



May 29, 2018

Via Certified Mail, Return Receipt Requested

John Tippets, Director
Idaho Department of Environmental Quality
1410 N. Hilton
Boise, ID 83706

David Groeschl, Acting Director
Idaho Department of Lands
300 N. 6th St., Suite 103
Boise, ID 83702

**Re: Sixty-Day Notice Of Intent To Sue For Clean Water Act Violations
For Discharging Arsenic And Other Pollutants From The Triumph
Mine To The East Fork Big Wood River Without A Permit**

Dear Directors Tippets and Groeschl:

I write on behalf of my client, the Idaho Conservation League (“ICL”), to provide notice of ICL’s intent to initiate a federal court citizen lawsuit against you, in your official capacities with the Idaho Department of Environmental Quality (“DEQ”) and Idaho Department of Lands (“IDL”), under Section 505 of the federal Clean Water Act (“CWA”), 33 U.S.C. § 1365. As set forth below, you (collectively referred to herein as the “State”) are discharging arsenic and other pollutants from the Triumph Mine site to the East Fork of the Big Wood River and nearby wetlands in Blaine County, Idaho, without a required National Pollutant Discharge Elimination System (“NPDES”) permit, in violation of CWA Section 301(a), 33 U.S.C. § 1311(a).

In the 1990s, because of high levels of contamination and risks to health and the environment, the U.S. Environmental Protection Agency (“EPA”) proposed cleaning up the Triumph Mine site under the national Superfund program. Instead of supporting Superfund cleanup, the State convinced EPA to let the State work with the responsible mining companies and lead the cleanup. Those mining companies are no longer involved at the site, and the State remains responsible for managing and cleaning it up. While the State has completed some cleanup tasks over the years, contamination remains, including from a mine adit and mine waste pile that continuously leak water contaminated with arsenic and other pollutants into a system of pipes and channels that discharge to wetlands and to the East Fork of the Big Wood River.

The State does not have an NPDES permit authorizing these ongoing pollution discharges to the East Fork of the Big Wood River and nearby wetlands. Last August, ICL raised its concerns about these illegal discharges with the DEQ and IDL. ICL has regularly followed up

with DEQ and IDL over the last nine months; however, the pollution discharges have continued and the State has refused to obtain and come into compliance with an NPDES permit.

Unless you take the steps necessary to remedy these CWA violations, ICL intends to file suit in U.S. District Court following the expiration of the 60-day statutory notice period, seeking declaratory and injunctive relief for your past and ongoing CWA violations, and for any additional similar violations identified subsequently.

ICL's Commitment to Improving Water Quality in the Big Wood River Watershed

Since 1973, the Idaho Conservation League has been Idaho's voice for clean water, clean air, and wilderness—values that are the foundation of Idaho's extraordinary quality of life. ICL works to protect these values through public education, outreach, advocacy, and policy development. As Idaho's largest state-based conservation organization, ICL represents around 30,000 supporters, many of whom have a deep personal interest in protecting and restoring water quality throughout the rivers and streams of Idaho, including the Big Wood River, through Clean Water Act enforcement and other means.

ICL has staff, board members, and supporters who live, recreate, and/or work in and around the East Fork of the Big Wood River and the Big Wood River, including near and downstream of your pollutant discharges from the Triumph Mine site. ICL staff, board member, and supporter interests are harmed by the State's unpermitted pollution discharges.

Furthermore, because of the importance of the Big Wood River to ICL and its supporters, ICL has invested, and continues to invest, significant organizational resources in protecting and enhancing the Big Wood River watershed and the ecosystems that depend on it. In recent years, ICL has invested organizational resources trying to address short- and long-term pollution problems at the Triumph Mine, including the unpermitted discharges at issue here, through public comments, site visits, and communications with the State.

The Clean Water Act's Prohibition On Discharging Pollutants Without A Permit

Congress enacted the Clean Water Act in 1972 to “restore and maintain the chemical, physical, and biological integrity of the Nation's waters.” 33 U.S.C. § 1251. To advance this goal, Section 301 of the federal Clean Water Act prohibits any “discharge of any pollutant by any person” to waters of the United States unless authorized by and in compliance with an EPA-issued NPDES permit. 33 U.S.C. § 1311(a); 33 U.S.C. § 1342.¹

