

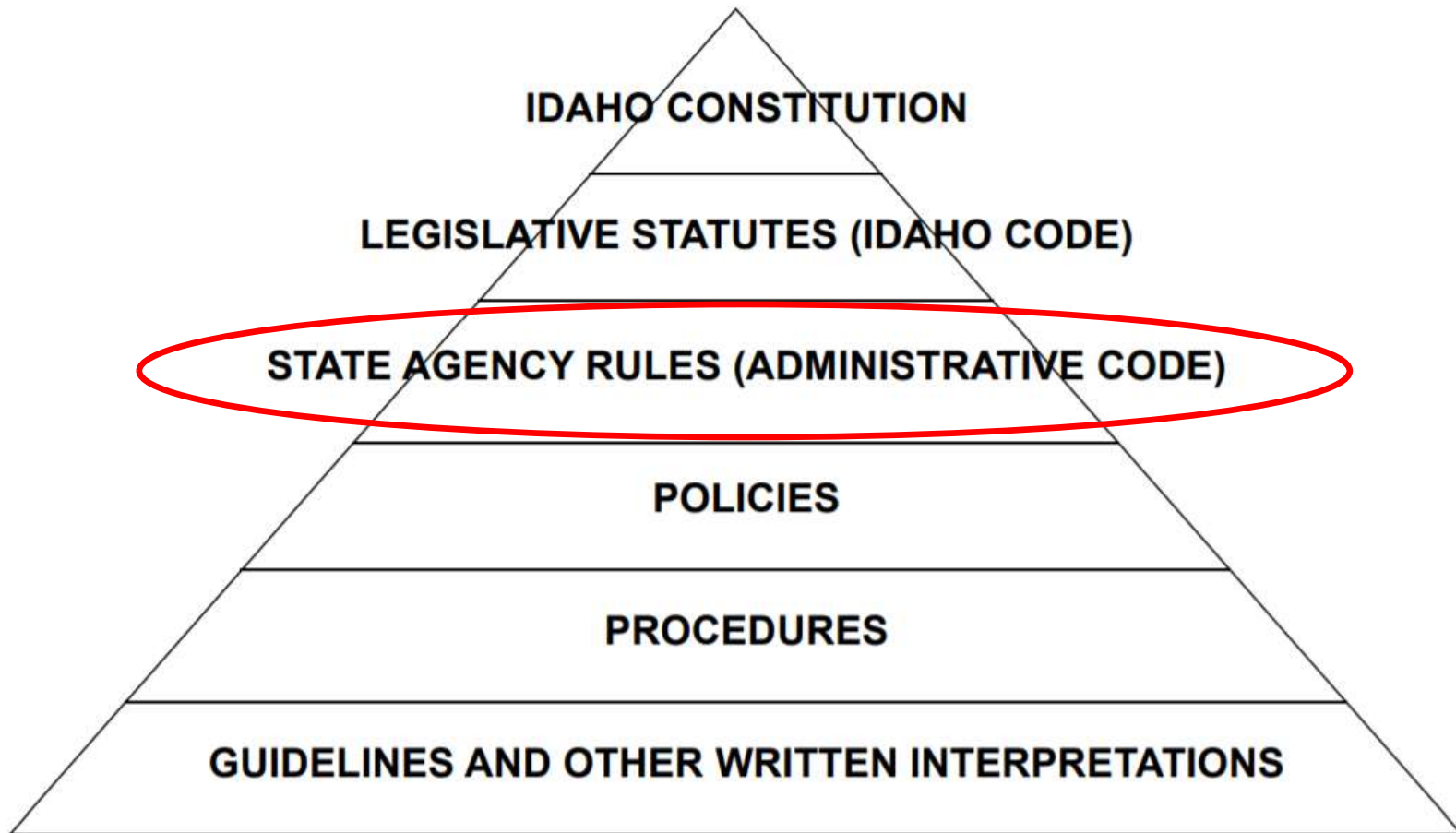


Negotiated Rulemaking Meeting:
IDAPA 37.03.05 – Mine Tailings Impoundment Structures Rule
& IDAPA 37.03.06 Safety of Dams Rules – May 27, 2022



