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June 10, 2019

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Submitted via email: paula.wilson@deq.idaho.gov

**Re: DEQ Negotiated Rulemaking - Ore Processing by Cyanidation,
Docket No. 58-0113-1901**

Dear Ms. Wilson:

The Idaho Mining Association (IMA) appreciates the opportunity to provide comments to the presentation IDEQ provided at the May 31, 2019 concerning the subject rulemaking. We appreciate the effort by IDEQ to accommodate IMA's request to incorporate a process in the current Cyanidation Rule (IDAPA 58.01.13) to allow an operator to propose a performance-based alternative design for cyanidation facilities that varies from the prescribed design for such facilities in the current rule but which would otherwise be protective of human health and the environment. We offer the following comments to some of the critical issues raised at the May 31 meeting.

1. New Section 201. IMA is generally supportive of the approach suggested by IDEQ of adopting a new section (201) in the Rule which describes the process and requirements an operator must follow to request an alternative performance-based design for cyanidation facilities. However, we offer the following comments to some of the requirements IDEQ suggested including in Section 201.

IDEQ proposes to require that an operator requesting an alternative design include a "hydrogeology assessment" and an "engineering assessment" as part of such a request. IMA is unclear what the scope of such assessments might be since they are undefined in the Rule and are not otherwise required under the current Rule. We would like to discuss the scope and intent of these assessments at the next rule-making meeting.

In terms of a "water quality assessment" we assume that means the operator would need to demonstrate that its alternative design will comply with state ground water and surface water quality standards. Similar to our comment above, since a "water quality assessment" is not defined in the Rule or otherwise required in the current Rule, we would like to discuss the scope and intent of this assessment at the next meeting.

Further, to the extent that IDEQ believes a cost recovery section needs to be included in the proposed new Section 201, to allow IDEQ to recover from an operator the costs of hiring a qualified 3rd party to review an alternative design, IMA has no objection to such a provision.

IDEQ proposes to also include in Section 201 a requirement that an Operator must demonstrate that an alternative design is “equally protective.” We are not clear what is intended by such a requirement, but assume IDEQ means that an operator must demonstrate that an alternative design is “equally protective” to the design criteria specified in the existing Rule at IDAPA 58.01.13.200.03. Since no facility has been constructed in Idaho utilizing the design criteria in Section 200.03, we are not aware of any information or data which demonstrates how protective the currently prescribed design might be in practice. Further, as discussed in more detail below, we do not believe there were any studies or data utilized by IDEQ in 2005 when the existing Rule was adopted which demonstrated what the performance standard would be for the design specified in Section 200.03. Thus, we are not clear how an operator would demonstrate through objective evidence that an alternative design is “equally protective” and are therefore concerned that a decision whether an alternative design is equally protective could be very subjective. IMA believes a better standard in the new Section 201 would be a demonstration by an operator that an alternative design will comply with state ground water and surface water quality standards. The state water quality standards are objectively based criteria that can be predicted (through modelling), measured and monitored. Furthermore, IMA believes that compliance with water quality standards is ultimately the goal of the entire Rule to ensure protection of human health and the environment. Therefore, IMA requests that IDEQ delete any requirement in Section 201 which requires an applicant to demonstrate that an alternative design is equally protective.

2. The Application of Section 39-107D to the subject Rulemaking. IMA disagrees with the suggestion by IDEQ that the current Rulemaking (premised upon IMA’s request) is governed by the requirements of Idaho Code Section 39-107D. It is important to note that Section 107D is taken almost verbatim from the Safe Drinking Water Act (SDWA), 42 USC Section 300g-1(b)(3) which requires EPA to utilize “best available science” and undertake “risk assessments” when the agency promulgates numeric drinking water standards (MCLs) and drinking water goals (MCLGs). The SDWA makes clear that the best available science requirement only applies to EPA’s promulgation of drinking water standards. We believe the Idaho Legislature had a similar intent when it passed Idaho Code Section 39-107D, namely, that it applies when the agency adopts a numerical standard that is otherwise more stringent than standards required by federal law. The requirements of Section 107D concerning IDEQ identifying best available peer reviewed science and the evaluation of the effect of standards on public health which supports a rule make little sense if the subject of a rule is not related to a numerical standard. IMA’s proposed alternative design process in the subject rulemaking illustrate this point.