“The centerpiece of the CWA is the NPDES permitting program.” *Am. Iron & Steel Inst. v. EPA*, 115 F.3d 979, 990 (D.C. Cir. 1997). NPDES permits must include conditions that will ensure compliance with the CWA. At a minimum, NPDES permits must include technology-based effluent limitation, any more stringent pollution limitations necessary to meet water

¹ At present, EPA issues Clean Water Act Section 402 discharge permits in Idaho through the NPDES program. However, the State has submitted a request to EPA to become authorized to administer the discharge permit program in Idaho.

quality standards, and monitoring and reporting requirements. *See* 33 U.S.C. §§ 1342, 1311 & 1318. Once regulated by an NPDES permit, pollution discharges must strictly comply with all of the terms and conditions of that permit. *EPA v. Cal. ex rel. State Water Resources Control Bd.*, 426 U.S. 200, 205 (1976).

The CWA defines “discharge” as “any addition of any pollutant to navigable waters from any point source.” 33 U.S.C. §1362(12)(A). The CWA defines “point source” to be “any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged.” *Id.* at 1362(14). The term “pollutant” is broadly defined in the CWA to mean “dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water.” *Id.* at 1362(6). The CWA defines “navigable waters” as “the waters of the United States.” *Id.* at 1362(7).

Federal courts have definitively ruled that the outfall from a mining-related pond is a point source. *See, e.g., Sierra Club v. Abston Construction*, 620 F.2d 41, 45 (5th Cir. 1980) (gravity flow may be part of point source discharge if miner initially collected or channeled the water and other materials); *U.S. v. Earth Sciences, Inc.*, 599 F.2d 368, 370 (10th Cir. 1979) (system of mining sump pumps, ditches, and hoses is a point source); *Consolidated Coal Co. Costle*, 604 F.2d 239, 249 (4th Cir. 1979) (point sources include mining slurry ponds, drainage ponds, and refuse piles); *Trustees for Alaska v. EPA*, 749 F.2d 549, 557–58 (9th Cir. 1984) (adopting *Earth Science*’s broad interpretation of “point source”); *Mokelumne River v. East Bay Util.*, 13 F.3d 305, 308 (9th Cir. 1993) (holding NPDES is required for “surface runoff that is collected or channeled”).

In addition, federal courts have been clear that waste rock piles, tailings dumps, and other disturbed lands at mine sites are point sources themselves because they act to collect and channel water contaminated by the waste. *See, e.g., Washington Wilderness Coal. v. Hecla Mining Co.*, 870 F.Supp. 983, 988 (E.D. Wash. 1994); *Sierra Club*, 620 F.2d 41 (point source may be present where miner designed piles of overburden such that, during precipitation, erosion results in a discharge by means of ditches, gullies, and similar conveyances, even if miner did nothing beyond mere collection of rock and other materials).

Pollution Discharges At The Triumph Mine Site

The Triumph Mine, located in Blaine County, Idaho, produced ore containing lead, zinc, and silver from 1882 to 1957. In 1988, DEQ assessed the mine site and found elevated levels of arsenic, manganese, and zinc in surface water. By 1993, EPA proposed adding the Triumph Mine site to the national Superfund list. EPA’s Superfund program is responsible for cleaning up some of the nation’s most contaminated land. After Triumph residents and the County opposed adding the site to the Superfund list, EPA and DEQ entered into a memorandum of agreement (MOA) giving DEQ remediation responsibility.

At the time of the MOA, Asarco Mining Company and IDL owned the land at the site. After remediation activities began, Asarco filed for bankruptcy and reached an agreement to pay DEQ \$1.675 million for remediation of lands they were responsible for, including discharge water from the Triumph tunnel. IDL retained responsibility for surface water contamination and arsenic dust pollution associated with the tailings pile.

DEQ and IDL have engaged in remediation, pollution prevention, and other activities at the Triumph Mine site. However, the mine site remains contaminated, and polluted water continues to flow from the site to the East Fork of the Big Wood River and nearby wetlands.

Figure 1 below is a Google Earth aerial image prepared by IDL with labels and drawings depicting the approximate locations of the State's pipeline for controlling polluted mine water from the site. Polluted water flows from the Triumph Mine tunnel out of the "Gated Adit" at a typical rate of approximately 5 gallons per minute. This water is piped into the "Surge Pond" and then enters a pipe that runs downhill to the "Y Junction". The other branch of the Y is fed by flows of polluted water from the "Permanent Pond." The Permanent Pond is perched on top of Triumph Mine lower tailings pile. At the Y Junction, water from the Gated Adit and water from the Permanent Pond combine and travel by pipe downhill toward the East Fork of the Big Wood River.

