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DEPARTMENT OF
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BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF BIG WOOD RIVER GROUND WATER MANAGEMENT AREA	**MUNICIPAL PROVIDERS' POST-HEARING BRIEF RE "FULLY CONSUMPTIVE" ISSUE**
IN THE MATTER OF APPLICATIONS FOR PERMITS FOR THE DIVERSION AND USE OF SURFACE AND GROUND WATER WITHIN THE SNAKE RIVER BASIN	

The City of Pocatello, City of Bellevue, City of Hailey, City of Idaho Falls, City of Ammon, Coalition of Cities[1], Falls Water Co., Inc., Veolia Water Idaho, Inc. ("Veolia"), and Wellsprings Group, LLC (collectively, the "Municipal Providers"), by and through their respective counsel of record, file this post-hearing brief, as instructed by Director and Hearing

[1] The Coalition of Cities is composed of the Cities of Bliss, Burley, Carey, Declo, Dietrich, Gooding, Hazelton, Heyburn, Jerome, Paul, Richfield, Rupert, Shoshone, and Wendell.

Officer Mat Weaver at the conclusion of the October 16-17, 2023 hearing, on the issue of whether the *Amended Snake River Basin Moratorium Order ("Amended SRB Moratorium Order")* and *Order Establishing Moratorium* in the Big Wood River Ground Water Management Area ("*BWR Moratorium Order*") properly mandate that new municipal water uses be treated as fully consumptive.[2]

As discussed herein, the evidence presented at the hearing overwhelmingly showed that (a) municipal water use rarely (if ever) is fully consumptive, and (b) the Department can condition and administer new municipal water rights to ensure depletions are fully mitigated. Accordingly, it is error for the Department to treat new municipal uses as "fully consumptive."

INTRODUCTION

Prior to the October 2023 hearing in this matter, the Municipal Providers filed *Municipal Providers' Motion for Partial Summary Judgment* ("*Motion*"), along with supporting memoranda and affidavits.[3] For brevity, the *MSJ Opening Brief's* "Background" section is incorporated herein by reference. The Director denied the Municipal Providers' *Motion* on grounds that (1) "it would be very difficult . . . to track the consumptive fraction of water uses for municipalities or even subdivisions throughout the state," and (2) "enforcement concerns" related to curtailing drinking water supply. *Order Denying Motion for Partial Summary Judgment* ("*Order Denying MSJ*") at 6 (Oct. 12, 2023). The Department's witness at the hearing confirmed these reasons underlie the new "fully consumptive" policy. Tr. Vol. I, 33:19-34:15. He also testified that the policy is justified because of the "authority being sought" by a

[2] The *BWR Moratorium Order* and the *Amended SRB Moratorium Order* are together referred to as the "*Moratorium Orders*."

[3] *Municipal Providers' Memorandum In Support of Motion for Partial Summary Judgment* ("*MSJ Opening Brief*"), the *Affidavit of Maximillian C. Bricker in Support of Municipal Providers' Motion for Partial Summary Judgment* ("*Bricker Affidavit*"), and *Municipal Providers' Reply in Support of Motion for Partial Summary Judgment* ("*MSJ Reply Brief"*).

municipal water right applicant which includes the ability for a municipal water right holder to reuse municipal effluent to extinction. Tr. Vol. I, 100:23-101:3.[4]

In this matter, the Municipal Providers seek to have the Department evaluate new applications to appropriate a water right for municipal and domestic purposes on a case-by-case basis to determine the amount of expected consumptive use and the amount of mitigation required. Tr. Vol. I, 271:2-5; Tr. Vol. II, 518:21-25. This is accomplished if language in the *Moratorium Orders* is changed as requested in the *Motion*. *See* Conclusion, *infra*.

Based on the evidence and testimony presented at the hearing, and for the reasons set forth below, the Director should issue amended *Moratorium Orders* that replace the "fully consumptive" provisions with case-by-case language for municipal and domestic water right applications.

