

PROPOSED CONDITIONS FOR IMAP APPROVAL

TO: Manuel Rauhut

FROM: Christopher H. Meyer *CHM*
Michael P. Lawrence *MPL*

RE: Proposed IMAP approval conditions

DATE: October 9, 2023 ("bucket notes" added April 23, 2024)

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BUCKET NOTES (ADDED 4/23/2024)

This memorandum is identical to the one provided to IDWR on October 9, 2023, with the addition of notes added to each proposed condition describing which “bucket” of water rights the condition belongs in.

The conditioning process for the IMAP is simplified because:

- All IMAP rights are ground water rights.
- None of the IMAP rights have combined use conditions.
- None of the IMAP rights have volume limits.

As the bucket notes show, every proposed condition, with the exception of conditions 17 and 19, should be included on every IMAP water right.

These conditions will not attach to non-IMAP rights that remain in Veolia’s portfolio.

In some cases (conditions 14, 18, and 20) the condition was initially unique to particular rights. However, due to the addition of global APODs, conditions 14, 18, and 2 will now attach to all IMAP rights.

Most conditions will simply be plugged in verbatim without any text change. However, conditions 3, 5, and 6 will need to be tailored individually for each water right to reflect flow rate or POD locations.

The text changes required for condition 6 reflects prior additions of APOD groups by previous transfer or partial decree. Accordingly, this language may be seen as falling into buckets corresponding to each APOD batch.

EXPLANATION OF PROPOSED CONDITIONS

Please see *IMAP Wrap-Up Notes* (a separate memo accompanying this one) for background information and further explanation.

The conditions set out below begin with the 12 proposed conditions in Shelley Keen’s memorandum of 6/29/2018 (“*Keen Memo*”) (a copy of which is attached as Exhibit B to *IMAP Wrap-Up Notes*).

Conditions 13 through 20 are based on bullet point recommendations set out on pages 22-26 of the *Staff Memo* of 1/14/2019, which are also discussed in the *Rauhut Memo* of 5/12/2023.

Condition 21 (Reopener) has no counterpart in the *Keen Memo*, the *Staff Memo*, or the *Rauhut Memo* but was discussed at length during the status conference on 7/10/2018, a recording of which is available on IDWR's website. Review of that status conference discussion is helpful.

Veolia's suggested condition language follows each of the conditions proposed by IDWR. The Veolia version is shown in redline format (underlining and strike-out).

Veolia's proposed language is followed by an explanation of Veolia's reasoning.

If the proposed condition is identical to or based on an IDWR standard condition, the standard condition number follows the heading in parentheses.

CONDITIONS BASED ON *KEEN MEMO*

Condition 1: PLACE OF USE

Bucket Notes: This condition will attach to all IMAP water rights.

IDWR version:

Place of use is within the service area of SUEZ Water Idaho as provided under Idaho law. The place of use is generally described as within the city limits of Boise and the surrounding service area.

Veolia version:

Place of use is within the service area of ~~SUEZ~~ Veolia Water Idaho, Inc. as provided under Idaho law. The place of use is generally described as within the city limits of Boise and the surrounding service area.

Explanation:

No change other than the name.

Condition 2: MAP ("180")

Bucket Notes: This condition will attach to all IMAP water rights.

IDWR version:

A map generally depicting the service area for this water right at the time of this approval is attached to this document for illustrative purposes.

Veolia version:

A map generally depicting the service area for this water right at the time of ~~this~~ the approval of transfer <IMAP transfer number> is attached to this document for illustrative purposes.

Explanation:

No change, other than to identify which approval.

Condition 3: **PLANNING HORIZON**

Bucket Notes: This condition will attach to all IMAP water rights, but it needs to be modified for each right to reflect the flow rate associated with that right.

IDWR version:

This right authorizes <0.00> cfs for reasonably anticipated future needs for a planning horizon that ends on December 31, 2065, within the service area pursuant to Chapter 2, Title 42, Idaho Code.

Veolia version: No change.

Explanation:

Note that the quantity in this condition reflects the quantity associated with this right alone, not the system-wide RAFN quantity.

It is also important to understand that the reference to reasonably anticipated future needs includes current demand and future demand, not just future demand. See discussion in *IMAP Wrap-Up Notes* (discussion under “Meaning of RAFN”). We trust this is not necessary to spell out in the condition, but would not object to IDWR doing so.

Condition 4: **SYSTEM CAPACITY (“109”)**

Bucket Notes: This condition will attach to all IMAP water rights.

IDWR version:

The full system capacity necessary to provide water for reasonably anticipated future needs authorized under this right must be used by the end of the designated planning horizon.

Veolia version: Eliminate this condition.

