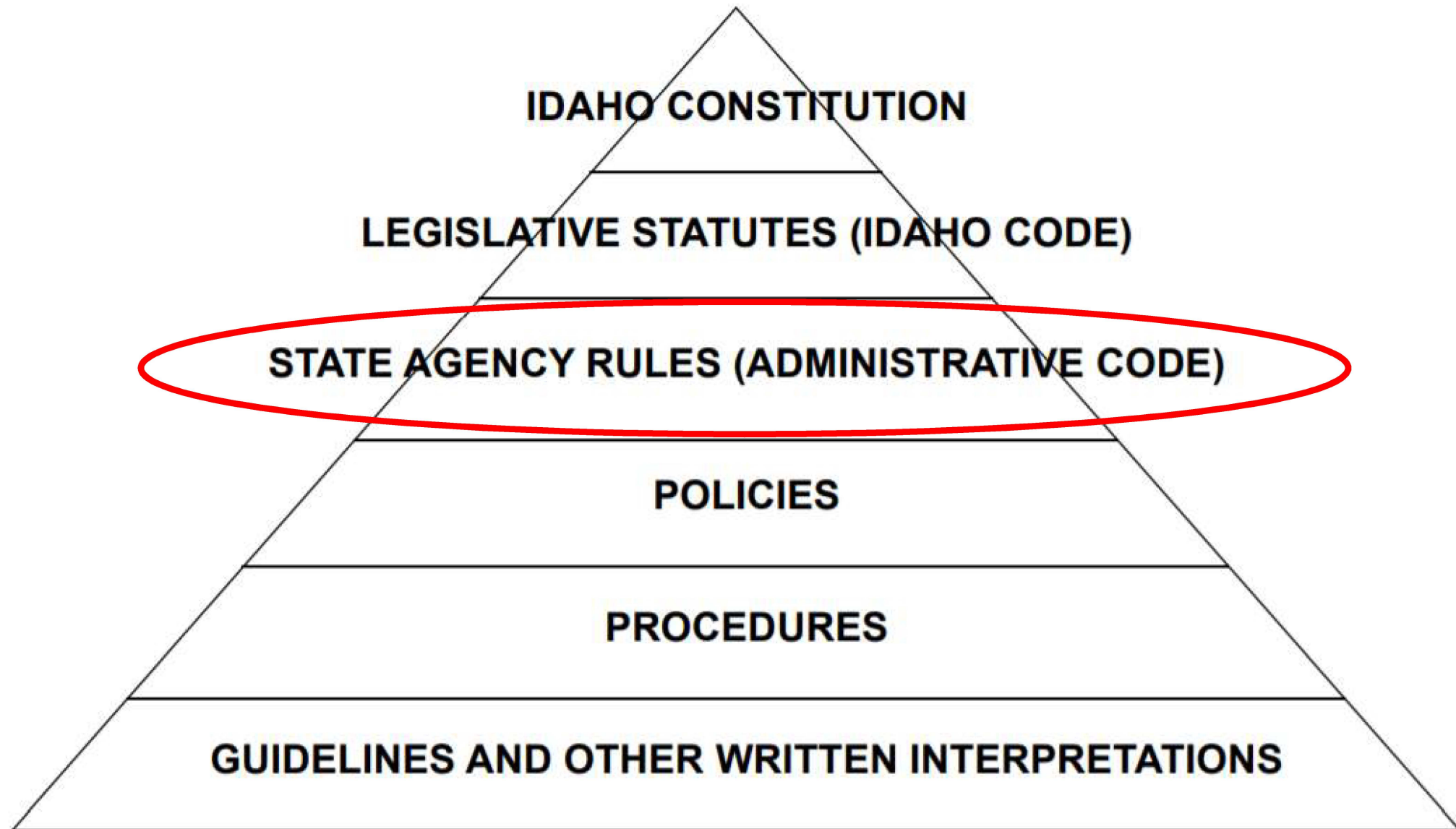


# IDAPA 37.03.07 061 and 063 Negotiated Rulemaking Meeting

April 27, 2021



# HIERARCHY OF STATE DOCUMENTS



# Review of Recent Related IDWR/IWRB Rulemaking

- The 2019 Legislative Session ended **without the reauthorization of the existing administrative rules** for Idaho;
- As a result, and in concert with his **Red Tape Reduction effort**, which was already underway, the Governor directed **all state executive agencies, including the IWRB/IDWR**, to republish existing rules by IDAPA chapter as both temporary and proposed rules;
- As directed by the Governor, the IWRB/IDWR comprehensively reviewed all rules and in the process identified rules to be eliminated because they were **obsolete, outdated, unnecessary, contrary to existing Idaho Code, contrary to federal law, or contrary to current court rulings**;
- Following review, the revised rules **were published as temporary and proposed rules on June 19, 2019**, in **Idaho Administrative Bulletin Vol. 19-6SE** (pp. 5926 – 6170);
- The 2019 Proposed Rules **were published as Pending Rules on November 20, 2019**, in the **Idaho Administrative Bulletin Vol. 19-11SE** (pp. 4624 - 4858).
- In January of 2020, the Governor passed Executive Order 2020-10, requiring all agencies to undertake a **“zero-base regulation”** review of all of their respective rules over a five year period of time. **2021 marks the first year of the five-year review schedule**. Accordingly, “zero-base” negotiated rulemaking for the Rules of Procedure (IDAPA 37.01.01), State Water Plan Rules (IDAPA 37.02.01), Dam Safety Rules (IDAPA 37.03.06), and Stream Channel Alteration Rule 61 (IDAPA 37.03.07.61) are underway.
- The 2019 Pending Rules were submitted to the legislature for review during its 2020 session. The **House and Senate germane committees ultimately reviewed and approved the Pending Rules and sent them to their full chambers for approval**.
  - In the House, the House Resource Committee voted to “approve Docket 37-0000-1900F with the exception of 37.03.07.061.01 [Standards for Suction Dredges] and 37.03.07.061.03 [Mechanized Equipment Prohibited Below High Water Mark].” – January 15, 2020