LEGAL STANDARD

The *Moratorium Orders* are "agency actions" under Idaho Code § 67-5201(4), which will be set aside by Idaho's courts if the agency's findings, inferences, conclusions, or decisions are determined to meet any of the standards described in Idaho Code § 67-5279(3). The Municipal Providers do not challenge the Director's authority to issue the *Moratorium Orders*,

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[4] The Surface Water Coalition's expert witnesses also argued that new municipal and domestic uses can be fully depletive "to the source," so it is reasonably conservative to treat them as fully consumptive. *See* Ex. 1 at 3-4. Testimony at the hearing, however, demonstrated that the Snake River system, both above and below ground surface, is hydraulically connected, and is presumed to be a single source until proven otherwise. Tr. Vol. I, 310-11; Tr. Vol. II, 332-33. The testimony is consistent with the law of the case from the SRBA:

> From the SRBA Commencement Order to this Basin-Wide Issue, the general interconnection of all waters in the Snake River System has been pled, supported by testimony and affidavit, and found by this court and the Idaho Supreme Court (*See* Appendix E). The finding in this regard is so well settled that any further provision on interconnection in the decree is redundant and unnecessary. . . . . Therefore, all water under the jurisdiction of the SRBA Court is interconnected, unless the party claiming otherwise proves by a preponderance of the evidence that the water is from a separate source.

Memorandum Decision and Order, Re: Basin-Wide Issue 5, In re SRBA Case No. 39576, Subcase No. 91-00005, pp. 23-24 (renumbered as 00-91005) (April 26, 1996).

Further, the Municipal Providers' expert witness demonstrated that the proper way to avoid local injury to seniors, under the "depletive to the source" theory, is to require mitigation in the right time, place, and amount, which is determined on a case-by-case basis. Tr. Vol. I, 205-06; Tr. Vol. II, 421-22.

but do challenge the Director's changed policy position that new municipal uses and domestic uses from community systems will now be treated as "fully consumptive," and therefore the appropriator must mitigate total diversions rather than depletions. The result of this new policy is that applicants for municipal water rights will be required to supply more mitigation than necessary[5] to protect existing water rights from injury, ensure compliance with the provisions of chapter 2, title 42, Idaho Code, and prevent violations of minimum stream flows.

For the reasons described below, the fully consumptive policies in the *Moratorium Orders* violate constitutional and statutory provisions, are not supported by substantial evidence in the record as a whole, and are arbitrary, capricious, and/or an abuse of discretion.

ARGUMENT

I. There is no dispute that municipal water use is not actually fully consumptive.

Although it is undisputed that municipal water can be fully consumed, no one at the hearing presented evidence that municipal water is actually fully consumed. In fact, one of the attorneys for the supporters of the "fully consumptive" policy stated at the beginning of the hearing that "I don't think factually anybody is in disagreement that, you know, not every water right, whether it's municipal, or irrigation, or whatever the use is, is not 100 percent fully consumptive." Tr. Vol. I, 21:5-9. And the Department's witness agreed with the statement that "municipal water rights can be fully consumptive but often are not." Tr. Vol. I, 399:8-11. There simply is no evidence that any municipal water rights in Idaho are fully consumed, or will ever be fully consumed, notwithstanding Idaho Code § 42-201(8) and the *Riverside* decision.[6] In fact, the uncontradicted testimony at the hearing demonstrates that the estimated consumptive use for the Municipal Providers range from 41% to 87%. Tr. Vol. I, 176:10-12; 265:19-21.

[5] Tr. Vol. I, 176:24-177:8 ("[i]n the case of an entity that only consumes 41 percent of its water, then it's being forced to mitigate, you know, 2.2, 2.3 times, you know, what its actual consumptive use is.").

[6] *Memorandum Decision and Order*, *Riverside Irr. Dist. v. IDWR*, Case No. CV14-21-05008 (Idaho Dist. Ct., Canyon Cnty., Dec. 28, 2021).

Moreover, it would be "virtually impossible" for the Municipal Providers to consume 100% of their diversions. *Id.*, 167:2-8, and it is unlikely that cities in the moratorium areas will ever fully consume their water rights, even in the distant future. *Id.*, 197:24-15; Tr. Vol. II, 428:17-429:3.