Explanation:

This is similar to standard condition 109. This condition became obsolete when the RAFN provisions of Title 42 were amended in 2020 to remove the “capacity of the system” language in Idaho Code § 42-219(1). S.B. 1316, 2020 Idaho Sess. Laws, ch. 164.

The system capacity condition was developed at a time when RAFN rights were licensed at the end of a development period that ended long before the expiration of the planning horizon. The 2020 amendment eliminated the confusion and debate over what “capacity of the system” meant for RAFN rights, replacing that concept with a system of incremental licensing.

It is now simple and straightforward, and the licensed quantity of a RAFN right no longer involves the concept of system capacity. In a licensing context, the quantity licensed in each increment and at the end of the planning horizon will equal the amount of water actually used. In a transfer context, there is no licensing and hence no incremental licensing. However, for any RAFN right (transferred or newly appropriated), the RAFN-based forfeiture protection ends for any portion of the authorized quantity of water that is not being used at the end of the planning horizon. As noted in proposed condition 21, IDWR may shorten the planning horizon for a transferred RAFN right if it becomes apparent that the RAFN quantity is larger than necessary. In other words, under the post-2020 approach, the focus is on actual use of water, not system capacity.

Condition 5: ADMINISTRATION OF APODs (“208”)

Bucket Notes: This condition will attach to all IMAP water rights, but it needs to be modified for each right to reflect the location of the well or wells initially associated with that right.

IDWR version:

To the extent necessary for administration between points of diversion for ground water, and between points of diversion for ground water and hydraulically connected surface sources, ground water was first diverted under this right from <well name> located in T __, R __, S __, __, __.

Veolia version:

To the extent necessary for administration between points of diversion for ground water, and between points of diversion for ground water and hydraulically connected surface sources, ground water was first diverted under this right from <well name> located in T ___, R ___, S ___, ___, ___ [list all original points of diversion]. Additional points of diversion have been authorized as set out in condition 6. The purpose of conditions 5 and 6 is to allow the right holder to divert water at points of diversion that were not initially associated with this right, but only when doing so does not cause material injury to other rights. Accordingly, if pumping from a well not originally authorized under this right is causing material injury to another right, the priority date and authorized quantity used for injury analysis shall be that of the right originally associated with the well causing the material injury. Provided, however, that in a regional curtailment, if the priority date of this right is senior to the cutoff date and the original point or points of diversion for this right lie within the curtailment zone, water may be diverted under this right from any authorized point of diversion.

Explanation:

The APOD language in the *Keen Memo* is standard condition 208. Veolia has no objection to the standard APOD language, but seeks clarification of what that language means.

Specifically, Veolia's proposed condition adds to the standard language in order to address the requirement set out in the stipulated withdrawal of protests filed by NMID, Settlers, and Veolia on 4/18/2018. That Stipulation states that IDWR should include language in the APOD condition explaining how the condition works.¹

¹ Numbered paragraph 4 on page 2 of the stipulated withdrawal of protests by NMID and Settlers dated 4/18/2018 states:

SUEZ's request for alternative points of diversion ("APODs"), if approved by the Department, will be made subject to an express, enforceable condition or remark appearing on the face of each right that embodies the principles described in *Suez's 2017 Supplement to the Update Report, Addressing APODs* (June 26, 2017), *Suez's Further Explanation of APOD Condition Language* (Sept. 11, 2017), and *SUEZ's Submission of Additional Authority on APODs*

The sentence beginning “Accordingly,” explains how the APOD condition will work in the context of (1) localized well interference and (2) a curtailment of limited geographic scope including some but not all of Veolia’s wells. Note that this language prevents Veolia from “bringing a senior water right in” to a curtailment zone (pumping under a senior water right whose original well is located outside the curtailment zone from an APOD within the curtailment zone when the right originally associated with the APOD inside the curtailment zone is curtailed). This is the limited regional curtailment scenario.

The sentence beginning “Provided,” is an exception applicable only in the context of a region-wide curtailment covering all of Veolia’s wells. It allows water to be diverted under a non-curtailed senior right from all APODs, but only if that right is not being “brought in” to the curtailment zone. This is the broad regional curtailment scenario.

