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Via Email
Angela Hansen
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Re: Veolia's comments on Strawman 2.0,
IDAPA 37.03.08 Water Appropriation Rules Negotiated Rulemaking

Dear Angie:

On behalf of Veolia Water Idaho, Inc., I am submitting these written comments concerning the Department's "Strawman 2.0" in the negotiated rulemaking for IDAPA 37.03.08 (Water Appropriation Rules). These comments are in addition to those we submitted on May 11, 2023, and are consistent with the comments I made orally at the July 26 public meeting.

These comments address draft Rules 35.03.e.iii and 45.01.e.i and .ii in Strawman 2.0.

Rule 35.03.e.iii

Veolia proposes the following changes (shown in redline) to draft Rule 35.03.e.iii:

> For a municipal purposes Application that proposes to appropriate water for reasonably anticipated future needs, include justification for the planning horizon, the anticipated service area at the end of the~~,~~ planning horizon, the anticipated population ~~at~~ at the end of the planning horizon~~projection~~, and the anticipated

> water demand within the service area anticipated at the end of the planning horizon. Also include a gap analysis showing the existing water right is insufficient to meet the municipal purposes need at the end of the planning horizon.

Veolia did not make this suggestion in its May 11, 2023 comments to Strawman 1.0 because it had understood that the measure for reasonably anticipated future needs ("RAFN") would be the population and water demand projections within the service area anticipated to exist at the end of the planning horizon. However, since then Veolia has learned through its Integrated Municipal Application Package ("IMAP") proceeding that there may be some uncertainty as to whether the statutory definitions provide for consideration of the service area anticipated to exist at the end of the planning horizon, or whether a municipal provider's current service area is the appropriate boundary for determining future needs.

Veolia believes that the statutory definitions, IDWR's existing guidance, and common sense dictate determining future needs within the service anticipated to exist at the end of the planning horizon.

The Municipal Water Rights Act of 1996 defines RAFN as "future uses of water by a municipal provider for municipal purposes within a service area which, on the basis of population and other planning data, are reasonably expected to be required within the planning horizon of each municipality within the service area not inconsistent with comprehensive land use plans approved by each municipality." Idaho Code § 42-202B(8) (emphasis added).

Read in context, "a service area" (in the definition of RAFN) refers to the service area that is reasonably anticipated to be in place at the end of the planning horizon. This squares with the definition of "service area" as "that area which a municipal provider is or becomes entitled or obligated to provide water for municipal purposes." Idaho Code § 42-202B(9) (emphasis added). The growing service area concept is central to the 1996 Act and lays the foundation for the whole concept of RAFN. Unlike places of use for all other water rights—which are fixed and specifically delineated—a municipal service area is allowed and expected to grow over time. So, obviously, any calculation of future demand must be based on the future service area.

This is consistent with IDWR's guidance on the subject, which says "A RAFN service area is a proposed future service area for the municipal provider." *IDWR Application Processing Memo No. 74* ("*Keen RAFN Memo*") at 6 (Oct. 1, 2021). The guidance also says that municipal providers should document their existing service areas but only because that sets the baseline for where the future service area may be: "The purpose of this current boundary information is to facilitate the Department's review of the proposed RAFN service area." *Keen RAFN Memo* at 7 (emphasis added). The quoted statement is made in the context of the memo's discussion of cities that provide municipal water; but the same principle applies to other municipal providers, as is expressly stated in the memo's conclusion: "In conclusion, RAFN service areas should

include all existing contiguous and non-contiguous areas of water service (assuming they are combined) and adjacent areas poised for development and likely to occur within the established planning horizon time period." *Keen RAFN Memo* at 8.

In sum, Veolia believes calculating RAFN based on demands projected within a reasonably anticipated future service area is consistent with the law and IDWR policy and common sense, and that it is prudent to make this clear in this rulemaking.