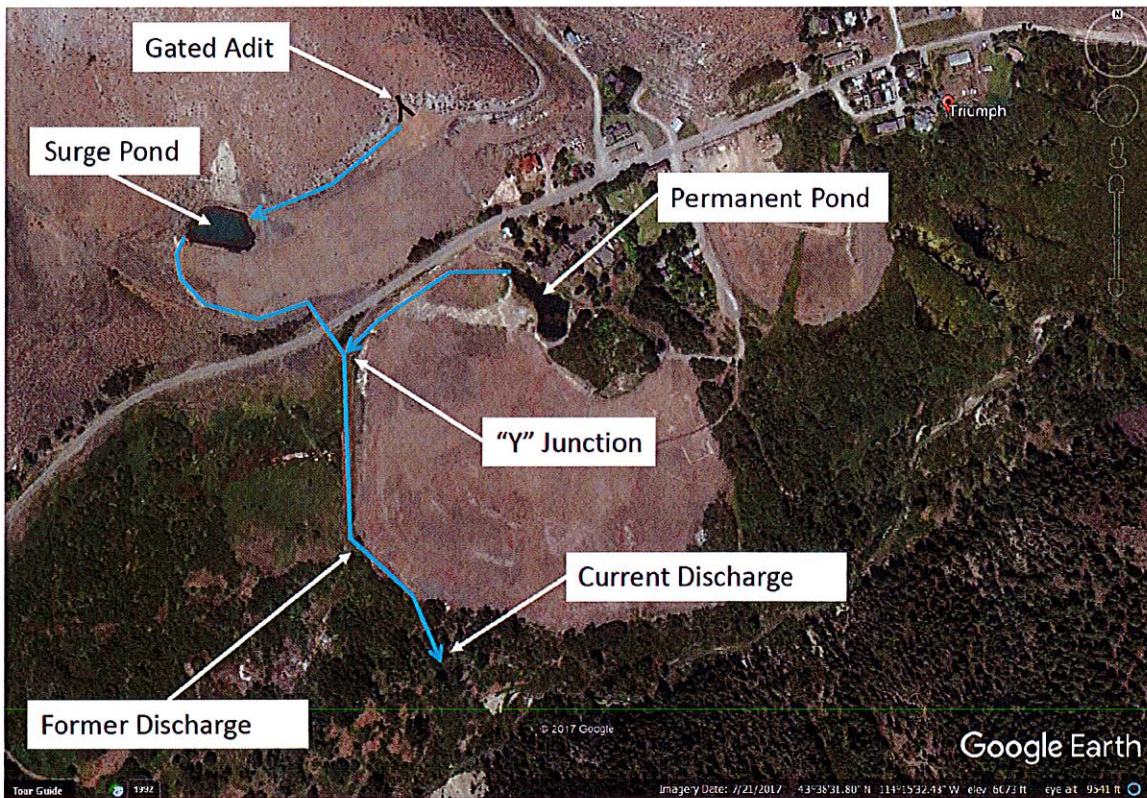


Figure 1. Satellite image of the Triumph Mine depicting approximate locations of the State's pipe system. Prepared by IDL and sent to ICL in IDL's November 3, 2017 letter.

At the bottom of the Y, the combined Adit and Pond water is discharged from the Y pipe at the “Current Discharge” location in Figure 1. At Current Discharge, polluted water exiting the pipes pools on the ground and, when water levels are high enough, flows through a channel that discharges into the East Fork of the Big Wood River.

ICL visited the Triumph Mine site two times in April 2017 in response to reports that visibly polluted water was running off of the tailings pile and flowing toward the East Fork of the Big Wood River. During both visits, water from the Permanent Pond was overflowing and running across the tailings pile to the base of the tailings pile. At the base of the tailings pile, orange water was pooling and traveling down a channel generally following the Y pipe system. This water joined the Y pipe discharge at Current Discharge and then flowed toward East Fork of the Big Wood River. Water quality samples taken of the pooled water at the bottom of the tailings pile and of the water flowing from the pool through the channel toward the East Fork of the Big Wood River (Image 1) had elevated levels of arsenic and cadmium.

