minimum standards adopted pursuant to this section.”

IDAPA Rule 37.03.07.30.02 specifically authorizes IDWR to allow applicants to eliminate “detailed plans” from their application if the proposed activity refers to a “specific minimum standard.”

IDWR has adopted the Idaho Recreational Mining Authorization Letter Permit (“Letter Permit”) to expedite authorization of suction dredge operations that meet the minimum standards described in Rule 61. Proposed projects meeting the minimum standards removes the necessity for IDWR to furnish copies of applications to other state and federal agencies and seek comment from those agencies. The Letter Permit is analogous to an Idaho fishing license; it only requires an applicant to give his or her name, address, the name or names of streams the applicant plans to dredge, and submission of a fee (\$10 for Idaho resident, \$30 for non-resident). The applicant's signature to the Letter Permit certifies that the applicant agrees to conduct his or her operations in accordance with Letter Permit conditions and instructions, and the minimum standards set forth in IDAPA Rule 61.

2. Rule Rejection Scenarios

During the January 15 House Resources and Conservation Committee hearing, the Committee discussed the potential rejection or hold of Rule 61 in its entirety as well as the rejection or hold of Rule 61 sub-parts 61.01 and 61.03. IDWR has considered both scenarios and offers comments below.

A. Scenario 1 – Rejection of IDWR Rule 61 in its Entirety

Legislative proposal: Removal of Rule 61 (Minimum Standard for *Suction Dredges and Non-Powered Sluice Equipment*) in its entirety from IDAPA 37.03.07.

Outcome: IDWR would process all suction dredge mining proposals using its Joint Application permit form and process.

Reason: Without a minimum standard in rule, IDWR could not implement an expedited approval process for select small scale dredge mining activity. Therefore, IDWR would have to default to the standard Joint Application permit process, furnish copies to state and federal agencies, and as appropriate, incorporate agency comments into permit conditions.

B. Scenario 2 – Rejection of Sub-Rules 61.01 and 61.03.

Legislative Proposal: Removal of sub-rules 61.01 (standards for suction dredges) and 61.03 (mechanized equipment prohibited below high water mark) from the *Suction Dredges and Non-Powered Sluice Equipment* Rule 61 minimum standard.

Outcomes: The 5 inch/15 HP dredge size limit and mechanized equipment prohibition is removed but other minimum standard sub-rules remain in place. At this time, IDWR is uncertain about how it would permit suction dredges on Idaho's stream channels. One of two outcomes would likely be employed:

Outcome A: IDWR might be able to offer expedited approval to applications proposing use of suction dredges at or under the 5 inch/15 HP standard and no use of mechanized equipment other than the dredge itself. The expedited process would be limited to certain waters identified in IWRB State Water Basin Plans, state navigable rivers or other streams located on state land. Applications for suction dredge mining operations that exceed the 5 inch/15 HP limit and use of mechanized equipment in addition to the dredge itself could be processed by IDWR under the standard Joint Application permit form and process.

Reason: Maintaining an expedited permit authorization process for dredge operations meeting the limits of removed sub-rules 61.01 and 61.03 is consistent with dredge mining limitations imposed by certain IWRB State Water Basin Plans, IDL laws and rules, and Idaho Department of Environmental Quality ("IDEQ") Idaho Pollution Discharge Elimination System ("IPDES") permit requirements. An expedited permit process would allow waiver of comments from other agencies.

Outcome B: IDWR would require the applicant to complete the Joint Application permit form for all suction dredge mining operations, regardless of size, type or make of suction

dredges or mechanized equipment used. A permit would only be issued after coordination with other agencies and notice.

Reason: No size or mechanized equipment standards or limits exist in IDWR rules. Idaho Code § 42-3804 requires IDWR to examine proposed stream channel alterations upon receipt of application and plans, and to furnish copies of the application and plans to other state and federal agencies having and interest in the stream channel to determine the likely effect of the proposed stream channel alteration upon the fish and wildlife habitat, aquatic life, recreation, aesthetic beauty, and water quality of the stream. IDAPA Rule 37.03.07.30.01 specifies that the Joint Application permit form is the appropriate form for the required application under the Stream Protection Act. Idaho Code § 42-3803(d) and IDAPA Rule 37.03.07.30.02 authorize IDWR to eliminate detailed plans in those cases where an applicant intends to follow the minimum standards described in the rules. The lack of rules describing equipment size or type limits applicable to an expedited authorization process means IDWR and other state agencies could not evaluate the effect of any proposed suction dredge mining operation on stream channels other than through the Joint Application form and process.

C. Potential Impacts to Permitting – Scenario 1 and Scenario 2 Outcome B, Use of Joint Application Form for All Suction Dredge Proposals and Authorizations.