Because the IMAP is reducing the authorized rate of diversion on some rights (to eliminate volume limits and combined use limits), it is important to understand how this will work in the context of APOD administration. Let us take the example of Water Right No. 63-11467 which is currently (before the IMAP) authorized to divert up 2.27 cfs from two points of diversion (Island Woods #1 and #2). In order to eliminate the volume cap of 520 AFA, Veolia has agreed that the transferred right will have a diversion rate of 0.72 cfs (which may be pumped 24/7/365). This right has a 1991 priority date. Let us hypothesize that a neighboring well with a junior (1992) priority date asserts well interference when Island Woods #2 is pumped at or above 1.50 cfs (a random number selected for this hypothetical). Prior to the IMAP, the well interference claim would have failed, because the Veolia right is senior and authorized to pump up to 2.27 cfs (until hitting the volume cap). After the IMAP, the claim would also fail. It is important to understand why. After the IMAP, Veolia could only pump 0.72 under no. 63-11467. If it pumped a total of 1.50 cfs from Island Woods #2, it would be using 0.72 cfs from no. 63-11467 and 0.78 cfs of some other right (relying on Island Woods #2 as an APOD). Veolia’s proposed APOD condition language says “the priority date and authorized quantity used for injury analysis shall be that of the right originally associated with the well causing the material injury.” Accordingly, even though no. 63-11467 is now authorized to pump only 0.72 cfs, it would still prevail in the well interference claim, so long as water from all rights pumped out of Island Woods #2 did not exceed 2.27 cfs and no more than 520 AFA is diverted from the well.

As discussed at the status conferences on 11/9/2017 and 7/10/2018, this language is important to clarify ambiguous statements by IDWR regarding the operation of the

(Nov. 28, 2017). So long as the APODs are granted subject to condition language along those lines, the Districts have no objection to the APODs.

APOD condition in a limited curtailment, which might be read to prevent curtailed rights from being pumped from APODs outside of the curtailment area.²

A more detailed discussion of the need for this language is found in *SUEZ's Submission of Supplemental Authority on APODs* dated 11/28/2017 (a copy of which is attached as Exhibit A to *IMAP Wrap-Up Notes*). It is also consistent with the discussion in (1) the *APOD Memo* (7/9/2018) (copy attached as Exhibit D to *IMAP Wrap-Up Notes*), and (2) *SUEZ's Submission of APOD Memorandum Prepared in Connection with Kuna's Transfer No. 81844* (10/16/2018).

It would probably make sense to reverse the order of conditions 5 and 6. This memorandum follows the order set out in the *Keen Memo*.

Condition 6: AUTHORIZATION OF ADDITIONAL APODs

Bucket Notes: This condition will attach to all IMAP water rights, but it needs to be modified for each right to reflect the location of each additional well now authorized as a POD, and when that additional well was added.

IDWR version:

This transfer authorizes additional wells located in T____,
R____, S____, _____ as points of diversion under this right
as of the date of approval.

Veolia version:

~~This transfer authorizes additional wells located in T____,
R____, S____, _____ as points of diversion under this right
as of the date of approval.~~

² The statements were included in two IDWR transfer approval orders, both dated 10/4/2016: (1) Transfer 79778 (City of Meridian, see backfile for No. 63-2893) and Transfer 80621 (City of Ketchum, see backfile for No. 37-2628).

The <partial decree>/<transfer> dated <date> authorized the following additional wells as points of diversion under this right: T __, R __, S __, __, __ [etc.].

Transfer <IMAP transfer number> dated <date> authorized the following additional wells as points of diversion under this right: T __, R __, S __, __, __ [etc.].

Explanation:

There are two APOD conditions (nos. 5 and 6). The original point(s) of diversion for this right are identified in condition 5 (Administration of APODs). Condition 6 only lists new APODs added after the water right was created. This makes a record of when each new well was added, in the event that the APOD authority is rolled back pursuant to condition 5 (Administration of APODs).

Veolia suggests one minor change: Because many of Veolia's rights already have some APODs,³ Veolia suggests expanding the description in condition 6 to include a separate paragraph each time APODs are added. If additional APODs are added in the future, additional paragraphs could simply be tacked on to condition 6 without changing anything else in condition 5 or 6.

Condition 7: SURFACE WATER FIRST ("102")

Bucket Notes: As explained below, Veolia believes this condition should be dropped. If it is included, this condition will attach to all IMAP water rights.

IDWR version:

The right holder shall not provide water diverted under this right for the irrigation of land having appurtenant surface water rights as a primary source of irrigation water except when the surface water rights are not available for use or where the use of surface water was replaced by the use of water diverted in connection with this right before the approval of this transfer. This condition applies to all land with appurtenant surface water rights, including land

³ Pre-IMAP APODs are identified in Exhibit 2 to the 2065 Master Water Plan (4/28/2017). Footnote 1 on page 4 of SUEZ's 2017 Supplement to the Update Report, addressing APODs dated 6/26/2017 also identifies APODs that were added to Veolia's water rights prior to IMAP approval via SRBA decree or post-SRBA transfer.

converted from irrigated agricultural use to other land uses but still requiring water to irrigate lawns and landscaping.