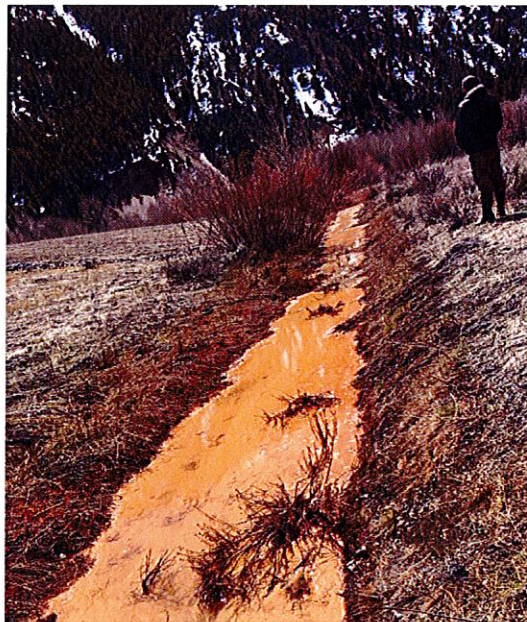


Image 1. Polluted water in channel at base of Triumph tailings pile flowing toward East Fork of the Big Wood River (April 22, 2017).

In June 2017, ICL toured the Triumph Mine site with representatives of IDL and DEQ. ICL, IDL, and DEQ viewed the Current Discharge area and observed muddy looking water exiting the Y pipe system, pooling, and continuing to flow from the pool through a channel to the East Fork of the Big Wood River (Image 2). Water samples taken from the pool at Current Discharge, from an exposed section of the Y pipe system upstream of Current Discharge, and from the channel below Current Discharge at the confluence of the Big Wood River all had elevated levels of arsenic, manganese, iron, and zinc.



Image 2. Water pooling at Current Discharge, which had elevated levels of arsenic, manganese, iron, and zinc, and water, and was observed flowing from the pool through a channel and into the East Fork of the Big Wood River (June 21, 2017).

In August 2017, ICL wrote to IDL raising, among other concerns with the site, that the State was discharging polluted water from the adit and tailings pond through its pipe and channel system into the East Fork of the Big Wood River without a permit. IDL responded by letter dated November 3, 2017 (Attachment 1). IDL said that it had replaced and improved portions of the pipe system, which IDL hopes will prevent the overland flow ICL observed and the suspected infiltration from the tailings pile during the April visits. IDL claimed it was previously unaware that water flowed from Current Discharge to the River and suggested that runoff of the high snowpack that year may be responsible for the flows.

Since November 2017, ICL has continued to visit the Triumph Mine site and continued to observe water exiting the pipe at Current Discharge, pooling, and then flowing through the channel toward the East Fork of the Big Wood River. *See, e.g.,* Images 3 & 4. ICL has also taken additional water samples, which continue to show elevated levels of arsenic, manganese, and cadmium at the Current Discharge pool and in the channel downstream near its confluence with the East Fork of the Big Wood River.



Image 3. Water in the channel below Current Discharge flowing toward the East Fork of the Big Wood River (March 27, 2018).



Image 4. About 10 feet from the East Fork, water with elevated arsenic levels flows in the channel under debris toward River (April 16, 2018).

The State's Clean Water Act Violations At The Triumph Mine

The State has violated, is continuing to violate, and will foreseeably continue to violate, Section 301 of the Clean Water Act, 33 U.S.C. § 1311(a), by discharging arsenic and other pollutants to the East Fork of the Big Wood River without an NPDES permit.

As described above, the State's Y-pipe and channel system at the Triumph Mine site collects and conveys water flowing out of the Gated Adit and the Permanent Pond. This water contains CWA "pollutants", including arsenic, cadmium, manganese, zinc, sediment, and may include additional regulated pollutants. Every day, or nearly every day, the State discharges the Adit and Pond water to a channel at the end of the Y pipe. On some days, flow in the channel below the Y pipe is high enough that the State's pipe and channel system discharges directly to the East Fork of the Big Wood River. On other days, when flows in the channel are lower, the State's pipe and channel system discharges to wetlands and other waters of the United States that make up the channel.

In addition to the water continuously flowing out of the Gated Adit and the Permanent Pond, the State conveys pond water, stormwater, snowmelt, and groundwater from the tailings pile area, which includes and surrounds the Permanent Pond. On days of precipitation and/or snowmelt, water from the tailings pile area is collected and flows overland to and/or infiltrates into the Y pipe and/or the channel below the Y pipe. This water contains pollutants and is discharged through the pipe and channel system directly to the East Fork of the Big Wood River on days with high enough flows and to wetlands and other waters of the United States in the channel system on other days.

