

Weaver, Mathew

From: Jonathan Oppenheimer <joppenheimer@idahoconservation.org>
Sent: Tuesday, June 22, 2021 3:41 PM
To: Weaver, Mathew
Cc: Golart, Aaron; Thorneycroft, Kensie
Subject: Follow up comments - Rule 61

Dear Mr. Weaver-

I have appreciated the opportunity to engage in the discussion re: Rule 61 on behalf of the Idaho Conservation League.

While I recognize that some dredge miners would prefer less regulation, less oversight, less monitoring and less accountability, it appears to me that IDWR must base its decisions on best available science, must justify decisions on well-supported rationale and cannot simply remove rules because people don't like them.

In this instance, I have seen no rationale, basis or justification for the proposed changes. The IDWR has failed to demonstrate how the agency can better meet its statutory duties by loosening existing rules and restrictions related to suction dredge mining and moving large rocks in stream channels. Specifically, IDWR has authority under Title 42, Chapter 38, Idaho Code, to regulate the alteration of stream channels for the health, safety and welfare of the public and to protect stream channels from alteration for protection of fish and wildlife habitat, aquatic life, recreation, aesthetic beauty, and water quality. IDWR has failed to provide any justification for this proposed rule change and why or how it will be more effective in protecting sensitive riparian areas from the damage associated with suction dredge mining and other stream alteration. Further, IDWR has failed to provide any meaningful analysis as to how the proposed changes better protect the aforementioned values: fish and wildlife habitat, aquatic life, recreation, aesthetic beauty, and water quality. Based on the extensive information associated with in-stream mining, increased intensity, increased movement of stream substrate and increased disturbance will only exacerbate the negative effects.

In particular, IDWR could not provide any information as to what existing impacts are currently occurring from winching (Mr. Weaver and Mr. Golart indicated at a meeting that they thought come-alongs or hand-operated winches may be used during dredge mining).

Existing rules prohibit cables or ropes from being strung across the channel. How could a winch operate without obstructing the free navigation of the channel? No analysis or input was provided by the Idaho Department of Lands related to the Public Trust responsibilities to protect navigation, fishing and other protected public trust uses. No analysis or disclosure was provided that existing regulations or protections are protecting public trust values, which includes fish and their habitat. To boot, no rationale was provided as to the effectiveness of avoiding take of endangered species, to the contrary, NOAA Fisheries stated, "these rules promoting instream suction dredge mining and its discharge of metals and sediment pollutants are expected to cause take of ESA-listed salmonids and degradation of their critical habitat. Section 9 of the ESA prohibits the unpermitted take of listed species and destruction of their designated critical habitat."

As a result, the Idaho Conservation League feels that to advance the proposed rule changes would be inconsistent with IDWR's statutory and regulatory obligations, fails to uphold the IDL's public trust responsibilities and increases the liability that the State of Idaho could face as a result of Endangered Species Act violations.

Please don't hesitate to contact me if you have any questions or need any clarification.

Sincerely,
Jonathan

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Jonathan Oppenheimer
External Relations Director
he/him ([what's this?](#))

Idaho Conservation League
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Weaver, Mathew

From: Golart, Aaron
Sent: Wednesday, June 16, 2021 2:22 PM
To: Jonathan Oppenheimer
Cc: Luke, Tim; Weaver, Mathew; Costello, Sean; Thorneycroft, Kensie
Subject: RE: IDAPA 37.03.07 SCA Rule 61 Strawman Draft v2.0

Jonathan,

We understand ICL's concern regarding expanding the use of winches and mechanical equipment and will consider addressing it in our revised rule. Please feel free to propose any rule modifications that may address ICL's concerns or may provide more clarity.

Thanks,

Aaron

From: Jonathan Oppenheimer [mailto:joppenheimer@idahoconservation.org]
Sent: Friday, June 11, 2021 2:53 PM
To: Golart, Aaron <Aaron.Golart@idwr.idaho.gov>
Cc: Luke, Tim <Tim.Luke@idwr.idaho.gov>; Weaver, Mathew <Mathew.Weaver@idwr.idaho.gov>; Costello, Sean <Sean.Costello@idwr.idaho.gov>; Thorneycroft, Kensie <Kensie.Thorneycroft@idwr.idaho.gov>
Subject: Re: IDAPA 37.03.07 SCA Rule 61 Strawman Draft v2.0

Thanks Aaron-

I appreciate that clarification, and I agree that cables, chains, ropes should be added to the definition equipment. As I recall, IDWR has previously mentioned that you believed that winches had been used in the past, and that they may have been considered legal, if the actual winch/come-along was located above the OHWM. As a result of this potential interpretation, ICL feels strongly that the definition of equipment should include all associated cables, chains, ropes or attachments.

Responding to your request for clarification on the last question: "Does IDWR have any information on the impacts associated with any previous dredging activities that may've included the use of a hand-operated winch (aka comealong, or other mechanical devices)?"

ICL is concerned that expanding the use of winches and mechanical equipment is not based on any evaluation of any existing effects from dredging and alteration of stream channels. If winches have been utilized, whether legal or not, IDWR should disclose any monitoring, effects analysis, or documentation associated with movement of stream substrate. Otherwise, it is unclear what the the decision to allow the use of powered equipment is based upon?