Veolia version: Preferably no condition at all. Or the following:

Taking into account operational complexities, the right holder shall divert water available under its natural flow surface water rights to meet demand whenever reasonably practicable. The right holder shall take no action to compel its customers or developers of land to be served by the right holder not to use surface water owned or controlled by them or a local irrigation entity that is available to them as a primary source of irrigation water and appurtenant to land served by the right holder.

Explanation:

The *Keen Memo* proposes “surface water first” language similar to standard condition 102. Veolia believes that the standard “surface water first” condition is unnecessary and inappropriate for municipal water providers, and should be dropped.

In 2022, Judge Wildman ruled that the “surface water first” provision in Idaho Code § 67-6537(1) applies to local governments only and that there is no blanket, state-wide “surface water first” policy. *Eden’s Gate*, pp. 5-7.

Recently enacted Idaho Code § 42-204A (2023 Idaho Sess. Laws ch. 97) and implementing guidance (*Application Processing No. 79* (dated 7/3/2023)) establish a “surface water first” requirement, but it is not a blanket policy either. The statute is expressly limited to new ground water irrigation appropriations. Accordingly, Veolia believes there is no basis to add a “surface water first” condition in the transfer of a water right. Indeed, it would appear appropriate to remove from any transferred right any “surface water only” condition previously imposed without legislative authority.

The condition is inappropriate for municipal water rights delivered in systems without a separate irrigation delivery system. The policy is also ill-suited for municipal providers because they have no control over the use of appurtenant surface rights held by their customers and land developers.

If the Department insists on including a “surface water first” condition, its operation and applicability needs to be tailored to the circumstances and spelled out in the condition. The policy could apply in either of two contexts: rights owned or controlled by Veolia and rights owned or controlled by others.

Rights owned or controlled by others

The “surface water first” policy should not apply to appurtenant surface water that is not owned or controlled by the municipal provider. For example:

- A developer might sell or abandon appurtenant irrigation rights prior to development, with the expectation that water will be provided by a municipal provider.
- A residential customer might fail to pay irrigation district fees.
- A homeowner could simply fail to turn on a separate non-potable lawn irrigation system and rely instead on potable municipal water.
- A commercial customer might find it more convenient to irrigate a few feet of ornamental landscaping with municipal water rather than maintain a separate surface water delivery system.

In each of these examples, the municipal provider would have no control over these decisions by third parties. And in most cases, the municipal provider would have no knowledge of the circumstances. In any event, under Idaho utility law, a utility has a duty to serve all customers within the certificated area irrespective of whether they use available surface water.

Rights owned or controlled by Veolia

The “surface water first” policy also could be employed in the context of the municipal provider’s use of its own portfolio of ground and surface rights. IDWR’s proposed language could be read to require Veolia to use no ground water unless all surface rights available to it were fully employed. The difficulty with this is that large municipal systems that employ both ground and surface water are extraordinarily complex physical systems operated to optimize water delivery. They require the integration of a vast array of water treatment facilities and programs, booster pumping stations, above-ground storage, aquifer recharge, and integrated delivery systems, making it difficult if not impossible to guarantee that every available surface right is fully employed for irrigation at all times. Enforcement of the policy in this context would place cumbersome and unmanageable burden on the Department as well as Veolia.

If the Department nevertheless finds that a “surface water first” condition must be included on some or all of the transferred IMAP rights, Veolia offers the suggested language set out above.

Note that Veolia’s proposed alternative language is limited to natural flow rights. We assume this is consistent with IDWR’s language, which speaks in terms of “water rights as a primary source of irrigation.” We are not aware of a state policy compelling

water users to draw down storage water. The reference to natural flow water is intended to make this clear.

Condition 8: TRANSFER TO NEW PLACE OR NATURE OF USE

Bucket Notes: This condition will attach to all IMAP water rights.

IDWR version:

That portion of this right authorized for reasonably anticipated future needs shall not be changed to a place of use outside the service area as defined in Idaho Code § 42-202B or to a new purpose of use.

Veolia version:

The portion of this right authorized for reasonably anticipated future needs that has not been diverted and applied to a beneficial use shall not be changed to a place of use outside the service area as defined in Idaho Code § 42-202B or to a new purpose of use. This condition does not prohibit the transfer or change in ownership of this water right or a portion thereof to another municipal provider that will continue service to customers in the area previously served by this right. Nor does it apply to the use of municipal water rights for groundwater recharge undertaken in support of a municipal water system.

Explanation:

The first proposed edit is simply a clarification that the condition applies only to the unused portion of a RAFN right. Simply referring to the portion authorized for RAFN is ambiguous. The quantity stated on a RAFN right includes both current demand and future demand. By the way, the reference to “diverted and applied to a beneficial use” is important, because water not diverted but held for future use is nonetheless deemed to be beneficially used under the language of the statute.

