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MAR 20 2018

DEPARTMENT OF
WATER RESOURCES

BEFORE THE IDAHO DEPARTMENT OF WATER RESOURCES

IN THE MATTER OF INTEGRATED
MUNICIPAL APPLICATION PACKAGE
("IMAP") OF SUEZ WATER IDAHO INC.,
BEING A COLLECTION OF INDIVIDUAL
APPLICATIONS FOR TRANSFERS OF
WATER RIGHTS AND APPLICATIONS
FOR AMENDMENT OF PERMITS.

**SUEZ'S MOTION TO DEFER OR, IN THE
ALTERNATIVE, FOR EXTENSION OF
TIME, WITH SUPPORTING ARGUMENT**

Pursuant to Idaho Department of Water Resources Rules of Procedure 565, 52, and 270.02, Applicant SUEZ Water Idaho Inc. ("SUEZ") respectfully requests that the Director defer briefing and a decision on the *Motion for Summary Judgment to Limit Planning Horizon* ("Motion for Summary Judgment") filed on March 16, 2018 by Boise Project Board of Control ("Boise Project")¹ until after the merits hearing scheduled for May 29 through 31, 2018. In the alternative, SUEZ respectfully requests that the Director extend the time to file SUEZ's response brief from March 30, 2018 (the default date under Rule 270.01) to April 13, 2018. SUEZ has also filed a *Motion for Expedited Consideration* of this motion to facilitate a decision by March 23, as necessary given the existing deadline of March 30.

¹ By its terms, the *Motion for Summary Judgment* was filed only by the Boise Project, and not by the other protestants represented by its counsel.

1. The Director should defer briefing and a decision on the *Motion for Summary Judgment* until after the merits hearing.

Under the Department's Rule of Procedure 565, the presiding officer "may consider and decide prehearing motions with or without oral argument or a hearing." SUEZ requests that the Director exercise this discretion and defer ruling on the *Motion for Summary Judgment* after the merits hearing for the following reasons.

First, the brevity of the *Motion for Summary Judgment* disguises the complexity of the issues it presents. The Boise Project's filing seeks a first-of-its-kind, precedential interpretation of the statutory requirement for a reasonable planning horizon for reasonably anticipated future needs, key issues in this case.² *Memorandum in Support of Motion for Summary Judgment* ("Memo in Support") at 4-6. The Boise Project asks the Hearing Officer to compare the duration of the planning horizon in SUEZ's *Master Water Plan for the Years 2015 through 2065* ("2065 Master Plan") to the durations of a COMPASS planning report and Blueprint Boise. *Id.* at 5-6. In the Boise Project's view, this facial comparison is all that is needed.

In reality, the Hearing Officer is called upon to weigh a broad range of facts and considerations before making a determination of the reasonableness of a municipal provider's planning horizon in light of the municipal provider's needs. This is not a trivial, check-the-box analysis. The statute speaks in terms of reasonableness: "'Planning horizon' refers to the length of time that the department determines is reasonable for a municipal provider to hold water rights to meet reasonably anticipated future needs. The length of the planning horizon may vary according to the needs of the particular municipal provider." Idaho Code § 42-202B(7)

² The Department has considered and acted on a handful of applications for reasonably anticipated future needs ("RAFN") water rights. None is on the scale of the pending IMAP application. To SUEZ's knowledge, the Department has made no rulings or otherwise established precedent (other than its RAFN guidance) regarding the questions presented in the *Motion for Summary Judgment*.

(emphasis added). So does the Department's guidance: "Department staff must evaluate, among other things, whether the proposed planning horizon is reasonable." Mat Weaver, *Memorandum – Application Processing No. 74, Permit Processing No. 20, License Processing No. 13, Transfer Processing No. 29*, at 5 (Mar. 16, 2015) (replacing Nov. 15, 2014 and Nov. 13, 2013 versions) ("*RAFN Guidance*") at page 7 (emphasis added)).³

Boise Project focuses not on the definition of "planning horizon" but on the definition of "reasonably anticipated future needs." SUEZ believes that is wrong. The former is a number of years; the latter is a quantity of water. But there is no need to resolve this question now. Even if the definition of RAFN has some bearing on the determination of the duration of the planning horizon, it speaks in terms of consistency—or, more precisely, lack of inconsistency—with comprehensive plans or other pertinent planning documents. Idaho Code § 42-202B(8) ("Reasonably anticipated future needs' refers to 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." (emphasis added)); *RAFN Guidance* at 8-9 (noting the statutory requirements of reasonableness and lack of inconsistency, and requiring review of comprehensive plans and other "pertinent planning document[s]").