The *Moratorium Orders'* singular treatment of municipal and domestic uses as fully consumptive is not based on any facts in the record. Rather, this treatment has been described as a "policy" determination by the Department. *See, e.g., Order Denying MSJ* at 6 ("the issue for hearing is whether the Director's adoption of a policy to treat municipal and domestic uses as fully consumptive given their potential to be fully consumptive, is appropriate."); Tr. Vol. I, 59:22-60:1 (calling the position a "policy decision"). Yet, in the development of this policy, the Department did not engage in any substantive investigative work. *Id.*, 44:23-45:9.[7]

As set forth below, none of the Department's rationales for the policy provide a sufficient basis for the Department to single out municipal water right applicants in the *Moratorium Orders*. This policy is not appropriate or supported by fact or law.

II. The Department's rationale for its "fully consumptive" policy is not supported by substantial evidence in the record.

A. It is not overly burdensome to track municipal consumptive use.

The Department's witness testified that it would be administratively burdensome for the Department to track the consumptive use of municipal water supply. Tr. Vol. I, 33:19-34:4. However, the Department has not conducted a study or otherwise analyzed the extent of administrative burdens that might be associated with tracking municipal consumptive use under new permits in the moratorium areas. *Id.*, 107:9-14.

The Department's witness also testified that the Department is capable of handling administrative burdens if it has sufficient resources available to it. Tr. Vol. II, 383:25-384:2.

[7] *More* specifically, the Department (1) did not survey the wastewater treatment methods of cities affected by the *Moratorium Orders* (Tr. Vol. I, 60:19-23); (2) did not investigate the process a municipality would have to go through to change its effluent treatment processes (Tr. Vol. I, 62:5-12); and (3) did not discuss the issue with public works directors or mayors of any of the affected cities (Tr. Vol. I, 62:19-63:4).

The Idaho Legislature recently provided for additional appropriations for additional staff for the Department, and if more resources are needed to address municipal applications were submitted, nothing suggests the Department would not likewise be able to adequately approve and enforce municipal permits, particularly given that such applications are "rare." Tr. Vol. I, 43:15-25; 151:4-17; Tr. Vol. II, 383:25-384:2.

At the same time, much of the burden to track and report municipal consumptive use can be assigned to the municipal permit holder, and that tracking and reporting can be standardized to reduce the burden on the Department of receiving and analyzing such information. Tr. Vol. I, 186:12-187:2; 193:1-6; Tr. Vol. II, 416:9-419:12. This is not dissimilar from existing reporting requirements placed on other water right holders, including irrigators and other cities within the moratorium areas. Tr. Vol. I, 192:5-25; Ex. 313 at 3-8. Furthermore, cities in other states monitor and report data to account for municipal consumptive use. Tr. Vol. I, 191:20-192:2; Ex. 312, App. B. There is no evidence that municipal providers in Idaho cannot similarly monitor and report data to account for municipal consumptive use. *See also* Tr. Vol I, 193:7-22.[8] Most municipal water right applicants would not have to change any of their practices to track and report their water use and discharge.

In sum, the evidence in the record shows that the Municipal Providers can readily track and report consumptive use under new municipal applications, and compliance analysis would not be overly burdensome on the Department. Therefore, there is no justification for the Department to require Municipal Providers to mitigate beyond the amount they consume.

B. Consumptive use requirements can be imposed and enforced.

The Department's authority to condition water rights is very broad. Tr. Vol. I, 98:3-4. The Department could condition a water right so that the right holder may not exceed a certain amount of consumptive use without providing additional mitigation. *Id.*, 220:14-20. As

[8] Evidence at the hearing demonstrates that this is already being done. For example, the City of Idaho Falls already monitors and reports their municipal water diversions to the Department and has readily accessible wastewater discharge data that could be used to determine its municipal consumptive use. Tr. Vol. II, 519:6-13.

explained above, municipal consumptive use can be tracked and reported. Another possibility is that the Department could condition a water right so the right holder must use certain wastewater treatment and disposal methods (*e.g.*, treatment and discharge to public waters) rather than change to more consumptive methods (*e.g.*, treatment and land application or evaporation). *Id.*, 109:24-110:2. Similarly, the Department could condition a water right so that the right holder must comply with a specific NPDES or IPDES permits which specify the authorized treatment and disposal methods. *Id.*, 408:24-409:8; Ex. 346.