IDAHO DEPARTMENT OF
WATER RESOURCES

HIERARCHY OF STATE DOCUMENTS





Safety of Dams Regulations

- Idaho Code Title 42, Chapter 17:
<https://legislature.idaho.gov/statutesrules/idstat/Title42/T42CH17/>
- IDAPA 37.03.05 – Mine Tailings Impoundment Structures Rules:
<https://adminrules.idaho.gov/rules/current/37/370305.pdf>
- IDAPA 37.03.06 Safety of Dams Rules:
<https://adminrules.idaho.gov/rules/current/37/370306.pdf>
- IDAPA 37.03.05 & 37.03.06 are under the authority of the Idaho Water Resource Board with oversight by the Director of the Idaho Department of Water Resources

Executive Order 2020-01 Zero-Base Regulation

- Signed by Governor in January 2020
<https://gov.idaho.gov/wp-content/uploads/sites/74/2020/01/eo-2020-01.pdf>
- Requires all agencies to undertake “**zero-base regulation**” review of all their respective rules over a five-year period.
- “**2021 marked the first year of the five-year review schedule.**”
- “...each agency must publish a notice of proposed rulemaking...to repeal the existing rule chapter.”



Priest Lake Outlet Dam. Summer 2016.



Executive Order 2020-01 Zero-Base Regulation

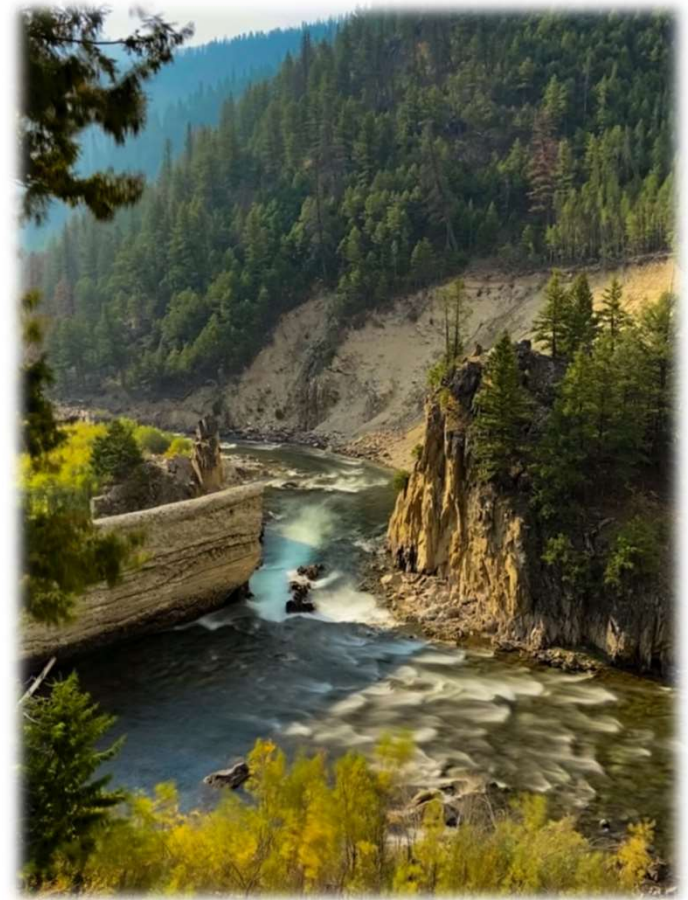
- “An agency wishing to renew a rule chapter...must promulgate a new rule...”
 - “The agency must perform a retrospective analysis of the rule chapter to determine whether the benefits the rule intended to achieve are being realized.”
 - “...whether [the benefits of the rule] justify the costs of the rule,”
 - “...whether there are less restrictive alternatives to accomplish [the rule’s] benefits.

