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A. Kenneth Dunn, Director  
Idaho Department of Water Resources  
STATEHOUSE MAIL

THIS IS NOT AN OFFICIAL ATTORNEY GENERAL OPINION  
AND IS SUBMITTED SOLELY TO PROVIDE LEGAL GUIDANCE

Dear Mr. Dunn:

You have requested guidance on whether the Idaho Dam Safety Act, I.C. §§ 42-1710 to 1721 ("Act"), applies to impoundment structures of waste water treatment and/or storage facilities which meet the literal statutory definition of a "dam" under the Act.

CONCLUSION:

The Act applies to impoundment structures of waste water treatment facilities that come within the definition of dam in I.C. § 42-1711(b).

STATUTORY ANALYSIS:

A "dam" is broadly defined by I.C. § 42-1711(b) as:

[A]ny artificial barrier, together with appurtenant works, constructed for the purpose of storing water or that stores water, which is ten (10) feet or more in height from the natural bed of the stream or watercourse at the downstream toe of the barrier, as determined by the department, or from the lowest elevation of the outside limit of the barrier, if it is not across a stream channel or watercourse, to the maximum water storage elevation, or has or will have an impounding capacity at maximum storage elevation of fifty (50) acre feet or more.

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A determination of whether this statute encompasses impoundment structures of waste water facilities must be guided by established principles of statutory construction. First, the literal wording of the statute must be examined. If the language is unambiguous, then the plain meaning controls. If, on the other hand, the statute is ambiguous, then other matters "such as the context, the object in view, the evils to be remedied, the history of the times and of the legislation upon the same subject, public policy, contemporaneous construction, and the like" will be considered. Local 1494 of the International Assoc. of Firefighters v. City of Coeur d'Alene, 99 Idaho 630, 639, 586 P.2d 1346 (1978), citing In re Gem State Academy Bakery, 70 Idaho 531, 224 P.2d 529 (1950).

The statutory language appears to be clear and unambiguous, and to comport with the basic legislative directive that "[a]ll dams . . . in the state are under jurisdiction of the department of water resources." I.C. § 42-1710 (emphasis added). Section 42-1711(b) is not limited to structures within a stream channel or watercourse.

Further, the definition of a dam in I.C. § 42-1711(b) excludes only certain structures: "No obstruction in a canal used to raise or lower water therein or divert water therefrom and no fill or structure determined by the department to be designed primarily for highway or railroad traffic shall be considered a dam." In a case such as this, the statutory construction rule of "expressio unius est exclusio alterius" is applicable; this means that where a statute specifies certain things, the designation of such things excludes all others. Local 1494, 99 Idaho at 639; Peck v. State, 63 Idaho 375, 120 P.2d 820 (1941). Therefore, under the "expressio unius" rule, the listing of specific exceptions to the definition of a dam means that there are no other exceptions to the general definition.

Our conclusion -- that the Dam Safety Act applies to waste water impoundment facilities -- is bolstered by considering the purpose of the Act, which is to provide public safety from the dangers of dams that are improperly built or maintained. I.C. § 42-1710 provides as follows:

It is the intent of the legislature by this act to provide for the regulation of construction, maintenance and operation of all dams, reservoirs and mine tailings impoundment structures exclusively by the state to the extent required for the protection of public safety. All dams,

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reservoirs and mine tailings impoundment structures in the state are under jurisdiction of the department of water resources. The department of water resources, under the police power of the state, shall supervise the construction, enlargement, alteration, repair, maintenance, operation and removal of dams, reservoirs and mine tailings impoundment structures for the protection of life and property. (Emphasis added).

This purpose supports a broad rather than a narrow definition of a dam. There is nothing in the Act or elsewhere to suggest that impoundment structures of waste water facilities that meet the statutory definition of a dam are not potentially dangerous to the public and are therefore not intended to be regulated by the Act.

The sparse legislative history of the Act does not suggest any interpretation other than the plain meaning. No legislative history is available for the original Act in 1969, and the 1974 amendments made only technical changes related to the reorganization of the department of water resources. Idaho Session Laws, ch. 20, § 11, p. 533.

In 1978, the "mine tailings impoundment structure" language was added to the Act. Idaho Session Laws, ch. 309, § 3, p. 785 (1978). Representative Chatburn had stated that "regulatory authority for unit farm construction standards, maintenance inspection or long term maintenance responsibility for these [tailings] ponds does not exist." House State Affairs Committee Minutes, March 9, 1978. The sponsor for the mine tailings amendments, Representative Ingram, later echoed the same sentiments. House Resources and Conservation Committee Minutes, March 11, 1978. Therefore, these tailings impoundments are now expressly included in the Act. These comments suggest that the legislative understanding of the Act was that the definition of dam is not as broad as is suggested by the language in the statute. However, this statement could also mean that the legislature was concerned with long-term maintenance of tailings dams since a dam at an inoperative or spent mine is more likely to be abandoned than a dam at an irrigation reservoir. Furthermore, in 1978, the language "constructed for the purpose of storing water or that stores water" was added to I.C. § 42-1711(b), apparently broadening the definition of dam to include anything that stores water. Thus, the two amendments offset one another and do not add to the interpretation of the statute.

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The original 1969 Act was modeled after an early draft of the Model Law for State Supervision of Safety of Dams and Reservoirs (1968), drafted and published by the United States Committee on Large Dams of the International Commission on Large Dams ("Model Act"). The introduction to the Model Act says nothing about the kind of impoundments it was designed to apply to other than stating that "[t]he definition of a dam subject to jurisdiction ... is expected to vary, state by state, to meet each state's individual needs." Model Act at II. Thus, this Model Act does not assist in the interpretation of the Act either.

It is therefore our opinion that if a structure is (1) an artificial barrier that (2) was constructed to store water, or stores water, and (3) meets the minimum size requirements, it is under the jurisdiction of the department of water resources regardless of what kind of water it impounds.

Please do not hesitate to contact me if you should have any further questions on this matter.

Very truly yours,



Steven J. Schuster  
Deputy Attorney General  
Natural Resources Division

SJS/paw