The second proposed edit addresses what happens when one municipal provider takes over service territory (and acquires the corresponding water rights or portion thereof) previously served by another municipal provider. The purpose of the limitation in the 1996 Municipal Water Rights Act was to prevent speculation in which water is acquired under the pretext of meeting future needs and then sold to other water users for

entirely unrelated purposes (e.g., selling RAFN water to a nuclear power plant or to cities in California). It was not intended to prohibit one municipal provider from acquiring the territory (and associated water rights) of another municipal provider—as happened recently when Veolia acquired the assets and service area of Eagle Water Company. This issue did not arise there, because Eagle Water Company did not hold RAFN rights. But if it had, the acquisition of such rights for the same use in the same place should not be prohibited. However, in such an acquisition, the shape of the service area would change (from that of the old municipal provider to that of the new municipal provider). The additional language makes clear that this change in shape (with continued service to the same area) does not trigger the prohibition on changes to a new place of use.

The final sentence recognizes established IDWR policy that ground water recharge undertaken in connection with municipal water system operations falls within the panoply of uses that may be made of a municipal water right, and is not a new use that could trigger the prohibition in this condition.

Condition 9: DOCUMENTATION OF QUANTITY (“10Q”)

Bucket Notes: This condition will attach to all IMAP water rights.

IDWR version:

After a specific notification by the Department, the right holder shall record the quantity of water diverted or shall enter into an agreement with the Department to use power records to determine the amount of water diverted and shall annually report the information to the Department.

Veolia version:

After a specific notification by the Department, the right holder shall record the quantity of water diverted on a system-wide basis ~~or shall enter into an agreement with the Department to use power records to determine the amount of water diverted~~ and shall annually report the information to the Department.

Explanation:

The *Keen Memo* proposes standard condition 01Q. Veolia asks that this condition be modified to eliminate the complex task of allocating the quantity diverted to individual

water rights. Reporting on a total, system-wide basis should be sufficient to ensure that Veolia is not exceeding its water rights.

One could be much more specific about exactly what system-wide data should be reported. We thought it wiser to leave that to be determined when and if the need arises.

As discussed in *IMAP Wrap-Up Notes*, the IMAP will result in the elimination of all combined use and volume limits on IMAP rights. Accordingly, in times of curtailment, administration will be simplified. Rights will be curtailed in order of priority. For those that remain “on,” it will be simple to determine Veolia’s system-wide diversion authority. There will never be a need to allocate the quantity of water diverted to individual rights. (Even if it were allocated to individual rights, doing so would be academic. It will not matter how much water is allocated to each right prior during the portion of the year prior to the curtailment, because non-curtailed rights may continue to be pumped at their authorized rate irrespective of how much volume was attributed to them before curtailment.)

We struck the words about power records, which is not relevant given Veolia’s ability to determine its production.

Condition 10: RIGHT-OF-WAY (“004”)

Bucket Notes: This condition will attach to all IMAP water rights.

IDWR version:

This right does not grant any right-of-way or easement across the land of another.

Veolia version: No change.

Condition 11: FAILURE TO COMPLY (“T08”)

Bucket Notes: This condition will attach to all IMAP water rights.

IDWR version:

Failure of the right holder to comply with the conditions of this transfer is cause for the Director to rescind approval of the transfer.

Veolia version: No change.

Condition 12: SIDE AGREEMENT

Bucket Notes: This condition will attach to all IMAP water rights.
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IDWR version:

The diversion and use of water described in this transfer approval may be subject to additional conditions and limitations agreed to by the participants in the IMAP contested case proceeding pursuant to separate agreements to which the Department is not a party. Because the Department is not a party to those agreements, the Department is not responsible for enforcement of any aspect of the agreements not specifically addressed in conditions herein. Enforcement of those portions of the agreements not specifically addressed in conditions herein shall be the responsibility of the parties to the agreements. Such agreements may include, but are not limited to, *IMAP Settlement Agreement Between Boise Project et al. and SUEZ*.

Veolia version:

The diversion and use of water described in this transfer <IMAP transfer number> approval may be subject to additional conditions and limitations agreed to by the participants in the IMAP contested case proceeding pursuant to separate agreements to which the Department is not a party. Because the Department is not a party to those agreements, the Department is not responsible for enforcement of any aspect of the agreements not specifically addressed in conditions herein. Enforcement of those agreements shall be the responsibility of the parties to the agreements. Such agreements may include, but are not limited to, *IMAP Settlement Agreement Between Boise Project et al. and SUEZ* (executed July 9, 2018).