- **Increased Applicant Time:** IDWR estimates applicants spend about 10 minutes to complete a Letter Permit application. Applicants would likely spend 30 to 60 minutes or more to complete a Joint Application. The burden would likely increase the number of calls and questions submitted to IDWR.
- **Increased IDWR Staff Time:** Staff time for processing a Letter Permit is limited to receipting and data entry of the applicant's name, address, contact information, residency and name(s) of streams the applicant plans to dredge. Total processing time of the Letter Permit is generally less than ten (10) minutes. IDWR estimates that completing data entry for most suction dredge proposals from a Joint Application would increase processing time by 20 to 30 minutes per application, not including time for scanning and electronic filing. Additionally, staff will have to review each application to determine the location and type of proposed mining operation, and whether other agencies need copies for review and comment. This additional review may add another 10 to 30 minutes per application, depending on the location and complexity of the application.
- **Number of Joint Applications will Double:** IDWR received an average of 420 dredge mining Letter Permits and 390 Joint Applications over the past four years. Removal of the Letter Permit authorization will double the average number of Joint Applications received.
- **Approval Delays:** The IDWR Letter Permit is an immediate authorization with no agency comment process. The Letter Permit functions as a permit for both IDWR and IDL (when used on navigable rivers and state lands). Without the Letter Permit, IDWR may need to seek comments from IDL and other state agencies before approving a Joint Application. This may add 20 to 40 days to process a permit.

- **Fee Questions:** Idaho Code § 42-221M states that an application for “recreational dredge permits” is \$10 for state residents and \$30 for non-residents. The fee for all other applications (Joint Application) is \$20, regardless of residency. Resident and non-resident applicants using suction dredges and non-powered sluice equipment are well accustomed to IDWR’s permitting forms and requirements; they know what to expect. If all dredge miners must file the Joint Application, applicants will likely be confused and frustrated about the appropriate application requirements and fees. Residents would have to pay an additional \$10 fee, while non-residents would pay \$10 less. Local state gold clubs in recent years have advocated for a non-resident fee increase; this scenario would create the opposite result.

4. Other State Laws and Rules

IDWR’s minimum standard Rule 61.01 is aligned with other Idaho laws and rules including:

- IWRB Comprehensive State Water Plan and River Basin Plans
 - Idaho Code § 42-1734A authorizes designation of protected rivers, including designation of natural rivers. In designating a natural river, the board shall prohibit a number of activities including dredge or placer mining. In designating a recreational river, the board shall determine which activities prohibited under a natural designation shall be prohibited on a recreational river and may specify the terms and conditions under which activities that are not prohibited may go forward. *Idaho Code § 42-1734A (4) and (5)*.
 - The IWRB has designated a number of protected rivers in River Basin Plans that restrict dredge mining to the 5 inch/15 HP minimum standard limit described in Rule 61. Basin Plans with designated protected rivers that limit suction dredge mining consistent with Rule 61 include:
 - South Fork Clearwater River Basin
 - South Fork Snake River Basin
 - Upper Boise River Basin
 - Payette River Basin
 - North Fork Clearwater River Basin
 - Middle Snake River Basin
- Idaho Code § 47-703A (6) (a) and (b) – “Casual” and “Motorized” Exploration
 - “Casual exploration” means entry and/or exploration which does not appreciably disturb or damage the land or resources thereon. Exploration using suction dredges having an intake diameter of five (5) inches or less shall be considered casual exploration when operated in a navigable river. Casual exploration does not require submittal of plan and bond, or prior “written approval” from the land board.
 - “Motorized exploration” means exploration which may appreciably disturb or damage the land or resources thereon. Motorized exploration includes, but is not limited to, ... sampling with suction dredges having an intake diameter greater than five (5) inches when operated in a navigable river. Motorized exploration requires submittal of a dredge mining plan and bond, and “written approval” by the land board prior to exploration.
- IDEQ IPDES Permit/EPA NPDES Permit

- a. Current EPA NPDES General Permit authorizes dredge mining statewide for dredges less than or equal to 5-inch diameter nozzles and less than or equal to 15 HP.
 - i. Dredge miners must apply for a permit authorized under the EPA NPDES General Permit. There is no fee for the General Permit.
 - ii. Permits are typically obtained in less than 30 days, good for up to 5 years.
- b. The current EPA NPDES General Permit was issued by EPA in 2013, renewed in 2018, and is effective until 12/31/2022.
- c. The EPA NPDES General Permit transfers to IDEQ and becomes an IPDES permit on 7/1/2020. IPDES will apply the same regulations through 2022.
- d. Section 401 of the Federal Clean Water Act requires state certification for any general permit or license issued by a federal agency for an activity that may result in a discharge into waters of the U.S. IDEQ is responsible for issuing § 401 certifications in Idaho, and has issued a § 401 certification of the “general” EPA NPDES General Permit for small scale suction dredge mining in Idaho.
- e. An “individual” NPDES/IPDES permit is required for dredges greater than 5 inches, or for operation of dredges on rivers closed under the NPDES General Permit. According to IDEQ, “individual” permits cost up to \$4,000, depending on the river where the dredging activity is proposed. The fee is due if and when the permit is approved. The lead federal agency issuing the “individual” permit is the EPA except for Federal navigable rivers like the Salmon River, where the US Army Corps of Engineers is the lead agency.