Review Negotiated Rulemaking

- I.C. § 67-5220 – Notice of Intent to Promulgate Rules – Negotiated Rulemaking
- (2) The notice of intent to promulgate a rule is intended to facilitate negotiated rulemaking, a process in which all interested persons and the agency seek consensus on the content of a rule. Agencies shall proceed through such informal rulemaking whenever it is feasible to do so in order to improve the substance of proposed rules by drawing upon shared information, knowledge, expertise and technical abilities possessed by interested persons and to expedite formal rulemaking.
- (3) To facilitate the achievement of the purposes of this section, agencies shall, at a minimum:
 - a. Provide a reasonable period of time for interested persons to respond...;
 - b. Provide notice of meetings to interested persons who responded...;
 - c. Upon request, make available to persons attending the meetings all information that is considered by the agency in connection with the formulation of the proposed rule...;
 - d. Consider the recommendations of interested persons concerning the subject of the proposed rule;
 - e. Establish, maintain and timely update the negotiated rulemaking schedule and a list of written comments and other documents and information pertinent to the proposed rules and make that information available to persons attending the negotiated rulemaking meetings;
 - f. Prepare a written summary of unresolved issues, key information considered, and conclusion reached during and as a result of the negotiated rulemaking...
- IDWR published its Notices of Intent for this Rulemaking in Idaho Administrative Bulletin 22-4 on April 6:
<https://adminrules.idaho.gov/bulletin/2022/04.pdf>

Review Negotiated Rulemaking

- Rule Writer's Manual:
https://adminrules.idaho.gov/rulemaking_templates/RuleWriterManual.pdf
- Negotiated Rulemaking, when determined by the agency to be feasible, “must be conducted by the agency with interested parties.”
- Negotiated Rulemaking is “intended to improve the substance of the rule through a consensus building process.”
- Negotiated Rulemaking “provides an opportunity for all interested and affected persons and the agency to discuss possible changes to the rule and attempt to reach a consensus on the proposed amendments...”
- Negotiated Rulemaking is an informal part of the rulemaking process that precedes all formal rulemaking proceedings.”
- Negotiated Rulemaking is a negotiation with “stakeholders [about] the very provisions of the rule that they (stakeholders) will be subject to and regulated by.”
- Negotiated Rulemaking is an opportunity for stakeholders to “provide input and ideas on the changes the agency is considering.”



Sunbeam Dam, Salmon River. Fall 2020.

IDWR/IWRB ZBR Rulemaking Approved Five-Year Rulemaking Schedule

Year 1

| Rule No. | Title | Date | Page Count | Word Count | |
|----------|--|------|------------|------------|-----|
| 37.01.01 | Rules of Procedure of the IDWR | 2000 | 35 | 6,440 | |
| 37.03.06 | Safety of Dams Rules | 1993 | 17 | 7,708 | |
| 37.02.01 | Comprehensive State Water Plan Rules | 1993 | 8 | 3,123 | |
| 37.03.07 | Stream Channel Alteration Rules 61.01, 61.03 | 1993 | 1 | 83 | |
| Total | | | 61 | 17,354 | 17% |

Year 2

| Rule No. | Title | Date | Page Count | Word Count | |
|----------|--|------|------------|------------|-----|
| 37.02.03 | Water Supply Bank Rules | 1997 | 9 | 3,450 | |
| 37.03.10 | Well Driller Licensing Rules | 2000 | 15 | 6,416 | |
| 37.03.04 | Drilling for Geothermal Resources Rules | 1993 | 13 | 6,197 | |
| 37.03.05 | Mine Tailings Impoundment Structures Rules | 1993 | 12 | 4,850 | |
| Total | | | 49 | 20,913 | 20% |

