

To: Idaho Department of Water Resources  
322 E. Front St.  
Boise, Idaho 83720-0098

From: Jann Higdem  
Coeur d' Alene Mining District

May 14, 2021

Re: Stream Channel Alteration Rules, Rule 61 – Minimum Standards for Suction Dredges and Non-Powered Sluice Equipment. IDAPA 37.03.07. The IWRB is negotiating these rules as part of its requirement to review each rule every 5 years consistent with the Governor's Zero-Based Regulation [Executive Order 2020-01](#).

Dear IDWR,

Thank you for the opportunity to partake in this Negotiated Rulemaking process. I offer my comments in multiple arenas: The E.O. 2020-01, the Legislative Intent of the Stream Channel Alteration and Dredge Mining Codes of Idaho, Conflicts between Idaho Codes, Basin Water Plans & IDAPA, and specifically on Rule 61.

#### E.O. 2020-01

The E.O. repeals & replaces E.O. 2019-02 the Red Tape Reduction Act. The ongoing review process for existing rules includes a mandatory retrospective analysis of the *rule chapter* to determine if the benefits of the rule are being realized, if those benefits justify the costs of the rule, and whether there are less-restrictive alternatives that could accomplish these benefits. Black's Law Dictionary defines "retrospective" as "Looking back; contemplating what is past" and "prospective" as "Looking forward; contemplating the future". The Division of Financial Management (DFM) was to develop a standardized process for the required retrospective analysis. The DFM has violated the E.O. by supplying state agencies with a Prospective Analysis form which is the converse of that mandated.

IDWR has submitted a DFM "Prospective Analysis" form. The Prospective Analysis contains sections: "Fiscal impact to the state General Fund, any dedicated fund, or federal fund", "Impact to Idaho businesses, with special consideration for small businesses" and "Impact to any local government in Idaho". IDWR's entries are unremarkable. Via the 2/26/21 Spackman/Weaver "Memo", IDWR did perform a very brief, somewhat myopic, retrospective analysis, which is not the same as the mandated DFM form.

The E.O. demands the agency determine if Rule 61 achieves the intended benefits. What *are* the intended benefits? Spackman claims they are solely to allow the dredger to use the Letter Permit instead of the Joint Permit. What about benefits to the environment? Do the regulations actually benefit the environment, or are they regulatory overreach? Do these benefits justify the associated costs? Spackman claims they do. The dredger saves \$10 and spends only 10 minutes instead of 30-60 filling out the paperwork and the staff will save 200 hours in processing. It is unclear how this estimate was derived, but in the 1/27 /2020 Spackman Memo to Sen. Crabtree, he states on page 5, "Total processing time of the Letter Permit is *generally* less than 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." An additional review of each application "*may* add another 10 to 30 minutes per application..." (emphasis added) Perhaps IDWR could use its IT staff to generate more efficient computer programs etc. It would almost retrospectively appear that IDWR was inadequately staffed and came up with the Letter Permit as a means to reduce their workload. If IDWR were to study dredge mining with a focus on the benefits (reclamation & improved fish habitat to combat climate change or temperature impairments), rather than sediment redistribution (in areas where there actually IS sediment as opposed to cobble), etc., it would seem that any cost to the dredger & IDWR via

permitting, is too much. Why is any IDWR permit mandated? If these dredges were intended to be regulated as harmful to the environment, they clearly would have been included in the Dredge Mining Act.

A cost not considered is the denial of the legal right to mine a claimed legally issued by the BLM. The dredger must annually pay \$160 per claim. The BLM acknowledges the “right to mine” and does not discriminate on perhaps arbitrarily “withdrawn” sections of waters, especially recreational waters. A review on the continued validity of withdrawn waters should take place and on a regular interval.

IDWR must consider if there are less-restrictive alternatives to accomplish the benefits. Spackman could find none other than possibly loosening the use of winches, but would likely require a separate permit for their acceptable uses & control. Spackman’s language appears to be discouraging any changes to powered equipment. He states some dredgers want to use winches to remove “large” boulders for safety’s sake. They actually want to remove rocks too heavy to humanly move (not necessarily “large boulders” which paints a different picture), because almost invariably there are gold pockets below them; hence additional income. IDWR has not identified the environmental harm that a winch poses below the mean high water mark.