These discharges are unpermitted, in violation of the Clean Water Act. The State has not applied for, received, and complied with a NPDES permit for these pollution discharges; however, the discharges are ongoing.

ICL further notes that your past and ongoing violations of the CWA are willful, knowing, and deliberate. Back in 1998, in the ROD approving DEQ's remediation plan for the site, EPA admitted that Adit and Pond water discharged to wetlands at the site eventually makes its way to the East Fork of the Big Wood River. Since observing such discharges in August 2017, ICL has been in regular communication with DEQ and IDL, urging the agencies to apply for an NPDES permit. And while ICL has continued to regularly visit and monitor the site and continues to find evidence of regular pollution discharges to the East Fork of the Big Wood River, the State still has not applied for an NPDES permit or ceased its pollution discharges.

ICL's Intent To Sue And Seek Injunctive Relief And Fees

As provided under the CWA's citizen suit enforcement provision, 33 U.S.C. § 1365, ICL is authorized to file federal court litigation against you for these ongoing violations of the CWA, and any similar violations ICL later discovers, following expiration of the 60-day notice period. 33 U.S.C. § 1365(b). The court may award injunctive relief as well as ICL's reasonable attorney fees and litigation costs incurred in prosecuting the action against you. *See* 33 U.S.C. §§ 1319(d) & 1365(a), (b) & (d).

Party Giving Notice

The full name, address, and telephone numbers of the party giving notice is:

Idaho Conservation League
Att'n: Dani Mazzotta
P.O. Box 2671
Ketchum, ID 83340
208.726.7485

Conclusion

If the State continues discharging arsenic and other pollutants to the East Fork of the Big Wood River and other waters of the United States without obtaining and complying with the terms of a valid NPDES permit, ICL intends file a Clean Water Act suit against you in your official capacities. We are providing this letter not only to comply with the CWA statutory notice requirement, 33 U.S.C. §1365(b), but also in the hope of preventing your ongoing and future violations of the Clean Water Act. One of the principal purposes of the CWA notice requirement is to allow parties to discuss resolution of claims short of litigation. During the 60-day notice period, Dani Mazzotta at ICL (contact info above) and I will be available to discuss alternative remedies and actions that might be taken to assure compliance in the future with the CWA.

Respectfully,



Bryan Hurlbutt, Staff Attorney
ADVOCATES FOR THE WEST
P.O. Box 1612
Boise, ID 83701
208.342.7024 x206

Attorney for Idaho Conservation League

Attachment 1: Nov. 3, 2017 IDL letter to ICL

Copies w/ Attachment Via Certified Mail:

Scott Pruitt, Administrator
Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

Chris Hladick, Regional Administrator
Environmental Protection Agency
Regional Admin.'s Office, RA-140
1200 Sixth Avenue
Seattle, WA 98101

Jim Wernitz, Director
Idaho Operations
Environmental Protection Agency
950 W Bannock Suite 900
Boise, ID 83702

Attachment 1

DIVISION OF LANDS AND WATERWAYS
RESOURCE PROTECTION & ASSISTANCE BUREAU
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FAX (208) 334-3698



TOM SCHULTZ, DIRECTOR
DAVID GROESCHL, DEPUTY DIRECTOR

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Sherri Ybarra, Supt of Public Instruction

November 3, 2017

Dani Mazzotta, Central Idaho Director
Idaho Conservation League
PO Box 2671
Ketchum, ID 83340

Justin Hayes, Program Director
Idaho Conservation League
PO Box 844
Boise, ID 83702

Re: Triumph Project

Dear Ms. Mazzotta and Mr. Hayes:

The Idaho Department of Lands (IDL) has met with the Idaho Department of Environmental Quality (IDEQ) to work on solutions to the concerns that you raised in your letter dated August 29, 2017. The purpose of this letter is to update you on progress that has been made since our on-site meeting. IDL is working to address the concerns in your letter as we continue to fulfill our requirements under the 1994 Consent Order and the 1998 Record of Decision.