Explanation:

This condition is necessary to comply with Veolia's settlement agreement with Boise Project. (See discussion in *IMAP Wrap-Up Notes*.)

Veolia suggests a minor change to IDWR's condition language. These rights may be subject to additional transfers in the future. The proposed edit is intended to avoid confusion over what "this transfer" refers to. Likewise, the date is added to avoid ambiguity should there ever be another agreement with Boise Project.

CONDITIONS BASED ON *STAFF MEMO*

Condition 13: MEASURING DEVICES ("T17")

Bucket Notes: This condition will attach to all IMAP water rights.
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IDWR version:

Prior to diversion of water under this approval, the right holder shall provide a means of measurement acceptable to the Department from all authorized points of diversion which will allow determination of the total rate of diversion.

Veolia version: No change.

Explanation:

This condition is discussed in the first bullet point on page 24 of the *Staff Memo*. The language quoted above comes from condition T17 on water right no. 63-19456 (one of the IMAP rights). Veolia has no objection to the inclusion of this condition. It has already installed measuring devices on all of its wells.

Condition 14: LOW TEMPERATURE GEOTHERMAL #1 (“058”)

Bucket Notes: Because all IMAP rights have global APODs including wells within the Boise Front Low Temperature Geothermal Groundwater Management Area, this condition will attach to all IMAP water rights.

IDWR version:

The point of diversion identified in this right is located within the boundaries of the Boise Front Low Temperature Geothermal Resource Groundwater Management Area. The well driller shall monitor water temperatures while drilling the well. If water with a temperature greater than 85 degrees Fahrenheit is encountered by the driller, drilling must immediately cease, and the Department must be notified. Drilling shall not resume until the Department has reviewed the drilling conditions, and established standards for construction with the driller.

Veolia version:

~~The point~~ Some of the points of diversion identified in this right ~~is~~ are located within the boundaries of the Boise Front Low Temperature Geothermal Resource Groundwater Management Area. The well driller shall monitor water temperatures while drilling ~~the well~~ any new or replacement well under this right within the Boise Front Low Temperature Geothermal Resource Groundwater Management Area. If water with a temperature greater than 85 degrees Fahrenheit is encountered by the driller when drilling such a well, drilling must immediately cease, and the Department must be notified. Drilling such a well shall not resume until the Department has reviewed the drilling conditions, and established standards for construction with the driller.

Explanation:

This condition derives from the discussion in the second bullet point on page 24 of the *Staff Memo*. That bullet point referenced standard condition 073 but did not provide the text for that condition. In Veolia’s *Response Memo* of 11/30/2020, Veolia incorrectly assumed that IDWR was speaking of the language above, which turns out to be standard condition 058. Veolia suggested minor clarifying amendments to standard condition 058,

which were agreed to on unnumbered page 5 of the *Rauhut Memo* transmitted to Veolia on 5/12/2023.

Condition 15: LOW TEMPERATURE GEOTHERMAL #2 ("073")

Bucket Notes: This condition will attach to all IMAP water rights.

IDWR version:

Diversion and use of water with a temperature greater than 85 degrees Fahrenheit is not authorized under this right.

Veolia version: No change.

Explanation:

This condition is discussed in the second bullet point on page 24 of the *Staff Memo*. This is standard condition 073. Veolia does not object to this condition because none of its wells pump low temperature geothermal water.

Condition 16: REDEFINITION OF ELEMENTS ("205")

Bucket Notes: This condition will attach to all IMAP water rights.

IDWR version:

The approval of this transfer redefines all of the elements of this water right, and the new use of water authorized by this approval shall constitute the full extent of the right.

Veolia version:

The approval of ~~this transfer~~ [IMAP transfer number] redefines one or more ~~all of~~ the elements of this water right, and the new use of water authorized by this approval shall constitute the full extent of the right.

Explanation:

This is a standard condition 205. It is included here in response to the fourth bullet point on page 25 of the *Staff Memo*. The suggested changes: (1) clarify which

transfer it refers to, as some of Veolia's rights are subject to multiple transfers and (2) reflect that not all of the elements are changed in the transfer.

Condition 17: SRBA GENERAL PROVISIONS ("T19")

Bucket Notes: This condition will attach only to IMAP water rights with SRBA decrees.

IDWR version:

Pursuant to Idaho Code § 42-1412(6), this water right is subject to such general provisions necessary for the definition of the rights or for the efficient administration of water rights as determined by the Snake River Basin Adjudication court in the final unified decree entered 08/26/2014.

Veolia version: No change.

Explanation:

This is a standard condition T19. It is included here in response to the third bullet point on page 26 of the *Staff Memo*. It should attach only to rights with SRBA decrees.