The IMA is not proposing a specific design in the proposal, nor is IMA proposing a different numerical standard related to public health or the environment, rather all that is proposed is a process to demonstrate that an alternative design will protect human health and the environment. IDEQ ultimately will have the discretion whether to approve such an alternative design. There is no “peer reviewed” science and supporting studies that evaluates a process (which is dependent

upon a variety of site-specific factors). Indeed, it is hard to imagine how a process to approve an alternative design in the abstract would be subject to peer reviewed science or data. Furthermore, a rule describing a process is not “based on science” within the meaning of Section 107D. Rather, implementation of the process by IDEQ may involve IDEQ utilizing science based on a variety of site-specific factors. However, Section 107D does not apply to IDEQ implementing a rule while utilizing science.

In summary, IMA does not believe the alternative design process is (or could be) subject to the requirements Idaho Code Section 39-107D. IMA is concerned that IDEQ is establishing a near impossible bar to modify its existing rule if IMA is required to provide data, case studies and peer reviewed science to support a process in the Rule. We do not believe this is what the Legislature intended in Section 107D and therefore we do not believe Section 107D applies to IMA’s proposed rule change or IDEQ’s proposed Section 201.

Alternatively, to the extent IDEQ insists that any rule change must meet the requirements of Section 107D, we believe IDEQ’s prior Section 107D statement supporting the Rule in 2005 should be applied to any amendment to the Rule. In 2006 IDEQ notified the Idaho Legislature that the best available data and peer reviewed science and supporting studies requirements in Section 107D were satisfied because the 2005 Rule was modelled after the state of Nevada regulatory requirements. As IMA’s proposal makes clear its alternative performance-based design is premised on Nevada’s regulatory requirements. Therefore, we believe IDEQ can again meet the intent of Section 107D by reliance on Nevada’s standards, particularly since Section 107D has not been changed or modified since 2005. Moreover, as IMA has previously pointed out and which has been discussed during the subject rulemaking, the IDEQ current rule does not distinguish between various cyanidation facilities, and the current design requirements are not well suited for tailing storage facilities (TSFs) that receive large volumes of tailings with low levels of cyanide. Although IDEQ did not make any distinction between facilities in 2005 when promulgating the current Rule, Nevada did make such a distinction back in 2005 and allowed alternative design proposals for TSFs. Thus, were IDEQ to adopt an alternative design proposal as is currently being considered in Section 201, the prior Section 107D statement would be more accurate.

3. Additional Studies. IDEQ has suggested that IMA must provide studies and data to support a Rule change based on Section 107D. We believe such a requirement is not appropriate since it does not appear that any such studies and data were utilized by IDEQ when it adopted the Rule in 2005 and Section 107D should not apply to the proposed Rule change. To the extent Section 107D applies to the Rule change, IMA should not be held to a different standard. Nevertheless, IMA has attempted to gather additional information to support a process which allows alternative designs (especially for TSFs). To this end, a number of engineering firms have provided specific examples to IDEQ in which alternative designs of TSFs (which vary from IDEQ’s current design) have been approved by regulators in other states (particularly Nevada). The engineering firms have also identified ways in which the prescribed design both differs from current best practice and may actually be counterproductive. Rather than having engineering firms further describe how alternative designs have been approved and performed in other states, it might make sense for IDEQ to coordinate with Nevada regulators about how the Nevada process has worked.

IMA remains committed to working with IDEQ to establish a workable alternative design process which protects human health and the environment, and we are hopeful we can accomplish this effort in 2019.

Sincerely,

A handwritten signature in blue ink, appearing to read "BJD", with a large, sweeping flourish above the letters.

Benjamin J. Davenport