The bottom line is that the Department and water users have devised creative approaches in developing water rights conditions. Tr. Vol. 1, 400:14-401:16. The Department can issue municipal water right permits requiring compliance with mitigation plans because the Department already has issued municipal water right permits obligating the holder to monitor and report their annual water use for purposes of determining whether additional mitigation is required. *Id.*, 109:14-18; 274:5-276:22; Ex. 312 (permit no. 63-34342).

There is no question that water users must comply with water right conditions, or else be subject to curtailment or enforcement by the Department. I.C. § 42-1701B. The Department's concern that municipal consumptive use could increase over time is easily remedied by requiring additional mitigation if that occurs or a reduction in consumptive use to avoid curtailment. Tr. Vol. I, 115:16-116:13. Reductions in consumptive use could occur by the return to prior less consumptive wastewater disposal methods, or by changing municipal water use practices such as by enforcement of residential irrigation restrictions. *Id.*; Tr. Vol. II, 451:8-22, 461:6-18, 496:17-497:24. There simply is no reason to believe that the Department is without authority to restrict municipal water use that is out of compliance with water right conditions.[9] Indeed, the City of Rexburg permit discussed at the hearing contains a condition which provides the Department authority to curtail the right because of noncompliance with its

[9] In a related fashion, the Department has issued curtailment orders against municipal providers in the Eastern Snake Plain Aquifer delivery calls. Tr. Vol. I, 194:10-16.

conditions, just like other permits. Tr. Vol. I, 66:19-67:4. Yet, the Department suggests that curtailment of such rights presents difficulty because it would implicate public health concerns. *Id.*, 34:5-15. However, when pressed on this question at the hearing, the Department's witness agreed that there is no priority or preference to municipal water rights in water right administration or compliance with permit conditions. *Id.*, 70:17-71:3. Curtailment of any water right causes difficulty for the water user in any context, not just curtailment of municipal water rights. *Id.*, 194:10-15. Municipal water rights are just like other water rights in Idaho—they are subject to priority administration and regulation to ensure compliance with permit conditions.

In sum, the Department's claim that difficulties associated with curtailing municipal water rights warrant treating them as fully consumptive is not supported by fact or law and should be rejected.

III. The Department's "fully consumptive" policy contradicts Idaho's Prior Appropriation Doctrine.

Idaho's Prior Appropriation Doctrine guarantees the public's right to appropriate the state's public waters,[10] and guarantees that the state will equally protect the rights of all users:

> Water being essential to the industrial prosperity of the state, and all agricultural development throughout the greater portion of the state depending upon its just apportionment to, and economical use by, those making beneficial application of the same, its control shall be in the state, which, in providing for its use, **shall equally guard all of the various interests involved**.

I.C. § 42-101 (emphasis added).

But the *Moratorium Orders'* new policy of treating municipal water rights as fully consumptive (even though they demonstrably are not in everyday practice) denies municipal users the right to appropriate public waters unless they mitigate beyond their actual consumptive

[10] "The right to divert and appropriate the unappropriated waters of any natural stream to beneficial uses, shall never be denied, except that the state may regulate and limit the use thereof for power purposes." Idaho Const. Art XV § 3.

use. This treats municipal users differently than all other appropriators in a way that is unjust and unsupported by fact or law. Tr. Vol I., 196:16-197:18.

A. It is not necessary for the Department to treat municipal uses as fully consumptive.

The Department asserts that it issued the *Moratorium Orders* pursuant to Idaho Code § 42-1805(7).[11] *Order Denying MSJ* at 7. That statute gives the Director the authority "[a]fter notice, to suspend the issuance or further action on permits or applications **as necessary** to protect existing vested water rights or to ensure compliance with the provisions of chapter 2, title 42, Idaho Code, or to prevent violation of minimum flow provisions of the state water plan." (Emphasis added.)