Have a great weekend,
Jonathan

On Thu, Jun 10, 2021 at 5:31 PM Golart, Aaron <Aaron.Golart@idwr.idaho.gov> wrote:

Jonathan,

In my opinion the current rule addressing mechanized equipment is a little ambiguous. I understand the rule as prohibiting mechanized hand-operated and powered equipment to alter the channel, even if the winch is located above the OHWM and a wire is attached to a boulder below OHWM.

Mechanized Equipment Prohibited Below High Water Mark. *There shall be no use of mechanized equipment below the mean high water mark except for the dredge itself, and any life support system necessary to operate the dredge.*

Someone may argue that the winch above the OHWM is the mechanized equipment and the wire itself is not mechanized, but it seems unreasonable to attempt to distinguish them as separate and independent of one another when utilized like this example.

We have not included clarification in the revised rule regarding chains, cables, ropes or other attachments.

I am unclear how to respond to your last question about impacts from using a mechanical device while dredging. That is a little broad in scope, maybe you could be more specific.

Thanks,

Aaron

From: Jonathan Oppenheimer <joppenheimer@idahoconservation.org>
Sent: Thursday, June 10, 2021 2:18:48 PM
To: Golart, Aaron
Cc: Luke, Tim; Weaver, Mathew; Costello, Sean; Thorneycroft, Kensie
Subject: Re: IDAPA 37.03.07 SCA Rule 61 Strawman Draft v2.0

Thanks Aaron-

But my understanding was that IDWR previously did not interpret the previous Mechanized Equipment Prohibition to limit the use of hand-operated winches, if the winch itself were located above the OHWM. Is there somewhere in the revised rule that clarifies that equipment includes chains, cables, ropes or other attachments?

And as I've noted previously, a hand winch operates with assistance of mechanical power. While not motorized power, the mechanical components of a winch exceed "human strength."

Does IDWR have any information on the impacts associated with any previous dredging activities that may've included the use of a hand-operated winch (aka comealong, or other mechanical devices)?

Thanks,
Jonathan

On Wed, Jun 9, 2021 at 5:12 PM Golart, Aaron <Aaron.Golart@idwr.idaho.gov> wrote:

Jonathan,

Correct, as the Rule is currently drafted there can be no attachments to a powered device to alter the stream channel below the OHWM. For example, a miner could not have a powered winch above the OHWM and string a cable below the OHWM into the river channel to move boulders and rocks. The winch would need to be non-powered and operated by only human strength.

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From: Jonathan Oppenheimer [mailto:joppenheimer@idahoconservation.org]

Sent: Wednesday, June 9, 2021 5:01 PM

To: Luke, Tim <Tim.Luke@idwr.idaho.gov>

Cc: Weaver, Mathew <Mathew.Weaver@idwr.idaho.gov>; Costello, Sean <Sean.Costello@idwr.idaho.gov>; Golart, Aaron <Aaron.Golart@idwr.idaho.gov>; Thorneycroft, Kensie <Kensie.Thorneycroft@idwr.idaho.gov>

Subject: Re: IDAPA 37.03.07 SCA Rule 61 Strawman Draft v2.0

Thanks Tim-

A clarifying question for you, Mat and others.

Does IDWR interpret the prohibition on powered equipment below the OHWM to include ropes, cables, chains or other attachments to the powered device?

Let me know.

Thanks,

Jonathan

On Wed, Jun 9, 2021 at 4:50 PM Luke, Tim <Tim.Luke@idwr.idaho.gov> wrote:

Good Evening,

Please find attached the IDWR Stream Channel Alteration Rule 61 Draft Strawman proposal version 2.0. At the public rulemaking meeting last week, IDWR committed to get this revised strawman version sent to interested stakeholders today. Please note that the changes highlighted in yellow are changes from version 1.0 to version 2.0. The version 1.0 changes remain in red font (not highlighted).

We ask interested parties to review version 2.0 edits and submit written comments to IDWR by June 23. Please send written comments to rulesinfo@idwr.idaho.gov

or to Kensie Thorneycroft at kensie.thorneycroft@idwr.idaho.gov .

IDWR requested the Office of Information Technology to post the following documents to our website by close of business today:

- April meeting attendance roster
- June meeting attendance roster
- June meeting audio file
- Pat Finnegan June 2 comments
- Gary Bowling June 2 comments
- June 3 Stakeholder Email Notice
- Strawman v2.0

IDWR staff is working towards completing a summary of comments from interested parties who participated at the first and second public meetings. We anticipate posting those summaries to our website sometime next week. Please note that the audio recordings, written comments from interested stakeholders, and other related documents may be found on our website at <https://idwr.idaho.gov/legal-actions/rules/stream-channel-rules.html>

Thanks again for your ongoing participation in this rulemaking process.

Best Regards,

Tim Luke

Idaho Department of Water Resources

Water Compliance Bureau Chief

tim.luke@idwr.idaho.gov | 208-287-4959

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Jonathan Oppenheimer
External Relations Director

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