

## IDWR Response to Public Comment

Docket No. 37-0302-2401

### IDAPA 37.03.02 Beneficial Use Examination Rules

Note: Rule numbers and sections references in the Comment section of this document are based on the existing Rule. Rule numbers and sections references in the IDWR Response section of this document are based on the Proposed Rules.

#### **Comment: Regarding Rule 30 Qualification, Examination and Appointment of Certified Water Right Examiners – Additional Requirement:**

A water rights examiner should also be a Landman able to create chains-of-title.

Stakeholder: Bill Turner – WaterBank

IDWR Response: IDWR declined to change the requirements based on stakeholder’s comment. Section § 42-217a, Idaho Code authorizes the Director to set procedures for the appointment of professional engineers or professional geologists as certified water right examiners.

#### **Comment: Regarding Rule 35.i Annual Volume Requirements – Suggested Revision:**

The proposed section (Section 035.i(iv)) is a new policy that is not consistent with the intent of the existing stub-in policy. Developers often have no control over the installation of the foundation. The language should be amended to provide the following: “For multi-home domestic or municipal use, the volume may include up to 0.6 af for in-home use and 0.6 af for ~~developed yard or landscape irrigation for~~ each lot with an existing stub-in water service line. ~~and foundation where each home’s use will meet the definition of Section 2-111(a), Idaho Code.”~~

Stakeholder: Bryce Farris – Sawtooth Law Offices, PLLC on behalf of Intermountain Sewer and Water Corp.

IDWR Response: IDWR revised the Proposed Rule by removing the section added to strawman version 1 in response to stakeholder comment.

#### **Comment: Regarding Rule 35.i Annual Volume Requirements – Support additional language:**

Because of the vagaries of the climate, the traditional five-year beneficial use standard makes it difficult for Idaho’s ski areas to realize in licensing the maximum amount of water that a ski area should be entitled to in drought conditions. Incorporating the fifty-year lookback standard specifically for snowmaking is consistent with how IDWR has reviewed licensing for snowmaking water rights.

Stakeholder: Brad Wilson – Idaho Ski Areas Association

IDWR Response: IDWR included the addition in the Proposed Rule in response to stakeholder comment.

**Comment: Regarding Rule 35.i Annual Volume Requirements – Suggested Revision**

The Idaho Water Resource Board needs to take advantage of high water years to maximize the amount of ground water recharge accomplished to fulfil various goals. Statutory provisions ensure water rights for ground water recharge can be limited. Limiting the diversion volume of IWRB owned licenses is contrary to the State’s objectives and is unnecessary. The Rule should be amended to include “Aquifer recharge water rights owned by the Idaho Water Resource Board” as exempt from volume reporting.

Stakeholder: Cynthia Bridge-Clark – Idaho Water Resource Board

IDWR Response: Statutory provisions authorize the Director to grant additional time to the Idaho Water Resource Board to develop permits they own to provide sufficient time to make use of high water years. IDWR did not include the proposed addition in the Proposed Rule.

**Comment: Regarding Rule 001 Title and Scope – Suggested Revision**

In Section 001.01 the rules are referred to as IDAPA 37.03.08 which is inconsistent with the title shown on the draft.

Stakeholder: Dave Shaw – ERO Resources Corp

IDWR Response: IDWR revised Section 001.01 in the Proposed Rule.

**Comment: Regarding Rule 009.04 Examination Fee – Suggested Revision**

The term “stockwatering” or stockwater” should be “live stock watering” or “livestock water” to be consistent with Idaho statutes.

Stakeholder: Dave Shaw – ERO Resources Corp

IDWR Response: IDWR uses the term to “stockwater” as the beneficial use when an appropriation of water is for the purpose of supplying drinking water to animals.

**Comment: Regarding Rule 010.01 Definition of Acre-Foot – Clarification**

The proposed definition is less precise.

Stakeholder: Dave Shaw – ERO Resources Corp

IDWR Response: IDWR changed the definition of “Acre-Foot” to an equal number of gallons based on common usage and to be consistent with IDAPA 37.03.08.