Condition 18: FLOATING FEATHER WELL

Bucket Notes: Because all IMAP rights have global APODs including the Floating Feather Well, this condition will attach to all IMAP water rights.

IDWR version:

Point of diversion located within SESW, S05, T04N, R01E is also known as Floating Feather Well. Point of diversion located within SWNW, S07, T04N, R01E is also known as Redwood Creek Well #1. Place of use is located within the service area of United Water Idaho. The right holder shall continue to monitor domestic wells located across from the Floating Feather well and a monitoring well located on the Hormachea property to determine if water levels are changing as a result of pumping under this water right. The right holder shall measure its diversions from the Floating Feather well, and report water diverted and water levels measured to

the department upon request. Water bearing zone to be appropriated is from 183 to 401 feet.

Veolia version:

Point of diversion located within SESW, S05, T04N, R01E is also known as Floating Feather Well. Point of diversion located within SWNW, S07, T04N, R01E is also known as Redwood Creek Well #1. ~~Place of use is located within the service area of United Water Idaho. The right holder shall continue to monitor domestic wells located across from the Floating Feather well and a monitoring well located on the Hormachea property to determine if water levels are changing as a result of pumping under this water right. The right holder shall measure its diversions from the Floating Feather well, and report water diverted and water levels measured to the department upon request. Water bearing zone to be appropriated is from 183 to 401 feet.~~

Explanation:

The condition is included here in response to the first bullet point on page 27 of the *Staff Memo*. The quoted language in the IDWR version of the condition is the same as a condition found in water right no. 63-12452. Veolia's suggested change eliminates portions of the condition that are not pertinent.

In particular, as determined in the beneficial use field exam report dated 8/1/2002, the requirement to monitor two domestic wells and a well on the Hormachea property "was satisfied after several years of monthly measurements failed to show any effects."

The "water bearing zone" issue is addressed in proposed condition 20.

Condition 19: SALMON FLOW MITIGATION ("120")

Bucket Notes: This condition will attach only to water right 63-12516.

IDWR version:

The Director retains jurisdiction to require the right holder to provide purchased or leased natural flow or stored water to offset depletion of Lower Snake River flows needed for salmon migration purposes. The amount of water required to be released into the Snake River or a tributary for this purpose

will be determined by the Director based upon the reduction in flow caused by the use of water pursuant to this permit.

Veolia version: No change.

Explanation:

This is a standard condition 120. It is included here in response to the second bullet point on page 27 of the *Staff Memo*. It should attach only to right no. 63-12464 (which, according to the *Staff Memo* is the only right that has this condition).

Condition 20: WATER BEARING ZONE

Bucket Notes: Veolia argued that this condition should be dropped, but IDWR rejected that suggestion. Accordingly, because all IMAP rights have global APODs including the wells initially associated with permits 63-12452, 63-12464, and 63-12516, this condition will attach to all IMAP water rights.

IDWR version: IDWR does not propose specific language, but references “water bearing zone” provisions in permits 63-12452, 63-12464, and 63-12516.

Veolia version:

The water bearing zone for points of diversion located within SESW, S05, T04N, R01E and SWNW, S07, T04N, R01E is below 183 feet. The water bearing zone for the points of diversion located within SWNW, S28, T03N, R03E and SENE, S29, T03N, R03E is below 80 feet. The water bearing zone for the points of diversion located within NESW, S23, T04N, R01W and SWSE, S24, T04N, R01W is below 233 feet.

Explanation:

This condition is based on the fourth bullet point on page 27 of the Staff Report. In its *Response Memo*, Veolia argued that this condition is unnecessary and inappropriate. IDWR rejected Veolia’s arguments on unnumbered page 6 of the *Rauhut Memo*. However, the *Rauhut Memo* agreed with Veolia that the purpose of the water bearing zone condition is to prevent the use of shallow wells (which potentially could cause injury to Boise River rights), not deep ones.

Accordingly, the language proposed above references only the upper boundary of the water bearing zone. This addresses the fact that in one instance (Foxtail #2), Veolia's well is deeper than the stated water bearing zone.

Water bearing zone language was originally included only on permit nos. 63-12452, 63-12464, and 63-12516. Because APODs would allow all IMAP rights to be diverted from the three wells associated with those permits, the proposed condition would attach to all IMAP rights and would attach to any current or future well drilled within those three 40-acre tracts.

In order to move forward with the IMAP approval, Veolia agrees to the proposed condition above, reserving the right to address the water bearing zone issue further at the time of licensing.

CONDITION PROPOSED BY VEOLIA

Condition 21: REOPENER

Bucket Notes: This condition will attach to all IMAP water rights.