One of the concerns expressed in your letter appears to be that the pipe from the permanent pond may have allowed leachate to infiltrate the pipe as a result of poorly constructed couplings and partial breakages. Additionally, because the pipe was partially clogged it could not convey enough water to prevent flow over the Lower Tailings Pile (LTP). In order to prevent pipe infiltration and water flow over the tailings next high flow season we have moved forward with replacement of the damaged pipe from the permanent pond to the "Y" connection noted in the attached Figure 1. Schedule 40 PVC was used to replace the HDPE corrugated pipe as recommended by our contractor. This eliminates the potential for water to infiltrate into the pipe and will prevent or reduce the water flowing over the reclaimed tailings and potentially infiltrating them. In addition to replacing the pipe we have installed several additional cleanouts for easier inspection and maintenance so that this situation can be avoided in the future.

As I imagine you are aware, the snowpack and runoff in 2017 was near historically high levels. Many of the tributary gulches that are normally dry in the spring were flowing in 2017 due to soil saturation and higher than normal groundwater. The Big Wood River flow of 5,770 cubic feet per second on May 7, 2017 has only been exceeded two other times

since 1916. Ground water and surface flows in this area are still above normal due to the spring 2017 runoff. The East Fork Big Wood River in October was twice the normal flow for that time of year. While the water flowing across the surface of the tailings may have increased infiltration into the tailings, flows of this volume and duration are rare and do not occur very often. In any case, replacing the pipe from the permanent pond will address the issue of water flowing across the tailings surface. Additionally, this has helped to lower the pond level thereby lowering the amount of water potentially infiltrating the tailings.

Another concern of yours is the lack of signage at the site. Signage is a sensitive issue at this site. Local residents have been quite vocal about the stigma of contamination, and this stigma led to the cleanup effort being transferred from the EPA to IDEQ. It can affect the residents' property values and ability to sell their properties. As a result, signage was not part of the approved remedial action that was publicly reviewed and commented on in the late 1990s. If past is prologue, signs warning about potential arsenic contamination would likely be opposed by the local residents.

However, your point is well taken and IDL is open to the possibility of signs that the residents would not object to. If you would like to propose something, IDL could help facilitate some community outreach. If a design was agreed to, then IDL might be able to purchase and install them. Installation would have to be on endowment land or other lands where we obtained permission from the landowner. Please see the Blaine County assessor's map service for information on current ownership. Freestanding signs, and not posts dug into the ground, would be preferred to minimize disturbance.

Regarding the discharge point, IDL and IDEQ never intended for the waters carried in the pipeline to discharge to surface waters. This pipe replaced an open ditch on the west side of the Lower Tailings Impoundment that existed from approximately 1950, when the LTP was constructed, to 1999, when the remedial action was implemented by IDL and ASARCO. The ditch ended near the southwest corner of the LTP and discharged to wetlands for almost 50 years. The adit drainage was the primary source of flow in the ditch. The adit water before 1999 carried higher flows with much higher concentrations of potential contaminants than the current discharge. Flows from the adit have greatly decreased and the water quality has improved since the initial plug installation in 2003. Further improvements are expected with the installation of the second plug in 2016. The pipelines constructed during the remedial action carry the adit water to the "Y" connection, the permanent pond drainage to the "Y" connection, and the combined waters from the "Y" connection to the wetlands south of the LTP. The pipeline along the west edge of the tailings impoundment is on private land just west of the state endowment land. The original discharge point of the pipe was on private land at the southwest corner of the LTP where the ditch formerly discharged to wetlands. Unfortunately, IDL and ASARCO

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neglected to obtain a permanent easement for the pipeline and discharge point prior to construction. The discharge point was then moved as part of a settlement with this landowner in 2008.

The spring of 2017 was the first time we have heard of water flowing down the former river channel to the East Fork of the Big Wood River as described in your letter. We are working with IDEQ to determine the best path forward to bring the discharge into compliance with the permit requirements of the Clean Water Act. As stated above, a solution to this issue is a complicated one that will likely take a considerable amount of time and effort before a suitable long term solution is identified and put in place. At this time IDL is actively working with IDEQ to develop that solution.

Thank you both again for the time and effort that you have spent identifying these issues at the Triumph Mine. We appreciate your feedback, patience, and cooperation as we deal with the site. If you would like to have a meeting to discuss any of the above in further detail, please feel free to give me a call me at 208-334-0261.

Sincerely,

A handwritten signature in black ink, appearing to read "Eric Wilson".

Eric Wilson
Resource Protection and Assistance Bureau Chief

Enclosures: Figure 1 of pipelines

cc: Rob Hanson
IDEQ State Office
Waste Management & Remediation Division
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Dave Tomten, EPA
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Boise, ID 83702
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Triumph, Lower Tailings Project
Pipeline locations are only approximate