45.01.e.i and .ii

Veolia proposes the following changes (shown in redline) to draft Rules 45.01.e.i and .ii:

> i. The direct effect the project will have on public water resources that are of interest to the people in the area directly affected by the proposed water use, including but not limited to, fish and wildlife habitat, aquatic life, recreation, aesthetic beauty, transportation, navigation, ~~and~~ water quality, and the effect of such use on the availability of water for alternative uses of water that might be made within a reasonable time; and
>
> ii. Whether the proposed water use is consistent with the State's policy of securing the maximum use and benefit ~~greatest possible benefit~~ from the public water resources ~~is achieved by considering the effect the project will have on the availability of water for alternative uses of water that might be made within a reasonable time~~.

Veolia proposes the changes above to achieve better consistency with Idaho law, including the 2003 amendment to the definition of "local public interest" in I.C. ¶ 42-202B(3).

The revised language in subsection .i above is consistent with the current statute ("'Local public interest' is defined as the interests that the people in the area directly affected by a proposed water use have in the effects of such use on the public water resource") and the 2003 amendment's Statement of Purpose ("… including but not limited to fish and wildlife habitat, aquatic life, recreation, aesthetic beauty, transportation, navigation, water quality and the effect of such use on the availability of water for alternative uses of water that might be made within a reasonable time.").

And the language in subsection .ii above, as revised, also is consistent with the 2003 Statement of Purpose, but replaces "greatest possible benefit" with "maximum use and benefit," which is terminology long enshrined in Idaho law. *Mountain Home Irr. Dist. v. Duffy*, 319 P.2d 965, 968 (Idaho 1957) ("It must be remembered that the policy of the law of this state is to secure the maximum use and benefit of its water resources."); *Poole v. Olaveson*, 356 P.2d 61,

65 (Idaho 1960) ("The policy of the law of this State is to secure the maximum use and benefit, and least wasteful use, of its water resources."); *Nettleton v. Higginson*, 558 P.2d 1048, 1052 (Idaho 1977) ("The governmental function in enacting not only I.C. § 42-607, but the entire water distribution system under Title 42 of the Idaho Code is to further the state policy of securing the maximum use and benefit of its water resources."); *Merrill v. Penrod*, 704 P.2d 950, 959 (Idaho Ct. App. 1985) ("That policy 'is to secure the maximum use and benefit, and least wasteful use, of its water resources.'"); *Kunz v. Utah Power & Light Co.*, 792 P.2d 926, 929 (Idaho 1990) ("The policy of the law of this State is to secure the maximum use and benefit, and least wasteful use, of its water resources."); *State v. Hagerman Water Right Owners* ("*Basin-Wide Issue 10*") ("*Hagerman I*"), 947 P.2d 400, 408 (Idaho 1997) ("The governmental function in enacting . . . the entire water distribution system under Title 42 of the Idaho Code is to further the state policy of securing maximum use and benefit of our natural water resources."); *Stott v. Finney*, 950 P.2d 709, 711 (Idaho 1997) ("It has been the policy of this State to secure the maximum use and benefit of its water resources."); *Aberdeen-Springfield Canal Co. v. Peiper*, 982 P.2d 917, 926 (Idaho 1999) (applying the "state policy of securing the maximum use and benefit of its water resources."); *Clear Springs Foods, Inc. v. Spackman*, 252 P.3d 71, 89 (Idaho 2011) ("The policy of securing the maximum use and benefit, and least wasteful use, of the State's water resources applies to both surface and underground waters, and it requires that they be managed conjunctively."); *Telford Lands LLC v. Cain*, 303 P.3d 1237, 1243 (Idaho 2013) (applying "this State's policy to secure the maximum use and benefit, and least wasteful use, of its water resources."); *Rangen, Inc. v. IDWR* ("*Rangen II*"), 369 P.3d 897, 907 (Idaho 2016) ("The policy of the law of this State is to secure the maximum use and benefit, and least wasteful use, of its water resources.").

The version of Rule 45.01.e.ii in Strawman 2.0 could be construed as creating a requirement that an applicant prove that its proposed use achieves the greatest possible benefit from the water resource—a kind of "highest and best use" standard that is not present in (or consistent with) Idaho law. Veolia's proposed revisions make the rule consistent with longstanding Idaho law and policy.

Thank you for considering these comments and proposed revisions to Strawman 2.0. Please let me know if you would like to discuss further.

Sincerely,

Michael P. Lawrence

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