  - IDWR, IDL, and IDEQ participated in a Legislative “Briefing on Stream Channel Alteration Rules Relating to Suction Dredge Operations” to review IDAPA 37.03.07 Minimum Standard Rule 61 – Suction Dredges and Non-Powered Sluice Equipment and IDWR’s Letter Permit Process – February 3, 2020
  - In response to the February 3 Legislative Briefing, Gary Spackman, Director of IDWR, and Roger Chase, then Chairman of the IWRB, issue a Memo to staff instructing them “to consider [rules 37.03.07.061.01 and 37.03.07.061.03] in calendar year 2021 pursuant to the Governor’s Executive Order no. 2020-01.” – on or around February 3, 2020
  - The House Resource Committee passed a motion by voice vote to “approve Sections 37.03.07.061.01 and 37.03.07.061.03 from Docket No. 37-0000-1900F.” – February 5, 2020
- In January 2021, consistent with instructions from the Director and legislative expectations, IDWR started ZBR Negotiated Rulemaking for IDAPA 37.03.06 061 and 063.

# Review E.O. 2020-01 Zero-Base Regulation

- E.O. 2020-01 Link: <https://gov.idaho.gov/wp-content/uploads/sites/74/2020/01/eo-2020-01.pdf>
- “Each rule chapter effective on June 30, 2020, shall be reviewed by the agency...”
- All rule chapters...shall be reviewed and, if applicable, be promulgated as specified in the Executive Order no later than sine die 2026.”
- “...each agency must publish a notice of proposed rulemaking...to repeal the existing rule chapter.”
- “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.”
- The agency must...





# Review Negotiated Rulemaking

- Title 67, Chapter 52 Idaho Administrative Procedures Act:  
<https://legislature.idaho.gov/statutesrules/idstat/Title67/T67CH52/>
- 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 person 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...



# IWRB/IDWR 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	<del>Comprehensive State Water Plan Rules</del>	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%