### Legislative Intent

IDWR needs to consider the “legislative intent” of both the Dredge Mining Protection Act codes (IC 47-13) and the Alteration of Channels of Streams codes (IC 42.38). Both of these acts & codes pre-date computer history, so the legislative intent discussion cannot readily be found. The Dredge Mining codes pre-date the Alteration of Streams codes. Without benefit of knowing the legislative intent, it would appear that Idaho felt that the dredges of environmental concern were those very large dredges down to the suction dredges whose intake diameter exceeded 8 inches. Suction dredges with smaller intake diameters were already on the market, so if they felt these smaller intakes were of environmental concern, they would have included them. They did not.

The Alteration of Channels of Streams codes for small-scale suction dredging, within a questionable Title “Irrigation and Drainage-Water Rights and Reclamation” Title makes one wonder how this category of mining fits in with irrigation. The legislative intent of this act states, “The legislature of the state of Idaho hereby declares that the public health, safety and welfare requires that the stream channels of the state and their environments be protected against alteration for the protection of fish and wildlife habitat, aquatic life, recreation, aesthetic beauty, and water quality.” IDWR has determined that small-scale suction dredge mining alters streams in a way that fails to protect these. Seemingly the decision is based on the definition of “alter” (to obstruct, diminish, destroy, *alter*, modify, relocate, or change the natural existing shape or direction of water flow of any stream channel within or below the mean high watermark thereof.). It is unclear which of these words/phrases IDWR is relying on for its jurisdiction, yet it chooses to regulate the industry through not one, but two permitting processes: a Stream Channel Alteration Permit (Joint) and a Letter Permit (One Stop). What legal process created the Letter Permit that IDWR uses today? What was the legislative intent for small-scale suction dredge mining? Exactly how does this mining actually “alter” a stream channel, especially considering spring run-offs that naturally create the channels? There is no clear path that shows why IDWR should have jurisdiction over this industry, which could easily have been included in the Dredge Mining codes, but seemed to feel that dredges with 8 or less inch diameter insignificantly affected the environment, or streambeds.

### Idaho Codes v. Basin Water Plans v. IDAPA

Both the Idaho Codes and Basin Water Plans have become “law” by approval of the Idaho legislature. They would then seem to have the same “standing” in law, which is secondary only to the Idaho Constitution. IDAPA Rules were also approved by the legislature, but are subsidiary to the laws & Constitution. IDAPA Rules have previously generally accepted in one mass omnibus document presented to the legislature and in such a volume that no one person could possibly ever read & absorb them all and have questions answered. The legislature was given summaries of the Basin

Water Plans, which often seem to have cherry picked and sometimes misrepresented the data within the actual plans. In essence, many have been unfairly ramrodded through a trusting legislature.

Depending on dates of the water plans, certain definitions differ. Examples: The 1995 Priest River Plan discusses placer & dredge mining, but the glossary defines it as “any dredge or other operation to recover minerals with the use of a dredge boat or sluice washing plant whether fed by bucket line or separate dragline of any other method. This could include, but is not limited to, suction dredges which are capable of moving more than 2 cubic yards per hour of surficial material.” which is IC 42.1731(4). It has no definition for recreational dredge mining. Yet, the 1993 Snake River Milner Dam-King Hill Plan states the same, and defines Recreational dredge mining as “dredge mining in which the nozzle is 5 inches or less, and moves less than 2 cubic yards per hour. So does the 1996 Snake River Plan. The 1999 Payette River Plan has the same placer/dredge mining definition as well as a recreational dredge mining definition but is “the operation of vacuum or suction dredges and power sluice equipment in which the nozzle is 5 inches or less, and the equipment rated at 15 horsepower or less, and capable of moving 2 cubic yards or less.” The above are all “law” and have conflicting definitions that should be revised to a single definition for the sake of consistency.