The authorities relied upon by the Department to issue the *Moratorium Orders* require that the Director find it "necessary" or that there is a "need" to do so. Here, the Department cannot show that treating all new municipal applications as "fully consumptive" is necessary to protect existing water rights, ensure compliance with the appropriation statutes, or prevent reductions to minimum stream flows. The evidence demonstrates that existing rights are protected from injury if new consumptive uses are mitigated at the appropriate times, locations, and amounts, which is necessarily determined case-by-case. Tr. Vol. I, 189:18-21, 193:23-194:9, 205:23-206:11; Tr. Vol. II, 421:17-422:13. Requiring excessive mitigation unfairly burdens the new municipal appropriator and is not necessary to protect existing rights or otherwise achieve the *Moratorium Orders'* objectives. Rather, it results in a windfall for senior users. Tr. Vol I, 204:5-18.

Treating new municipal uses as fully consumptive is not necessary to ensure compliance with the appropriation statutes in Title 42, Idaho Code, and is specifically contrary to Idaho

[11] The *Order Denying MSJ* also cites to Rule 55 of the Department's Water Appropriation Rules, which states that "[t]he Director may cease to approve applications for permit in a designated geographical area upon finding a need to: i. Protect existing water rights; ii. Insure compliance with the provisions of Chapter 2, Title 42, Idaho Code; and iii. Prevent reduction of flows below a minimum stream flow which has been established by the Director or the board pursuant to applicable law." IDAPA 37.03.08.055.01.a (emphasis added).

Code § 42-101 (quoted above) because this policy does not equally guard all the various interests. Testimony at the hearing confirmed that industrial uses often are fully consumptive and commercial uses may be fully consumptive, and the consumptive component of each can change over time, but the *Moratorium Orders* provide that new industrial and commercial uses will be considered on a case-by-case basis rather than assume they are fully consumptive like municipal uses. Tr. Vol. I, 79:10-23, 112:22-114:23, 196:1-11.

In addition, it is not necessary to treat new municipal uses as fully consumptive because actual consumptive use can be tracked, reported, and adjusted. The alleged burden placed on the Department if new municipal consumptive use is tracked and reported does not create a necessity that justifies treating municipal uses as fully consumptive. In Idaho, full economic development and optimum development of Idaho's water resources[12] "are two sides of the same coin. Full economic development is the result of the optimum development of water resources in the public interest." *Clear Springs,* 150 Idaho at 808, 252 P.3d at 89. Testimony at the hearing demonstrated that the burden of providing more mitigation than necessary would include the cost of acquiring the mitigation supplies and the risk that adequate mitigation is not available. Tr. Vol. I, 286:7-16. In addition, treating new municipal and domestic uses as fully consumptive presents other societal costs, such as halting residential development or causing residential developers to resort to drilling multiple exempt wells rather than a single permitted well, *id.*, 105:25-06:10, or retiring more irrigated agriculture than necessary for mitigation. *Id.*, 286:17-287:10.

While there are certainly some additional administrative burdens associated with approving new municipal and domestic applications subject to the requirement that they fully

[12] "The policy of the law of this State is to secure the maximum use and benefit, and least wasteful use, of its water resources." *Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790, 808, 252 P.3d 71, 89 (2011). "Not only farmers, but industry and residential users depend upon . . . the maximum use and benefit of [the State's] water resources." *State v. Hagerman Water Right Owners, Inc.*, 130 Idaho 727, 735, 947 P.2d 400, 408 (1996). *See also* Idaho Const. Art. XV § 7.

mitigate their *depletions*, these costs to the Department do not outweigh the costs to municipal providers if they are required to fully mitigate their *diversions*.

B. The Department's policy is unconstitutional.

The Department's policy also is inconsistent with caselaw addressing the government's regulation of fundamental constitutional rights. The Idaho Supreme Court has stated:

> [I]f a fundamental right is at issue, the appropriate standard of review to be applied to a law infringing on that right is strict scrutiny. Under the strict scrutiny standard of review, a law which infringes on a fundamental right will be upheld only where the State can demonstrate the law is **necessary** to promote a compelling state interest.