**Comment: Regarding Rule 010.11 Definition of Diversion Works – Suggested Revision**

The definition of “diversion works” does not appear to include a ground water well.

Stakeholder: Dave Shaw – ERO Resources Corp

IDWR Response: A well is considered a device that facilitates diversion of water from the natural course of flow.

**Comment: Regarding Rule 010.13 Definition of Irrigation – Clarification**

Why is irrigation limited to cultivated land and does the definition restrict the use of water under the authority of a permit for irrigation.

Stakeholder: Dave Shaw – ERO Resources Corp

IDWR Response: The definition clarifies the application of water for “irrigation” must be for the purpose of plant growth. Other applications of water may be for other beneficial uses described by other terms.

**Comment: Regarding Rule 010.16 Definition of Legal Subdivision – Suggested Revision**

The description should not include the word “nearest”.

Stakeholder: Dave Shaw – ERO Resources Corp

IDWR Response: IDWR revised the description in the Proposed Rule.

**Comment: Regarding Rule 010.19 Definition of Period of Use – Suggested Revision**

Water rights do not allow water to be diverted that is not beneficially used. The proposed addition of “diverted or” should be removed.

Stakeholder: Dave Shaw – ERO Resources Corp

IDWR Response: IDWR revised the language in the Proposed Rule.

**Comment: Regarding Rule 010.21 Definition of Place of Use – Suggested Revisions**

The place of use should be described by Legal Subdivision when available.

Stakeholder: Dave Shaw – ERO Resources Corp

IDWR Response: IDWR declined to revise subsection 010.21. The criteria for the description of the place of use is in subsection 035.01 of the rules.

**Comment: Regarding Rule 010.22 Definition of Point of Diversion – Suggested Revisions**

The point of diversion should be described by Legal Subdivision when available.

Stakeholder: Dave Shaw – ERO Resources Corp

IDWR Response: The declined to revise subsection 010.22. The criteria for the description of the point of diversion is in subsection 035.01 of the rules.

**Comment: Regarding Rule 030.07 Certified Water Right Examiners – Suggested Revision**

The end of the first sentence of the rule should include “unless the CWRE has been retained by a state agency holding a water right permit.”

Stakeholder: Dave Shaw – ERO Resources Corp

IDWR Response: IDWR declined the suggested revision because it is unnecessary, the second sentence states permit holders are responsible for the costs.

**Comment: Regarding Rule 035.01.b Description of the Diversion Works – Clarification**

Aerial photographs are rarely used anymore. Most CWRE’s and IDWR staff rely on digital cameras and aerial images such as those from the National Agricultural Imagery Program. The rules should be changed to include digital images.

Stakeholder: Dave Shaw – ERO Resources Corp

IDWR Response: IDWR revised Rules 035.01.b, 035.01.q, and 045.03 to include reference to images.

**Comment: Regarding Rule 035.01.c Interconnected Conveyance Systems – Suggested Revision**

The section should include a requirement for examiners to note that there is no interconnected water sources if there is none.

Stakeholder: Dave Shaw – ERO Resources Corp

IDWR Response: IDWR declined the suggested revision because it is unnecessary, the second sentence requires the examiner to include information demonstrating distinct from other water uses.

**Comment: Regarding Rule 035.01.f Irrigated Areas – Suggested Revision**

Suggest changing “... examination report and the full or partial acreage ...” to “... examination report along with the full or partial acreage ...” to make clear the intent is for both to be the same map.

Stakeholder: Dave Shaw – ERO Resources Corp

IDWR Response: IDWR revised Rule 035.01.g to clarify the requirement to describe separate diversion works and show the systems on included maps.

**Comment: Regarding Rule 035.01.g Number of Irrigated Acres – Suggested Revision**

Suggest revision to further clarify situations requiring reporting the number of acres to the nearest 0.10 acres.

Stakeholder: Dave Shaw – ERO Resources Corp

IDWR Response: IDWR revised Rule 035.01.f.i to clarify the reporting requirements for irrigated acres.

**Comment: Regarding Rule 035.01.h Description of the Diversion System – Suggested Revision**

The description includes terminology that is not clearly defined. The Rules should allow for multiple diversions, primarily wells, to divert into a common distribution system.