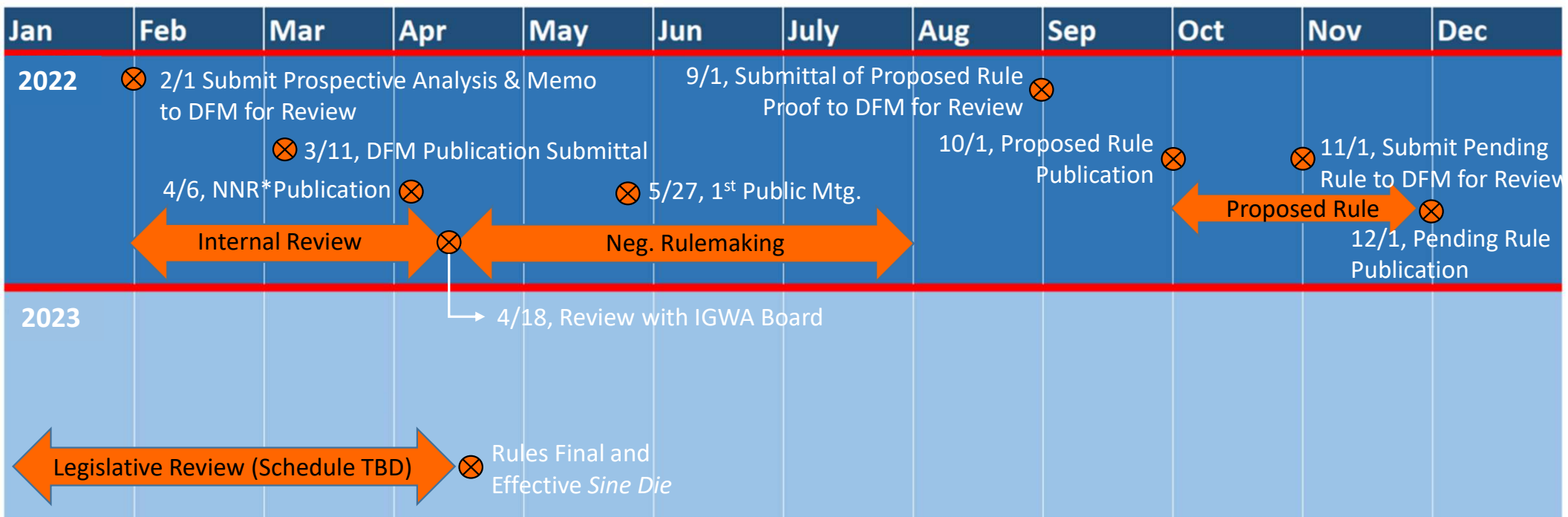
Year 3

| Rule No. | Title | Date | Page Count | Word Count | |
|----------|---|------|------------|------------|-----|
| 37.03.08 | Water Appropriation Rules | 1993 | 24 | 10,718 | |
| 37.03.03 | Rules and Minimum Standards for the Construction and Use of Injection Wells | 2013 | 26 | 10,488 | |
| Total | | | 50 | 21,206 | 21% |

ZBR Rulemaking Approved Five-Year Rulemaking Schedule

| Year 4 | | | | | |
|---------------|---|------|------------|------------|------|
| Rule No. | Title | Date | Page Count | Word Count | |
| 37.03.01 | Adjudication Rules | 2009 | 11 | 4,968 | |
| 37.03.02 | Beneficial Use Examination Rules | 2012 | 13 | 5,107 | |
| 37.03.09 | Well Construction Standards and Rules | 2009 | 40 | 13,225 | |
| Total | | | 64 | 23,300 | 23% |
| Year 5 | | | | | |
| Rule No. | Title | Date | Page Count | Word Count | |
| 37.03.11 | Conjunctive Management Rules | 1994 | 13 | 6,405 | |
| 37.03.12 | IDWR Water Distribution Rules - Water District 34 | 1994 | 9 | 3,692 | |
| 37.03.07 | Stream Channel Alteration Rules, entire chapter | 1993 | 27 | 7,681 | |
| 37.02.04 | Shoshone Bannock Tribal Water Supply Bank Rules | 1994 | 7 | 1,772 | |
| Total | | | 56 | 19,550 | 19% |
| Grand Total: | | | 280 | 102,323 | 100% |

ZBR Rulemaking Timeline – Dam Safety Rules





IDWR offices are open to the public and following the CDC guidelines for wearing masks and observing social distancing. For in-person visits, we encourage you to call ahead for an appointment.

Current Topics

North Idaho Water Users– [IDWR](#) is sending out commencement notices for the Clark Fork – Pend Oreille (CFPRB) Adjudication in 5 mailing groups through 2022.

- Due to the large volume of expected claims, commencement notices will be mailed out in groups between September 2021 – August 2022. Property owners in IDWR administrative Basin 96 will begin receiving commencement notices as early as January 2022.
- **File Online** – The new online portal to file an Adjudication Claim or submit a Water Right Application for Permit is now available. Printable forms are available [here](#).