Van Valkenburgh v. Citizens for Term Limits, 135 Idaho 121, 126, 15 P.3d 1129, 1134 (2000) (internal citation omitted) (emphasis added). Put another way:

> Strict scrutiny should be applied to legislation dealing with fundamental rights or suspect classifications. Strict scrutiny requires that the government action be necessary to serve a **compelling state interest**, and that it is **narrowly tailored** to achieve that interest.

Reclaim Idaho v. Denney, 169 Idaho 406, 431, 497 P.3d 160, 185 (2021) (quoting *Bradbury v. Idaho Jud. Council*, 136 Idaho 63, 69, 28 P.3d 1006, 1012 (2001) (internal citations omitted) (emphasis added)). The Idaho Supreme Court has consistently recognized that "a right is fundamental under the Idaho Constitution if it is expressed as a positive right, or if it is implicit in Idaho's concept of ordered liberty." *Van Valkenburgh* at 126, 15 P.3d at 1134 (citing *Idaho Sch. For Equal Educ. Opportunity v. Evans*, 123 Idaho 573, 581-82, 850 P.2d 724, 732–33 (1993)). *Van Valkenburgh* dealt with the right to vote and held that voting was a fundamental right "because the Idaho Constitution expressly guarantees the right of suffrage." *Id.*

The right to appropriate the state's public waters is expressly enumerated in the Idaho Constitution. As such, it is a fundamental right that can only be infringed upon if it is necessary to serve a compelling state interest, and if the infringement is narrowly tailored to achieve that interest. Here, the Department has not shown a compelling state interest. The only grounds for

the fully consumptive policy is that tracking municipal consumptive use could create additional (but unquantified) administrative burdens and that enforcing limits on consumptive use could be difficult. For the reasons already discussed, neither rationale is compelling since the evidence shows that tracking and reporting is commonplace, the burden of doing so can be placed mainly on the appropriators, and the Department has full authority to enforce those limits.

But even if these were compelling reasons, the Department cannot show that treating new municipal uses as fully consumptive is necessary or narrowly tailored to serve those interests. As already described, the policy is not necessary because actual municipal consumptive use can be tracked, reported, and enforced. Moreover, the policy is not narrowly tailored to serve the Department's purported interest. It is an overbroad, one-size-fits-all approach that elevates administrative ease above the constitutional rights of all municipal appropriators, regardless of their potential to ever fully consume their water supply.[13]

There is no analysis in the record of how burdensome analyzing municipal consumptive use in future applications might be on the Department. The evidence does show, however, that there are very few new municipal applications pending in the moratorium areas, Tr. Vol. II, 463-67, which suggests that there is little threat of a flood of new municipal applications. It also shows that the Department regularly requires monitoring and reporting of water use in other contexts. Tr. Vol. I, 271:6-272:10. In addition, much of the burden of tracking and reporting municipal consumptive use can be shouldered by the municipal water provider instead of the Department. *Id.*, 193:1-22. And finally, the evidence shows that the Department can enforce permit conditions by curtailing water use or requiring additional mitigation. *Id.*, 116:3-13, 279:23-280:2.

[13] Indeed, that new municipal uses could theoretically become fully consumptive at some point in the future does not constitute the type of injury that Idaho water law concerns itself with: "The question here presented is whether other users . . . are injured or will be . . . substantially injured, not merely a fanciful injury but a real and actual injury." *Beecher v. Cassia Creek Irr. Co., Inc.*, 66 Idaho 1, 7, 154 P.2d 507, 509 (1944).

In short, the Department's fully consumptive policy toward municipal appropriators does not pass the strict scrutiny test for regulating fundamental constitutional rights, let alone the rational basis standard.[14]

IV. The Department's adoption of the "fully consumptive" policy was arbitrary and capricious, and/or an abuse of discretion.