# IWRB/IDWR 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%

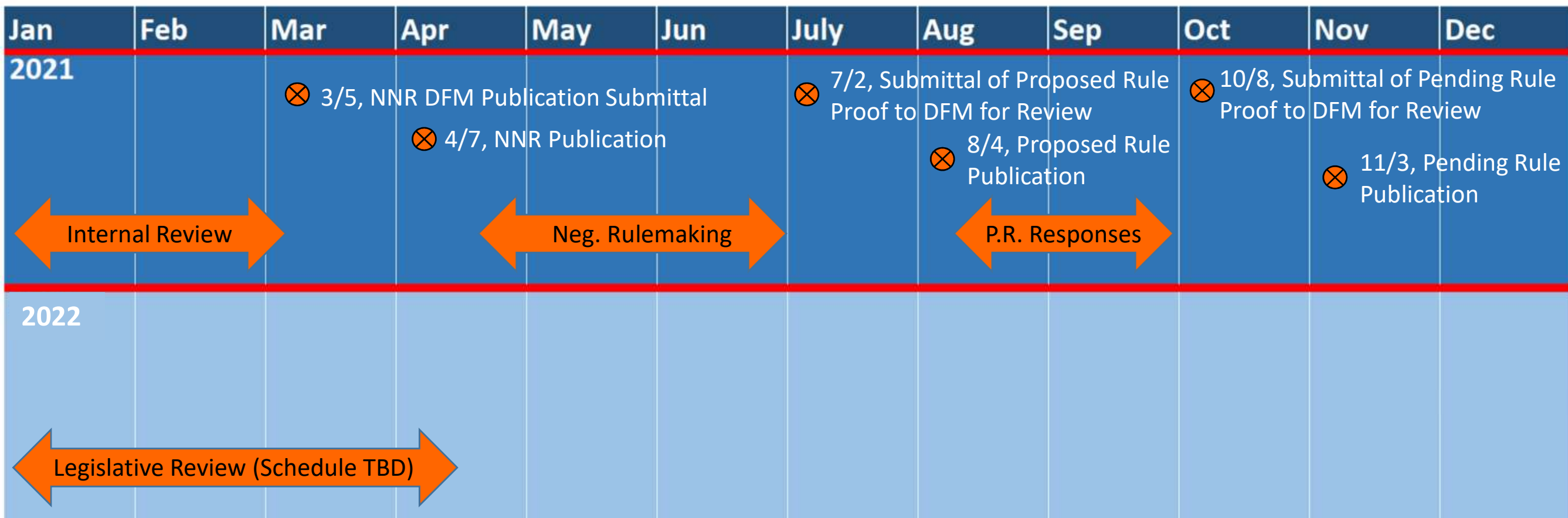
## Year 5

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%



# Rule 61 ZBR Rulemaking Timeline



# Stream Channel Alteration Regulations

- Title 42, Chapter 38 Alteration of Channels of Streams:  
<https://legislature.idaho.gov/statutesrules/idstat/Title42/T42CH38/>
- IDAPA 37.03.07 – Stream Channel Alteration Rules:  
<https://adminrules.idaho.gov/rules/current/37/370307.pdf>
- IDAPA 37.03.07 is under the Authority of the Idaho Water Resource Board
- 37.03.07 Rule 61 is a Minimum Standards Rule
  - I.C. § 42-3803(d): The board may, by regulation, dispense with procedural requirements for permit application and approval contained in this chapter for projects and activities which, in all respects, at least meet minimum standards adopted pursuant to this section.
  - Because of the limitations imposed by Rule 61, IWRB has adopted the Idaho Recreational Mining Authorization Letter Permit (“Letter Permit”) process and “dispensed with [the Joint Application] procedural requirements” and instead rely on the expedited letter permit process, which doesn’t require inter-agency coordination or the rigorous application review that the Joint Application process requires.
  - As a result, Letter Permits are typically issued immediately. Whereas, the Joint Application process is typically a weeks long review process.
  - The South Fork of the Clear Water River has “special supplemental” permitting requirements to conform with the legal requirements of the *Comprehensive State Water Plan South Fork Clearwater River Basin*.