Thus, to address the *Motion for Summary Judgment*, at a minimum the Hearing Officer must evaluate the overall reasonableness of the proposed planning horizon and compare the 2065 Master Plan to comprehensive land use plans and other pertinent documents. These documents

³ Memorandum of Mat Weaver to Regional Offices, Water Allocation Bureau, re: Recommendations for the Processing of Reasonably Anticipated Future Needs (RAFN) Municipal Water Rights at the Time of Application, Licensing, and Transfer (Nov. 13, 2013) ("*RAFN Guidance*").

span thousands of pages: the 2065 Master Plan is 335 pages; Blueprint Boise appears to be over 700; the COMPASS document is 218 pages; and the pertinent water planning documents run in the 100- to 200-page range. The analyses and conclusions in the documents are based on differing assumptions, forecasts, and are created for different purposes. Understanding these documents, their contents, their limitations, and their bearing on this case, as necessary to make a determination of reasonableness and consistency (or lack of inconsistency), will be a heavy lift, requiring the Hearing Officer to not only review the documents but also to hear testimony from expert witnesses concerning the creation, purpose, and impact of the documents.

Conceivably, the Boise Project and SUEZ could submit these many thousands of pages of documents, SUEZ could submit its expert testimony and other evidence, and the parties could ask the Director to pore through the documents and evidence, unguided, to determine the issue of consistency (or, more precisely, lack of inconsistency) before the May 29 hearing. This hardly seems a model for sound decision-making. At the hearing, SUEZ intends to introduce the pertinent planning documents and expert testimony that synthesizes, compares, and explains the relevant portions of the documents. SUEZ respectfully submits that the Director will be better served to hear the testimony, consider the arguments, and issue a decision on a full record rather than wading through reams of paper and issuing a decision on an abbreviated schedule.

Second, deciding the *Motion for Summary Judgment* before the hearing will not foster efficiency for the parties or the Director. While the Hearing Officer deliberates on the *Motion*, the parties have no choice but to prepare for the hearing scheduled for the end of May. By the time the Hearing Officer issues a decision, the parties will already be substantially or fully prepared for the hearing. Of course, if the Hearing Officer denies the *Motion for Summary Judgment*, the parties and the officer will have to repeat the evidence and argument at the

hearing. But even if the officer grants summary judgment on the planning horizon issue, the hearing will proceed. Setting aside the fact that the parties will have to be prepared regardless of the decision, the Boise Project has asked that the Hearing Officer “assign a planning horizon that conforms to the requirements of I.C. § 42-202B(8).” *Memo in Support* at 2. So the issue of reasonableness and consistency must still be heard, even if for a shorter horizon. The hearing will go on.

SUEZ respectfully submits that the Department’s and parties’ time is better spent preparing for and conducting the full hearing rather than making paper submissions beforehand. Deferring briefing and a decision on the *Motion for Summary Judgment* will reduce duplicative efforts and foster the just, speedy, and economical decision of all the issues presented by the agency. *See* Rule 52 (“The rules in this chapter will be liberally construed to secure just, speedy and economical determination of all issues presented to the agency.”).⁴

Third and finally, at heart, this proceeding is designed to provide the Director and the Department with the opportunity to vet and, ultimately, settle upon the proper interpretation of the Idaho Municipal Planning statute as applied to these facts. This close to the hearing, faced with important issues of fact and law, SUEZ respectfully submits that the Director, the Department, and the parties will be better served by hearing the evidence on all issues and making a decision afterwards, rather than a rushed or piecemeal decision on a cold, voluminous paper record.

⁴ If the requested deferral is not granted, SUEZ will, of course, urge denial of the *Motion for Summary Judgment* on the obvious ground that material facts central to the issue of the duration of the planning horizon are in dispute, and that the motion should be denied on that ground without reaching the merits. SUEZ would have no choice, however, but to brief the merits as well.

2. In the alternative, the Director should grant an extension of time to allow SUEZ a full and fair opportunity to respond to the *Motion for Summary Judgment*.

Rules 565 and 270.02 provide that the presiding officer can grant an extension of time for good cause. Good cause is present here.

First, the rules provide fourteen days as a default response time. This short timeframe may be adequate for run-of-the-mill motions. But the Boise Project's *Motion for Summary Judgment* is not a run-of-the-mill motion. It presents important and complicated legal and factual issues that require consideration of voluminous documents and evidence, including expert testimony. SUEZ needs more than fourteen days to review and analyze the documents cited by the Boise Project, and to then synthesize and present its evidence on the reasonableness and lack of inconsistency of its planning horizon. Fourteen days is not enough time for the task at hand.

Second, the timing is particularly difficult here. Counsel for SUEZ is, among other things, preparing for the hearing in May and other pressing matters, including the Refill litigation. One member of the team, the lead counsel, has a preplanned family wedding trip from March 23, to March 27, 2018; another has a pre-planned family trip for March 27 to April 2, 2018. These scheduling issues, combined with the nature of the issues presented in the *Motion for Summary Judgment*, provide good cause for an extension of time. SUEZ respectfully requests that, if the Director is not inclined to defer decision until after the merits hearing, that an extension be granted such that the response is due on April 18, 2018, 28 days after the *Motion for Summary Judgment* was filed.

Respectfully submitted this 20th day of March, 2018.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 20th day of March, 2018, the foregoing was filed, served, and copied as shown below. Service by email is authorized by the Hearing Officer's Order of September 11, 2017 at page 3.

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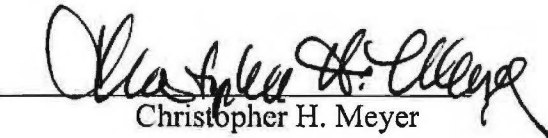
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