For more information:

04/20/22 Press Release – [IDWR](#) to host public workshops to assist with water rights claims

11/29/2021 Press Release – [Clark Fork-Pend Oreille River Basin Adjudication](#) is under way, on schedule

[Northern Idaho Adjudication Brochure](#)

[Priest Lake Management](#)

Quick Links:

[Search Water Rights](#)

[Find a Well](#)

[IDWR Rulemaking](#)

[Big Wood Ground Water Management Area Advisory Committee](#)

Upcoming Events

03

MAY

2:00 pm - 6:00 pm

**IDAPA 37.03.10 WELL DRILLER
LICENSING RULES – PUBLIC
MEETING**

Tuesday, Boise/Zoom IDWR Room 602 C/D

05

MAY

1:00 pm

**CLOUD SEEDING COMMITTEE
MEETING NO. 3-22**

Thursday, Boise / Zoom

11

MAY

9:00 am - 2:00 pm

**EASTERN SNAKE
HYDROLOGIC MODELING
COMMITTEE**

Wednesday, Boise / Zoom

12

MAY

9:00 am - 11:30 am

**MAY WATER SUPPLY
MEETING**

Thursday

[See All Events](#)

Map & GIS Data Hub



Water Resource Board





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Legal Actions

Archived Legal Matters

Orders ▾

Settlements ▾

Curtailment Notices and Orders ▾

Guidance Documents

Statutes, Rules, and Hearing Procedures ▾

Rulemaking

2022/2023

2021/2022

2020/2021

2019/2020

Hearing Procedures

Administrative Actions

Delivery Call Actions

District Court Actions

Mitigation Plan Actions

Statutes, Rules, and Hearing Procedures

IDWR Rulemaking

The Idaho Administrative Procedure Act ("APA") (Title 67, Chapter 52, Idaho Code), which governs rulemaking in Idaho, defines rulemaking as the process for the formulation, adoption, amendment, or repeal of a rule. This process can be driven by a number of different events but two of the most common are the enactment of a new or amended statute by our state Legislature or the enactment of a new law or regulation by the federal government. However, a citizen's petition to amend or adopt a new rule, a change in an agency's process or procedure requirements, a court order, or the need to simply update the rule can cause an agency to initiate rulemaking and set the process in motion.

In Idaho, rules are typically proposed by state agencies, opened for public comment, and in many instances, reviewed by a board of citizens appointed by the governor. If approved by the board, the rules are then sent to the Legislature for review. If the Legislature does not act on the rules, they automatically take effect at the end of the legislative session. However, legislative action affirmatively approving a rule is required when a rule implements a new fee or revises an existing fee. Rules are compiled in administrative codes and people who do not adhere to the rules may be subject to enforcement actions. Rules specifically governing the actions of the Idaho Water Resource Board (IWRB) and the Idaho Department of Water Resources (IDWR) are contained in Chapter 37 of the Idaho Administrative Code.

When feasible, negotiated rulemaking is conducted with interested parties, in order to improve the final rule and expedite the

Terminology

+ Curtailment

+ Delivery Call

+ Mitigation Plan

Statutes & Rules

Listed below are legal considerations regarding water rights, irrigation, and floodplain management in Idaho.

Idaho Constitution

- Article XV: Water Rights

Idaho Statute

- Title 42: Irrigation and Drainage — Water Rights and Reclamation
- Title 43: Irrigation Districts
- Title 46, Chapter 10: State Disaster Preparedness Act

Idaho Administrative Code

- Rule 37: Department of Water Resources

Legal Actions

Archived Legal Matters

Orders ▾

Settlements ▾

Curtailment Notices and Orders ▾

Guidance Documents

Statutes, Rules, and Hearing Procedures ▾

Administrative Actions

Delivery Call Actions

District Court Actions

Mitigation Plan Actions

IDWR Rulemaking 2022/2023

The following table summarizes the IWRB's and IDWR's rulemaking activities for the 2022/2023 rulemaking period.