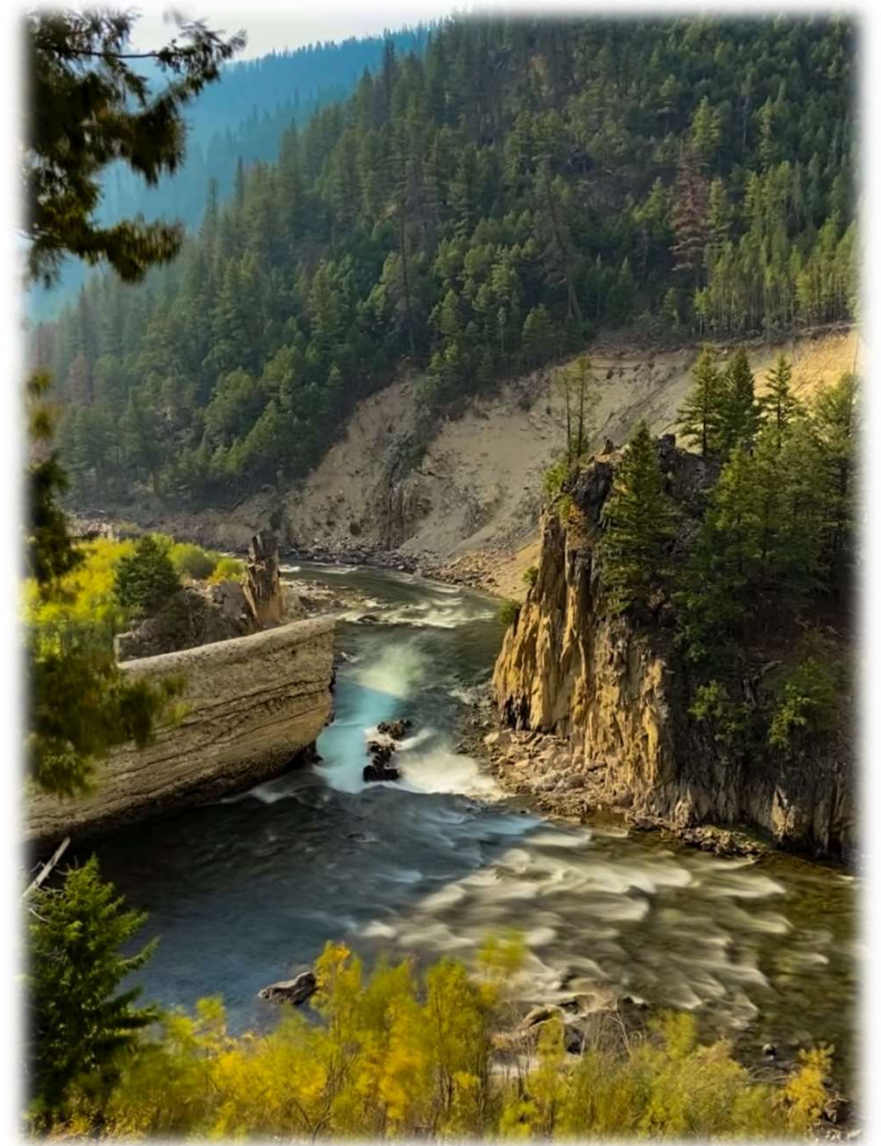


# Five-Year Summary of SCA Permits Issued



# Review Negotiated Rulemaking

- Rule Writer's Manual:  
[https://adminrules.idaho.gov/rulemaking\\_templates/RuleWriterManual.pdf](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.



# Today's Meeting Process

1. Requires polite and respectful engagement.
2. We are recording today's proceedings and the recordings will be posted to IDWR's 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.
5. IDWR, IDL, and IDEQ representatives are participating to answer related questions.
6. At the end of the meeting we will need to determine whether additional meetings are needed.



# ZBR Rulemaking Resources

- Work Product: N:\Administration Reports\Rules\2021 Rulemaking\
- IDWR On-Line Rule Publications (Current): <https://idwr.idaho.gov/legal-actions/rules.html>
- Example On-Line Rulemaking Publication (To Be?): <https://agri.idaho.gov/main/i-need-to/see-lawsrules/rulemaking/isda-rulemaking-2019-2020/rules-governing-pesticide-and-chemigation-2020-2021/>
- Executive Order 2020-01 (Zero-Base Regulation): <https://gov.idaho.gov/wp-content/uploads/sites/74/2020/01/eo-2020-01.pdf>
- Office of the Administrative Rules Coordinator: [https://adminrules.idaho.gov/rulemaking\\_templates/](https://adminrules.idaho.gov/rulemaking_templates/)
- DFM Application Rulemaking Forms: [https://dfm.idaho.gov/state\\_agencies/forms/](https://dfm.idaho.gov/state_agencies/forms/)
  - DFM Application Forms User Manual: [https://dfm.idaho.gov/state\\_agencies/forms/forms\\_instructions.pdf](https://dfm.idaho.gov/state_agencies/forms/forms_instructions.pdf)
  - DFM Forms Application Log-In: <http://apps.dfm.idaho.gov/dfmforms/> (you will need to create an account with David Fulkerson [david.Fulkerson@dfm.Idaho.gov](mailto:david.Fulkerson@dfm.Idaho.gov))
- Rule Writer's Manual: [https://adminrules.idaho.gov/rulemaking\\_templates/RuleWriterManual.pdf](https://adminrules.idaho.gov/rulemaking_templates/RuleWriterManual.pdf)



# Goals for Today's Meeting

- Build consensus.
- Share information and communicate perspectives respectfully.
- Enhance public awareness and involvement.
- “Reality Check” for IDWR, the other agencies here, and all of the stakeholders.
- Embrace creative outcomes and creative problem solving.
- Increase understanding of the rules.
- Save time and money for everyone involved – *for example, by avoiding future litigation.*
- Build relationships between and amongst stakeholders.
- Increase regulatory certainty for those operating under the rule.
- Improve technical aspects of the rule and increase understanding of complex aspects.
- Solve problems at the regulatory, administrative level, instead of at the legislature.



# We Are NOT Here To:

- Debate the merits of, or change current Idaho Statutes.
- Debate the merits of Federal Policies, Rules, and Laws.
- Debate issues of personal freedoms.
- Delegate IWRB/IDWR rulemaking responsibilities and authorities.
- Replace the formal rulemaking process, which is ultimately approved by the legislature.
  - So as an example, this informal process can't be used to create a policy or guidance in lieu of formal rules.
- Eliminate or reduce IDWR's obligation to fully analyze the rule and rulemaking requirements imposed on it by Idaho law.
- Set aside legal or political rights as a condition of participation.
  - As an example, this process isn't a settlement negotiation. It is cooperative, consensus-building process, with IDWR having the responsibility to make decisions on the rules and go forward.
- The process is voluntary for everyone involved.





# Questions?



*Alexander Reservoir, Soda Springs, Idaho. 2019.*

# The End.