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Via Email
Angela Hansen, P.G.
Water Allocation Bureau Chief
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Re: Veolia's comments on Strawman 2.0,
IDAPA 37.03.02 – Beneficial Use Examination Rules Negotiated Rulemaking

Dear Angela:

On behalf of Veolia Water Idaho, Inc. ("Veolia"), we are submitting these written comments concerning the Department's "Strawman 2.0" in the negotiated rulemaking for IDAPA 37.03.02 (Beneficial Use Examination Rules), which was released on July 1, 2024.

Municipal and domestic volume

It appears that Strawman 2.0 addresses Veolia's primary concern with IDWR's Strawman 1.0. The original proposal in Strawman 1.0 included language in former Subsection 035.01.i.iv regarding volume limitations on domestic and municipal uses. It applied the same principles to both, which was inconsistent with the Department's historical policies and practices.

Strawman 2.0 removes former Subsection 035.01.i.iv altogether. Veolia agrees with that deletion.

As for municipal rights, the body of law and policy governing how RAFN and non-RAFN municipal water rights are quantified is extraordinarily complex. And it is evolving. Take, for example, the recent changes in law governing the incremental licensing of RAFN rights. Attempting to codify all this in a beneficial use exam rule would be unworkable. The Department was wise to recognize this.

Likewise, attempting to codify the law governing the quantification of domestic rights is fraught with difficulty and prone to error—as some other commenters pointed out in their comments on Strawman 1.0.

We turn now to the exemptions from the volume reporting requirement set out in existing Strawman 2.0's Subsection 035.01.j.

Strawman 2.0 retains the language of existing Subsection 035.01 (addressing municipal use) which exempts:

> Municipal use by an incorporated city or other entity serving users throughout an incorporated city, except [for certain] situations that do require a volume to be reported . . . .

Veolia suggests revising this provision to incorporate and be consistent with the definition of "municipal provider" in Idaho Code § 42-202B(5). Specifically, Veolia suggests the following revisions to Strawman 2.0's Subsection 035.01.j.vii, (additions underlined; deletions in strikeout):

> Municipal use by <u>a municipal provider (defined under Idaho Code § 42-202B(5))</u> ~~an incorporated city or other entity serving users throughout an incorporated city~~, except the following situations that require a volume to be reported . . . :

Veolia suggests this change because the language currently in Strawman 2.0 (and the existing rule) describes municipal use by an "entity serving users throughout an incorporated city." However, some municipal providers (like Veolia) serve users in multiple incorporated cities and outside of those cities in unincorporated areas. Likewise, some municipalities deliver municipal water outside the boundaries of their city limits. Veolia's proposed clarification would make the rules consistent with the statutory definition of "municipal provider," which does not limit the service area of municipal providers to city limits.

Subsection 035.01.j.ii of Strawman 2.0 contains a similar exemption (from the volume reporting requirement) for domestic use from ground water. We are unclear as to why the Department has exempted domestic rights. If the intent is simply to defer to other laws and policies, that makes sense. Those laws and policies are complex and not well suited to

rulemaking. If that is the intent, the rule should make that more clear. In any event, the Department should consider adding language to clarify that the rule is not intended to "exempt" domestic rights from the various limitations imposed by law (e.g., 13,000 gallons/year) that apply to many domestic uses.

Additional revisions

Veolia also suggests the following additional revisions to Strawman 2.0:

1. Subsection 001.04 (Rules): This section contains boilerplate ensuring that the rules will not be used "to deprive or limit the Director of any exercise of powers, [etc.] . . . ." This language should be strengthened to unequivocally state that the rules must not be construed or applied in a manner contrary to any other substantive Idaho law, regulation, or established Departmental policy in effect at the time the rule is employed. These rules are essentially procedural. They are not intended to resolve or fix in stone the many substantive water law questions that may come into play during the licensing of a water right. It would be unfortunate if future litigants were given an opportunity to use these rules to, for example, argue against Departmental policies on such complex issues as the law of reservoir refill, RAFN, or consumptive use.

2. Subsection 010.11 (Diversion Works): This section defines "Diversion Works." The language should be clarified to include groundwater diversions (*i.e.*, wells) rather than be limited to diversions from "the natural course of flow."

3. Subsection 035.01.i.iii: This Subsection addresses the volume of "storage use that includes refill . . . ." That language should be changed by adding "under priority" so that it reads: "storage use that includes refill under priority . . . ." Perhaps that is implicit. But experience has shown that what implicitly means one thing to one person may implicitly mean something different to another. It is better to be explicit (or to explicitly not resolve a question). This ties in with Comment #1 above. It is important that these rules not inadvertently serve to change (or prevent change to) complex areas of water law that continue to evolve.

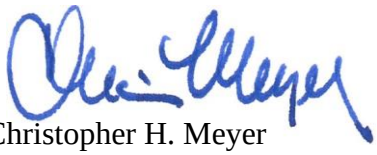
4. Subsection 035.01.l: This Subsection addresses information on "the extent of beneficial use." This Subsection should be deleted because the phrase "extent of beneficial use" is ambiguous and the apparent concept is covered by other provisions in Subsection 0.35. Alternatively, it should be reframed to say something like "the extent of beneficial use as provided under Idaho law" to make clear that the rule is not replacing or changing other law and policy.

5. Subsection 035.01.o: This Subsection addresses the circumstance where the prove-up quantity exceeds the amount authorized under the permit, etc. This Subsection should be moved to Subsection 035.03 (General) because it applies to all permits subject to licensing (which is the subject of Subsection 035.03). Alternatively (if left in its current location), Subsection 035.01.o should state that "The amount of water recommended for licensing shall be limited to . . . ."

Thank you for considering these comments and proposed revisions to Strawman 2.0. Please let us know if you would like to discuss further. We would be pleased to provide further explanation or clarification.

Sincerely,

Michael P. Lawrence



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