

Recommendation Memo

State of Idaho

Department of Water Resources

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Date: January 12, 2024

To: Idaho Water Resource Board

Thru: Mat Weaver, Director; Tim Luke, Water Compliance Bureau Chief

From: Erik Boe, Ground Water Protection Section Manager

Subject: Memorandum re: IDWR's Well Construction Standards Rules, IDAPA 37.03.09 with Retrospective Analysis and Recommendation.

Executive Order 2020-01

Executive Order No. 2020-01 (the "EO") requires the Idaho Department of Water Resources ("IDWR") and the Idaho Water Resource Board ("IWRB") (collectively "Agencies") to review all rule chapters under the Agencies' purview by 2026. The review must be a critical and comprehensive review. EO at 2.

Pursuant to the schedule already determined by the Division of Financial Management ("DFM") and the Agencies, IDWR's *Well Construction Standards Rules* ("Well Construction Rules" or "Rules"; IDAPA 37.03.09) must be analyzed in the fourth year of the review process.

Therefore, the EO requires the Agencies to review the Well Construction Rules to determine whether they should be repealed altogether or re-promulgated. If the Agencies desire to re-promulgate the Well Construction Rules, the Agencies must retrospectively analyze the rules and determine whether the rules need to be re-promulgated, and, if so, to recommend an approach. *Id* at 3.

This Recommendation Memorandum ("Memo") provides analysis and recommendations for the Director and Board.

Retrospective Analysis

1. What are the benefits of the current rule?

The Well Construction Rules establish minimum standards for the construction of all new wells and the modification and decommissioning (abandonment) of existing wells. The intent of the Rule is to protect the public health, safety, welfare and environment, and to prevent the waste of water, or mixture of water from different aquifers. The Rule also implements the drilling permit fees set forth in Idaho Code § 42-235. Additional benefits of the current Rules include:

- Preserves the pressure, temperature, and quality of Idaho's aquifers.

- Establishes additional requirements for the construction of low temperature geothermal resource wells to prevent waste and preserve the temperature and pressure of the valuable resource.
- Establishes requirements for the construction of artesian wells to protect against artesian aquifer pressure loss and prevent waste.
- Establishes well drilling permit requirements.
- Excludes specific borings from permitting requirements.
- Establishes decommissioning requirements for unused wells.
- Identifies suitable casing and sealing materials for the differing hydrogeologic conditions found across Idaho.
- Establishes well owner responsibilities for maintenance and use of wells.
- Provides for the establishment of Areas of Drilling Concern to protect public health and prevent the spread of contaminants in ground or surface water.

2. Do the benefits of the rule justify the costs of the rule?

Idaho relies on ground water for over 95% of its drinking water. Ground water is vital for irrigation to support Idaho's large agricultural economy, as well as the commercial, domestic, municipal, and industrial economic sectors of the State. The Rules add clarification to statutes and implements practical methods and standards necessary to protect the vital ground water resources of the state from waste and contamination. The Rules are therefore important to the public interest of the State.

Well construction permit fees are nominal (\$75 to \$200 per permit application), and are controlled by statute, not rule. Rule modifications will not include new fees or changes to fees set by statute. Potential rule modifications should not result in added costs or time necessary for permitting or inspection of well construction activities. IDWR employs six to six and one-half full-time employees to manage the well construction program across the state. Approximately seventy percent of the cost of the program is offset by well construction permitting fees with the remainder fulfilled via other IDWR fee accounts.

Well construction activities fluctuate year over year correlating strongly with state-wide economic conditions. IDWR generally receives approximately 3,000 to 5,000 well construction applications per year. During fiscal years 2022 and 2023, IDWR received 4,938 and 4,651 applications, respectively.

Based on the information summarized above, IDWR concludes that the benefits of the Rules justify the costs of the Rules. The additional protection to ground water resources in Idaho afforded by these rules justifies the relatively minor costs attributed to minimum standards imposed by the Rules.

3. Are there less restrictive alternatives to accomplish the benefits of the rule?

The current Well Construction Rules add clarification to statutes captured in Chapter 2, Title 42, Idaho Code, and establishes minimum standards for the construction of all new wells and the modification and decommissioning (abandonment) of existing wells. IDWR will propose removing certain sub-rules that are unnecessary or obsolete, including sub-

rules that reiterate current statutes. The negotiated rulemaking process will determine whether the Rules are necessary or require substantive modification. The negotiated rulemaking process is an opportunity for IDWR to consider all suggested alternatives or other recommendations related to these Rules.

4. Recommendation

Idaho Code § 42-235 requires that the construction of any well, or changing the construction of any well, be authorized by permit issued by the Director to protect the public health, safety and welfare of the environment, and to prevent the waste or mixture of water from different aquifers. Given this statutory mandate, IDWR staff recommends the Rules be repealed and replaced through the negotiated rulemaking process.

Pursuant to the negotiated rule process, IDWR staff will seek comment on whether any non-regulatory measures can be implemented in lieu of the Well Construction Rules. IDWR will propose some minor rule changes or updates for the purposes of clarification and consistency with current statutes.