None of the plans show the formula and the weighting of the various components of how the various “protected” rivers & streams came to be seemingly forever labeled as “natural” or “recreational”. Natural is basically the state’s term for the federal term “Wild” and is similar to Wilderness or “not trammled by man”. Recreational is the state’s term for the federal term “Scenic” or “less trammled by man” and is considered outstanding in many ways and might include some man-made development within the waterway or riparian area near the waterway. The IWRB’s designation of every protected water identically follows the NPS’s list of Proposed Wild & Scenic rivers/streams in Idaho. Why? Small-scale suction dredge mining (aka recreational dredging) is banned in recreational waters. Exactly why is recreational dredge mining banned in recreational rivers/streams? The IWRB offers no explanation as to how this was decided. Was the decision based on a FEIS from an Idaho agency; a California agency, or no FEIS at all? Does the Board possess any peer-reviewed studies that look at the beneficial impacts of small-scale suction dredging in the areas of 1) reclaiming mercury, lead, lead artifacts such as fish hooks, and a host of other items deposited in the waters by other recreational users, and 2) deeper pools with cooler waters created and disturbed nutrients the fish immediately seek out? The pools are a temporary antidote to climate change for fish survival, until the spring run-off fills in the pools. It appears an arbitrary decision was made by the Board and the exclusion of recreational dredges in recreational waters must be reviewed for potential governmental overreach beyond the legislative intent of the Dredge Mining Act.

#### Rule 61

IDAPA 37.03.07.61 is Rule 61. the 1999 Payette Basin Plan says on page H-1, “In 1971 the Idaho Legislature enacted the Stream Channel Protection Act, requiring permits for *most* stream channel alterations...In 1980 the Department streamlined the process by developing a “one Stop Permit” for recreational suction mining.” I am unable to locate the “legal genesis” of this Permit, such as Negotiated Rulemaking. It appears to be a backdoor Policy-turned-Law. According to the 1/27/20 Spackman Memo to Sen. Crabtree the current Stream Channel Alteration Rules were adopted in 1993, after negotiated rulemaking in 1992. “The 5inch nozzle diameter/15 HP standard was a consensus agreement between IDWR, the dredge mining community, state and federal agencies and other interested stakeholders.” “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 61.01.” (emphasis added) It is my understanding from other dredgers that a Riggins, Idaho dredge miner who was member of the Idaho Gold Prospectors Association and dredge designer & manufacturer of various sizes, was instrumental in the 5/15 “consensus” on behalf of at least the mining community. He had professionally determined that his company could earn a higher profit from manufacturing the 5/15 than any other size. In an 11/16/2017 Memo from Tim Luke to the IWRB, Luke stated, “However, most operators working in Idaho rivers like the SFCR, on average, move about 1 to 1.5 CY per day using a 4 to 5 inch nozzle dredge and no more than 1.75 CY per day when working hard in good conditions with a 5 inch nozzle dredge. 31” The footnote stated, “Trees, Alan. Personal communication. November 7, 2017.” Did he have a vested interest in pursuing the 5/15 and did the others within the consensus know this?

The 1999 Payette Basin Plan mentions that the Idaho Gold Prospectors Association “stressed that regulated suction dredge mining would have little to minimal impacts, while most research has reported on the impacts of unregulated activities.”

The document goes on to say a review of some of this literature included a 1994 California Fish & Game Final Environmental Impact Study (FEIS) which explained the degree of impact to the rivers/streams was based dredge size, size of the water body, comparison of the dredge & water body size, the density of dredges and the amount of fine material dredged. It stated that regulations would need to consist of seasonal or permanent closure for reaches with special status fish species, establishing dredging seasons that avoided interference with critical spawning periods of fish, no dredging into the stream bank, no damage to woody riparian habitats, conditions on the use of winches, restrictions on the size of nozzle intake, prohibiting the damming or obstructing of a stream, prohibiting stream diversions into a stream bank, and finally prohibiting importing earth material into water. “These conditions are currently part of the One Stop Permit.” Why did IDWR use another state’s data to regulate small-scale suction dredge mining, and not its own? Again, absent any rulemaking, it appears that the One Stop Permit is a policy which eventually became Rule 61.

**I support the rescission of Rule 61 in toto, with NO replacement. Small-scale suction dredge mining does NOT need to be regulated. If the legislature had wanted it to be regulated, they would have included it in the Dredge Mining Protection Act. The definition of “alter” must be legislatively revised because suction dredge mining does not permanently alter a stream channel. Small-scale suction dredging is far more beneficial than destructive to the environment. The dredges have reclaimed the waters by removing other pollutants (metals & recreational users refuse) and creating a nutrient-rich cooler habitat for aquatic species.**

Respectfully submitted,  
Jann Higdem