Stakeholder: Dave Shaw – ERO Resources Corp

IDWR Response: IDWR revised Rule 035.01.g to remove the reference to a distribution system and revised Rule 010 to include a definition of diversion works and revised the definition of conveyance.

**Comment: Regarding Rule 035.01.j Volume Reporting – Suggested Revision**

The description should be “The following water uses are exempt from the volume reporting requirements:”

Stakeholder: Dave Shaw – ERO Resources Corp

IDWR Response: IDWR revised Rule 035.01.i in response to stakeholder comment.

**Comment: Regarding Rule 035.01.j Volume Reporting – Remove Exemption**

Reporting volume should be required for all water users, including Municipal uses. IDWR ability to manage water users and the conserve the public water resource is dependent on knowing the volume of water being put to beneficial use.

Stakeholder: Allison Lebeda – Nez Pierce Tribe Water Resources Division

IDWR Response: IDWR declined to removed municipal use permits from the volume reporting exemption because common law referred to as the growing communities doctrine and the 1996 Municipal Water Rights Act allows the holders of specific types of municipal permits to grow into the full capacity of a water right as customer demand increases over time. Volume reporting is not required for permits that meet certain criteria.

**Comment: Regarding Rule 035.01.j Volume Reporting – Remove Exemption**

Irrigation is a consumptive use such that not all the water diverted for irrigation returns to the stream or spring. The volume should be reported for irrigation use from a spring or natural stream.

Stakeholder: Allison Lebeda – Nez Pierce Tribe Water Resources Division

IDWR Response: IDWR declined to remove irrigation from a spring or stream from the types of permits exempt from reporting volume because IDWR does not think a volume is necessary for administration.

**Comment: Regarding Rule 035.01.r On-Site Examination Exemption – Remove Exemption**

The Nez Pierce Tribe does not believe any use should be exempt from an on-site examination and direct measurement of the diversion rate.

Stakeholder: Allison Lebeda – Nez Pierce Tribe Water Resources Division

IDWR Response: IDWR declined to remove the exemption criteria for permits that do not require an on-site beneficial use examination because the exemption reduces costs and delays when the extent of beneficial use for certain types of permits can be confirmed by records provided by the permit holder or CWRE.

**Comment: Regarding Rule 035.01.j Volume Reporting – Suggested Revision**

In response the IWRB's suggested addition to Rule 035.01.j, to add ground water recharge permits held by the IWRB as a use exempt from volume reporting. All ground water recharge permits should be exempt from volume reporting because typical conveyance systems for ground water recharge activities utilize canal diversions which do not require volume measurements and it is inconsistent with the equal protections clause of the United States Constitution to hold private rights to a higher standard.

Stakeholder: - T.J. Budge – Racine Olson PLLP

IDWR Response: IDWR did not include the addition proposed by the IWRB in the Proposed Rule.

**Comment: Regarding Rule 035.01.d Return Flows – Suggested Revision**

The description of the conveyance system for return flows should include a measurement of the volume returned to the public water source to help with accounting of water right junior to minimum flow water rights.

Stakeholder: Allison Lebeda – Nez Pierce Tribal Water Resources Division

IDWR Response: IDWR declined to include the suggested revision because requiring all water users that return water after beneficial use to measure and report the amounts would place unnecessary burden on water users. IDWR uses conditions of approval on water right permits when measuring the amount of return flows is necessary for administration of water.

**Comment: Regarding Rule 035.01.i Volume Reporting – Support for Revision**

Veolia Water Idaho Inc supports IDWR decision to remove volume limitations on domestic and municipal uses.

Stakeholder: Michael Lawrence and Christopher Meyer Givens Pursley LLP – Veolia Water Idaho Inc.

IDWR Response: IDWR removed the section on the Proposed Rule.

**Comment: Regarding Rule 035.01.j Volume Reporting – Suggested Revision**

Veolia Water Idaho Inc suggests revising the language to be consistent with the definition of municipal provider in Idaho Code 42-202B(5). The following language is suggested, “Municipal use by a municipal provider (defined under Idaho Code § 42-202B(5)) except the following situations that require a volume to be reported....”