There was no IDWR proposal in the 6/29/2018 memo. This is Veolia's proposal:

On or before December 31, 2044 [about 21 years] and again each 21 years thereafter (or such other date as the Department may specify in the future) or upon the expiration of the planning horizon then in effect, whichever occurs first, the right holder shall prepare an updated forecast of peak demand at the end of the planning horizon, together with a gap analysis comparing projected peak demand with the right holder's portfolio of water rights and other entitlements available to meet that demand. The demand forecast and gap analysis shall be consistent with procedural requirements, law, and guidance on the subject then in effect. The evaluation shall be submitted to IDWR with notice provided by the right holder to the parties and interested parties to transfer <IMAP Transfer number> and such other persons or entities as IDWR may direct. Following the submission of each such demand forecast and gap analysis or the right holder's failure to timely provide such, IDWR may (1) request the submission of additional information from the right holder and engage informally with the right holder and others regarding such information, (2) initiate a contested

case, or (3) take no action. If IDWR does not initiate a contested case within three months following the latest submission, any interested person including the right holder may petition IDWR to initiate a contested case. If a contested case is initiated, IDWR shall determine whether the right holder has met its obligation to demonstrate that there is no substantial shortfall of projected peak demand compared to available water rights and entitlements at the close of the planning horizon. This determination shall take into account all relevant circumstances including the need for redundant supplies and a reasonable cushion. Based on that determination, IDWR may elect to lengthen or shorten the duration of the planning horizon consistent with Idaho law then in effect.

Explanation:

As far back as 9/25/2003 (see proposed conditions submitted on that date), Veolia has urged the inclusion of a reopener provision in the IMAP approval. The reopener is not urged because it would benefit Veolia. It is urged because it is good water planning policy. And it provides assurance to IMAP Protestants and the Department that the IMAP will not lock up resources that the passage of time proves are no longer reasonably anticipated to be needed by Veolia.

The IMAP approval condition set out above satisfies the condition in the Stipulation for Withdrawal filed by NMID, Settlers, and Veolia on 4/18/2018. That stipulation was conditioned on the inclusion of a reopener provision in the IMAP approval.

Note that several other former IMAP Protestants have submitted filings stating that they support or welcome a reopener. (See *IMAP Wrap-Up Notes*.) No IMAP participant has opposed the concept of a reopener provision.

Initially, IDWR was reluctant to impose a reopener for two reasons. First, it imposes an administrative burden on the agency. Second, it is perceived by some to be beyond the authority of IDWR to change the quantity of a licensed or decreed water right (or any other element) outside of a forfeiture proceeding (notwithstanding IDWR's statutory authority to condition a transfer approval).

These concerns were addressed and resolved by Phil Rassier's proposal (as set out in the email forwarded by Chris Meyer to IDWR and parties on 7/9/2018, a copy of which is attached as Exhibit C to *IMAP Wrap-Up Notes*). The basic idea is that the reopener will not authorize any element of the water right to be changed—especially the

quantity. But the planning horizon is not an element of the right, so it may be subjected to potential modification in a condition.

To avoid the Department's concern about the administrative burden on the Department, the reopener provision simply requires the right holder to submit an updated forecast and gap analysis from time to time (and not very often). If everything is on track, nothing else need happen. If new demand projections fall substantially short of prior projections, or if the correctness of those projections are questioned, anyone (including IDWR, interested parties, and the right holder) may initiate (or request) a contested case. But IDWR is under no obligation to act, if it sees no need to do so.

If IDWR chooses to initiate a contested case (either on its own initiative or in response to a petition), that proceeding might result in lengthening or shortening the planning horizon. For example, if IDWR determined that the right holder is unlikely ever to need all the water authorized under its RAFN rights, it could shorten the planning horizon. Once the shortened planning horizon expires, the unused portion of the RAFN rights would lose their RAFN-based forfeiture protection. If, on the other hand, IDWR determined that growth is occurring, but at a somewhat slower pace than originally anticipated, it would have the option of extending the planning horizon to allow the right holder to continue to grow into its RAFN rights.

In the status conference of 7/10/2018 (a recording of which is available at IDWR's website), this approach seemed to have achieved something approaching consensus.

The 21-year provision requires some explanation. That number divides in two what is left of the planning horizon (2023 to 2065, 42 years). Thus, there will be one forecast update in 21 years, and another at the end of the planning horizon (unless the planning horizon is changed).

One might ask, why compel Veolia to make yet another submission at the end of the planning horizon? (At that point the gap analysis would be based on current peak demand, not projected future demand.) The answer is that this is a check on the possibility that there will be a substantial quantity of unused water rights in 2065. If that were to occur, Veolia could make a pitch to extend the planning horizon. If the planning horizon were not extended, the unused rights (or portions thereof) would be susceptible to a forfeiture challenge.