The *Moratorium Orders* effectuate a change to the Department's prior policies.[15] The prior orders did not treat municipal uses as fully consumptive. While an agency is "free to act," and alter its regulatory policies, it may only do so if it "enters sufficient findings to show that its action is not arbitrary and capricious." *Wash. Water Power Co. v. Idaho Pub. Utils. Comm'n*, 101 Idaho 567, 579 (1980). An agency action is arbitrary "if it was done in disregard of the facts and circumstances presented or without adequate determining principles," and capricious "if it was done without a rational basis." *In re Delivery Call of A&B Irrigation Dist.*, 153 Idaho 500, 511 (2012). "Agencies are free to change their existing policies as long as they provide a reasoned explanation for the change." *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 221 (2016). "The agency must at least display awareness that it is changing position and show that there are good reasons for the new policy." *Id.* (internal quotation marks omitted). An unexplained inconsistency in agency policy is "a reason for holding an interpretation to be an arbitrary and capricious change from agency practice." *Id.* at 222. "When an agency changes its policy position, the A[dministrative] P[rocedures] A[ct] requires an agency to provide more substantial justification when its new policy rests upon factual findings that contradict those

[14] To the extent the Department has any compelling reason to treat municipal appropriations differently than others, the Department could instead impose a case-by-case analysis requiring mitigation requirements to increase commensurate with consumptive use changes, or even a presumption that municipal use is fully consumptive unless the appropriator can demonstrate otherwise. As it stands, however, the Department's policy violates municipal appropriators' constitutional right to appropriate public waters.

[15] The *Amended SRB Moratorium Order* "modifies certain exceptions related to domestic uses and clarifies the application of the non-consumptive use exception to municipal water use and domestic water use." *Amended SRB Moratorium Order* at 1. Similarly, the *BWR Moratorium Order* rescinds the Department's policy, adopted in the 1991 Management Policy, "allowing a municipal provider to appropriate water for municipal purposes by applying for a water right permit without mitigation." *BWR Moratorium Order* at 6. Both of the *Moratorium Orders* provide that "[a]pplications for municipal water use and for domestic use from community water systems shall be considered fully consumptive." *Id.* at 8; *Amended SRB Moratorium Order* at 28.

which underlay its prior policy." *Western Watersheds Project v. Bernhardt*, 519 F. Supp. 3d 763, 789 (D. Idaho 2021) (internal quotation marks omitted). "Failure to do so renders its new policy arbitrary and capricious." *Id.*

Here, the Department acknowledged in the *Moratorium Orders* that it was changing its policy concerning municipal use and domestic use from community water systems. But only in the *BWR Moratorium Order* did the Department offer any explanation as to why. *BWR Moratorium Order* at 5-6. But the Department's explanation is deficient because, as already explained, it disregards the facts and circumstances of municipal use and has no rational basis. Clearly the *Amended SRB Moratorium Order* is even more deficient for offering no explanation at all.

In any case, the *Moratorium Orders'* failings cannot be remedied by the evidence presented at the hearing. That evidence showed that municipal water use rarely (if ever) is fully consumptive, and the Department can condition and administer municipal water rights so that depletions are properly mitigated. The Department's fully consumptive policy was not justified in the first place, and it would be arbitrary, capricious, and/or an abuse of discretion to maintain this policy given the record developed at the hearing.

CONCLUSION

The evidence in the record shows that municipal water providers can readily calculate consumptive use; the Department can delegate the burdensome tasks to the municipal providers; new permits can be conditioned to ensure depletions are properly mitigated, administrative burdens are minimized, and public health emergencies are avoided; and the Department already administers existing permits with such conditions. The Municipal Providers therefore request the language in the *Moratorium Orders* concerning municipal water use be changed to:

> Applications for municipal water use and for domestic use shall be evaluated on a case-by-case basis to determine whether the proposed use, or some portion thereof, is non-consumptive.

Respectfully submitted this 17th day of November, 2023.

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CERTIFICATE OF SERVICE

I hereby certify that on 17th day of November, 2023, a true and correct copy of the foregoing document was served by email and addressed to the following:

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