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Idaho State Legislature

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MEMORANDUM

TO: Rules Review Subcommittee of the Senate Resources & Environment Committee and the House Resources & Conservation Committee

FROM: Deputy Division Manager - Katharine Gerrity

DATE: July 10, 2019

SUBJECT: Department of Water Resources

IDAPA 37.00.00 - Notice of Omnibus Rulemaking - Temporary and Proposed Fee Rulemaking (Docket No. 37-0000-1900F)

The Idaho Department of Water Resources submits notice of temporary and proposed rules that reauthorize and re-publish the following previously approved chapters at:

- **37.01.01**, Rules of Procedure of the Idaho Department of Water Resources
- **37.02.03**, Water Supply Bank Rules
- **37.03.01**, Adjudication Rules – All rules except Subsections: 025.08, 035.02.b.i., 035.02.c.i., 035.03.c.i., 035.04.b.i., 035.06.a., 035.06.b., and 035.07.a. According to the department, these rules are unnecessary because per rule subpart 025.08, they are "solely for the purpose of illustration and do not have the effect of rules as stated." The department notes that eliminated rules will be incorporated into existing IDWR Water Right Adjudication policy.
- **37.03.02**, Beneficial Use Examination Rules – All rules except Subsections 010.12 (which the department indicates defines a word that is not used elsewhere in the rules), 055.01 (the department indicates that the rule is no longer applicable because there are no more permits with proof submitted before the effective date of the rule and no examination fee has been paid), and parts of Section/ Subsections 002., 010.19, 025.01 (the department states that these subparts are outdated and mandates submittal of information in the form of an affidavit when other forms are acceptable to the department), 030.03 (the department indicates that this rule is outdated and states denied applications will be returned to the applicant, when in fact, the department should retain the application as evidence for the record in case of an appeal of the action), 030.08, 035.01.c., 035.01.g., 035.01.m., 035.01.p., 035.03.b., 045.01 (the department indicates that these subparts contain an outdated directive about page margins that is no longer needed or enforced), and 050.02.b. The department states that the remaining omitted parts of rules (without parenthetical notation) have unnecessary words and phrases that add complexity to the rules without affecting the meaning of the rules.
- **37.03.03**, Rules and Minimum Standards for the Construction and Use of Injection Wells – All rules except Subsections/Sections: 010.07, 010.15, 010.29, 010.30, 010.40, 010.48.a., 010.48.b., 010.49.e., 010.54, 010.56,

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010.69, 010.70, 010.75, 010.90, 010.91, 010.92, 010.98, 010.101, 025, 040.02.b., 040.02.d., 045, 048, 051, 054, 057, and 060. According to the department, these subparts govern Class 2 injection wells. Class 2 wells are the class of wells used to inject: process water from oil and gas pumping; fluids used for enhancing the recovery of oil or natural gas; and liquid hydrocarbons (at standard temperatures and pressures) for underground storage. The department notes that in 2018, Idaho voluntarily transferred primacy over Class 2 injection wells to the EPA. Class 2 wells are currently administered by the EPA (see 40 CFR Part 147). The department states that now that the EPA administers Class 2 injection wells in Idaho, these subparts are contrary to federal rule.

- **37.03.04**, Drilling for Geothermal Resources Rules – All rules except Subsection: 025.03. The department notes that Rule subparts 025.03.a, 025.03.b, and 025.03.c restate fees that are statutorily defined in Idaho Code Sections 42-4003 and 42-4011. Furthermore, the fee identified in the rules for production wells, exploratory wells, and injections wells are outdated and no longer consistent with the statutorily defined fees. According to the department, rule subparts 025.03.d and 025.03.e will be removed from the rules and added to existing IDWR policy governing well drilling permit processes.

- **37.03.05**, Mine Tailings Impoundment Structures Rules

- **37.03.06**, Safety of Dams Rules

- **37.03.07**, Stream Channel Alteration Rules - All rules except Subsections/Sections 055.03, 055.05, 055.06, 058, 060, and 061, part of rule 056.07, and Appendix E, Appendix F, Appendix G, Appendix L, Appendix M, and part of Appendix K. The department states that these subparts cover minimum standard rules for the use of gabions, dikes and levees, and jetties in stream channel alteration activities. The department states that these minimum standards are outdated and rarely used in stream channel alteration work. The department notes that the current Stream Channel Coordinator has rarely permitted alteration activities that include these minimum standards. If gabions, dikes, levees, or jetties are proposed in the future, they can still be permitted as non-minimum standard stream channel alterations.

- **37.03.08**, Water Appropriation Rules – All rules except Subsections 035.03.a., 035.03.b.xv., 040.01.e. (The department states that these subparts are outdated, IDWR does not require a surety bond from water right applicants.), 040.02.d. (The department states that this rule is no longer consistent with Idaho Code provisions. The opportunity to receive notification by mail was replaced in Section 42-203A, Idaho Code, with a requirement for notice on IDWR’s internet homepage.), 050.07 (The department states that this rule restates unambiguous requirement from Section 42-204, Idaho Code, and is unnecessary.), and parts of rules 030.01.c., 030.03.a., 030.03.c., 035.01.a. (According to the department, these subparts are inconsistent with provisions of the Idaho Code and incorrectly state that certain changes to existing water rights require the filing of an application for permit. The requirement is not consistent with the requirement of Section 42-222, Idaho Code, requiring the filing of an application for transfer to change an existing right.), 035.01.b. (The department notes that this rule is inconsistent with Section 42-111, Idaho Code.), 035.02.a., 035.03.a (According to the department, these subparts repeat a directive in rule subpart 035.01.d and is unnecessary.), 035.03.b.ii. (The department states that this rule is out of date and requires IDWR to use local common names for water sources, but in many instances IDWR does not know the local common name or in other instances multiple names are used locally.), 035.03.b.xv.(According to the department, this rule is outdated and addresses circumstances which do not occur.), 035.04.a., 040.02.a.i., 040.02.a.ii., 045.01.e.iii., 045.02.b.iii., and 050.02 (According to the department, these subparts are out of date and refer to “Policy 32 I” in the State Water Plan and the current state water plan does not contain a “Policy 32 I.”) In addition, the department states that a number of the parts of rules being eliminated have unnecessary words and phrases that add complexity to the rules without affecting the meaning of the rules.

- **37.03.09**, Well Construction Standards and Rules

• **37.03.10**, Well Driller Licensing Rules

These rules were previously analyzed and reviewed by the Legislative Services Office upon their initial promulgation. In addition to the information provided above regarding parts of rules that were omitted, the department also made additional changes that clarify provisions, revise verbiage and reorganize some subsections. No other changes from the existing rules have been noted.

This is a fee rule. According to the department, this rulemaking does not impose a fee or charge, or increase a fee or charge, beyond what was previously approved and codified in the prior rules.

The rulemaking appears to be authorized pursuant to Sections 42-238, 42-603, 42-1414, 42-1701A, 42-1714, 42-1709, 42-1721, 42-1734, 42-1761, 42-1762, 42-1765, 42-1805, 42-3803, 42-3913, 42-3914, 42-3915, 42-4010 and 67-5206, Idaho Code.

cc: Department of Water Resources
Gary Spackman

***** PLEASE NOTE *****

Per the Idaho Constitution, all administrative rules may be reviewed by the Legislature during the next legislative session. The Legislature has 3 options with this rulemaking docket: **1)** Approve the docket in its entirety; **2)** Reject the docket in its entirety; or **3)** Reject the docket in part.