Stakeholder: Michael Lawrence and Christopher Meyer Givens Pursley LLP – Veolia Water Idaho Inc.

IDWR Response: IDWR revised Rule 035.01.j in response to stakeholder comment. The language is not the same as the language proposed by the stakeholder but it is consistent with Idaho Code § 42-202B.

**Comment: Regarding Rule 001.04 Rules – Suggested Revision**

The language should be strengthened to be clear the rules must not be applied contrary to Idaho Law because the Rule is procedural and are not intended to resolve or fix in stone the many substantive water law questions that arise during beneficial use examination.

Stakeholder: Michael Lawrence and Christopher Meyer Givens Pursley LLP – Veolia Water Idaho Inc.

IDWR Response: IDWR declined to further revise the language of this section because the language is intended to support the authority of the Director.

**Comment: Regarding Rule 010.11 Diversion Works – Suggested Revision**

The language should be clarified to include ground water diversions.

Stakeholder: Michael Lawrence and Christopher Meyer Givens Pursley LLP – Veolia Water Idaho Inc.

IDWR Response: A well is considered a device that facilitates diversion of water from the natural course of flow.

**Comment: Regarding Rule 035.01.i.iii Volume Reporting – Suggested Revision**

The language should be changed to, “..storage use that includes refill under priority...” so that it is clear what volume should be reported.

Stakeholder: Michael Lawrence and Christopher Meyer Givens Pursley LLP – Veolia Water Idaho Inc.

IDWR Response: IDWR declined to revision the language because the additional words are unnecessary, lawful appropriation pursuant to a water right permit can only be made when water is available under the priority of the right.

**Comment: Regarding Rule 035.01 Examination Report – Suggested Revision**

The language “the extent of beneficial use” should be removed or reworded because it is ambiguous and the concept is covered by other provisions of the rules.

Stakeholder: Michael Lawrence and Christopher Meyer Givens Pursley LLP – Veolia Water Idaho Inc.

IDWR Response: IDWR revised the language on the Proposed Rules in response to stakeholder comment.

**Comment: Regarding Rule 035.01.o Quantity Limits – Suggested Relocation**

The paragraph should be moved to subsection 035.03 because it applies to all permits or it should be revised to “The amount of water recommended for licensing shall be limited to...”.

Stakeholder: Michael Lawrence and Christopher Meyer Givens Pursley LLP – Veolia Water Idaho Inc.

IDWR Response: IDWR declined to revise the language because the intent of the paragraph is to limit the quantity of water available to record on the water right license and not restrict the measurements taken during the field examination or reported.



### **Comment Regarding Rule 035.01.j Volume Reporting – Suggested Revision**

Elmore County agrees with the IWRB that permits for ground water recharge should be exempt from reporting volume but does not agree that only permits held by the IWRB should be exempt from volume reporting.

Stakeholder: Dylan Lawrence Varin Thomas – Elmore County

IDWR Response: IDWR did not include the addition proposed by the IWRB in the Proposed Rule.

### **Comment: Regarding Rule 035.01.j Volume Reporting – Suggested Revision**

Veolia provided comment regarding version 2 of IDWR's strawman, some of which were address in the Proposed Rules. Veolia is still concerned the criteria for municipal use that is exempt from reporting volume limits the exemption to permits with places of use that include users within a municipality's service area. Veolia suggests the following language for Rule 035.01.i.vii, "Municipal use by a municipal provider as defined in Section 42-202B(5), Idaho Code that is serving users within a service area as defined in Section 42-202B(9), Idaho Code,..."

Stakeholder: Michael Lawrence and Christopher Meyer Givens Pursley LLP – Veolia Water Idaho LLC.

IDWR Response: IDWR declined to revise the language as proposed. The growing communities doctrine recognized the need of an incorporated city to grow into the full extent of water right to meet future demand. The 1996 Municipal Water Rights Act codified the growing communities doctrine and established specific defined terms. The language in the Proposed Rule updates the current language to include the terms defined in Section 42-202B, Idaho Code.