Show entries

Search:

| Authorizing Authority | Section | Docket Description | Status |
|-----------------------|-------------------------|--|--------------------|
| IWRB/IDWR | All | Omnibus Temporary Fee Rulemaking | Pending Initiation |
| IWRB | Planning and Projects | ZBR* Rulemaking – IDAPA 37.02.03 Water Supply Bank | Pending Initiation |
| IWRB | Ground Water Compliance | ZBR* Rulemaking – IDAPA 37.03.04 Drilling for Geothermal Resources Rules | Pending Initiation |
| IWRB | Ground Water Compliance | ZBR* Rulemaking – IDAPA 37.03.10 Well Driller Licensing Rules | Pending Initiation |
| IWRB | Safety of Dam | ZBR* Rulemaking – IDAPA 37.03.05 Mine Tailings | Pending |



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Legal Actions

Archived Legal Matters

Orders ▾

Settlements ▾

Curtailment Notices and Orders ▾

Guidance Documents

Statutes, Rules, and Hearing Procedures ▾

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Delivery Call Actions

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Mine Tailings Impoundment Structure & Safety of Dams Rules

IDAPA 37.03.05 – Mine Tailings Impoundment Structure & IDAPA 37.03.06 – Safety of Dams

The IWRB is negotiating these rules as part of its requirement to review each rule every 5 years consistent with the Governor's Zero-Based Regulation [Executive Order 2020-01](#).

During this review process IDAPA 37.03.05 and IDAPA 37.03.06 are being modified and combined into one single rule chapter.

Scheduled Meetings and Deadlines

27
MAY

9:30 am

RULEMAKING PUBLIC MEETING REGARDING IDAPA 37.03.05 – MINE TAILINGS IMPOUNDMENT STRUCTURE & IDAPA 37.03.06 – SAFETY OF DAMS

Friday, Boise/Remote Connection

The deadline to request participation in the rulemaking public meeting is **May 25, 2022**. To sign up to attend the meeting via telephone/videoconference or to ask questions about the May 27, 2022 public meeting, please email or call Sarah Tschohl at rulesinfo@idwr.idaho.gov or (208) 287-4800.

Documents

- [Preliminary Draft Rule \(Strawman v1.0\)](#)—May 23, 2022
- [IDAPA 37.03.05 and 37.03.06 Rule Comparison Matrix](#)—May 23, 2022
- [Comparison of Existing IDAPA 37.03.05 and Existing IDAPA 37.03.06 Rules](#)—May 3, 2022
- [Draft Letter to Dam Owners Regarding Rulemaking Public Meeting](#)
- IDAPA 37.03.05—[Notice of Intent to Promulgate Rules – Zero-Based Regulation Negotiated Rulemaking](#) (Admin. Bulletin Vol. 22-5)—April 11, 2022
- IDAPA 37.03.06—[Notice of Intent to Promulgate Rules – Zero-Based Regulation Negotiated Rulemaking](#) (Admin. Bulletin Vol. 22-5)—April 11, 2022
- [Zero-Based Regulation Prospective Analysis](#)

Comments

Comments may be sent by email or mail to rulesinfo@idwr.idaho.gov or

IDWR Rules Review Officer
PO Box 83720
Boise, ID 83720

Terminology

- + [Curtailment](#)
- + [Delivery Call](#)
- + [Mitigation Plan](#)

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Idaho Administrative Code

- [Rule 37: Department of Water Resources](#)

Hearing Procedures

Overview of IWRB & IDWR
Contested Case Processes

Submit Comments to
rulesinfo@idwr.idaho.gov

Today's Meeting Process

1. Requires polite and respectful engagement.
2. We are recording today's proceedings and we will publish the recordings to our website.
3. IDWR has prepared a Preliminary Draft Rule or "strawman," which it will present.
4. After presentation of the strawman, stakeholders will have an opportunity to comment regarding the strawman, including submittal of written comments.
5. IDWR representatives are participating to answer some questions.
6. Today is not a debate of the strawman rule.
7. At the end of the meeting, we will determine whether additional meetings are needed.



Negotiated Rulemaking Next Steps

- Submit written comments by C.O.B. June 17, 2022
- Through rulesinfo@idwr.idaho.gov
- Reference the rule chapter: IDAPA 37.03.05 or IDAPA 37.03.06.
- If appropriate, IDWR will revise the Strawman Rule based on comments and hold additional meeting(s).
- Goal: Publish a Proposed Rule in October Bulletin.





Questions
About the
Process?