

REVISED APOD LANGUAGE FOR IMAP

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EXECUTIVE SUMMARY

IDWR staff have expressed concern over Veolia’s proposed APOD condition language. IDWR observed that the APOD condition should not dictate or constrain how material injury will be evaluated in the future. Nor should it describe future curtailment scenarios in a way that is limited to how curtailment has been undertaken in the past.

For example, it was pointed out that while regional curtailments in the Snake River Plain have been essentially two-dimensional (resulting in curtailment zones on a map), curtailments in the future could be “three-dimensional,” taking into account, for example, the varying impact of shallow and deep wells on the river.

Veolia agrees that it is important that the APOD condition language stick to guiding principles, the core of which we believe is to identify which water right priority dates associated with a well should be used to determine material injury to senior water rights.

IDWR has been reluctant to adopt APOD condition language previously proposed by Veolia. Accordingly, Veolia now proposes what we think is a better way to address IDWR’s concerns, while also achieving the goal of providing meaningful guidance to those who, in the decades ahead, may be called upon to decipher and apply the obtuse language of IDWR’s standard condition no. 208.

In short, Veolia is comfortable with how current IDWR leadership understands the condition. But it is hard to say how agency officials or courts might interpret the standard condition language years from now if it is not more clearly explained.

The condition language set out in the following pages is based on the illustrative example of IDWR’s draft APOD conditions (sent on 1/3/2025) for water right no. 63-11990.

Note that Veolia’s new proposal combines conditions 12 and 13 in no. 63-11990 into a single APOD condition.

Before jumping into the nitty-gritty of the draft condition language, it is important to confirm that we are all on the same page as to how the APOD condition works conceptually. Our understanding is set out in the four-page “APOD Principles” discussion below. We do not believe there is any disagreement between IDWR and Veolia on this. After all, we have litigated this—on the same side—to the Idaho Supreme Court. As we understand it, the only debate today is over the extent to which the APOD condition language in the IMAP should spell out this detail. As you know, Veolia believes that spelling it out now will reduce the likelihood of litigation in the future, and ensure that the correct result is reached in any event.

APOD PRINCIPLES

Basic principle

The purpose of the APOD condition is to allow the effect of a diversion from a well to be evaluated in a material injury determination based on the appropriate water right priority dates associated with the well. Wells may be authorized to divert multiple water rights, each with its own priority date. Similarly, water rights may be authorized to divert from multiple wells in which various APODs were authorized on different dates. These water rights (with APODs added subsequently to the original well or wells) are the candidates for having the APOD condition attached. In Veolia's case, that would be all of its IMAP transfers.

In short, the APOD condition allows IDWR to “roll back” the clock to see whether a particular water right was authorized to be diverted from a well on the date relevant for administration.

Importantly, the ability to “roll back” the clock does not necessarily mean that authority to divert “junior” water rights from a well is eliminated. Diversions at a well that are deemed “junior” under the roll-back analysis may be curtailed if and only if they cause material injury to senior water rights. Thus, in some instances, water may be diverted from an APOD that was authorized for a particular right after the date relevant for administration. Of course, if they are deemed “senior” under the roll-back analysis, they may be used irrespective of injury (because they are senior). Determining whether a water right diverted from a well is “junior” or “senior” must take into account the date which the water right obtained its APOD authorization. This is true in the context of both well interference and regional administration.

Well interference

In well interference administration, the effect of a water right's diversion from one well on another right is evaluated as if its priority date were the date the water right was authorized to divert from the well as an APOD. If the APOD's authorization pre-dates the priority date of the allegedly injured right, diversion from that APOD is not curtailed because authorization existed when the allegedly injured right “came online.” On the other hand, if the APOD's authorization post-dates the priority date of the allegedly injured right, diversion of the water right from that APOD may be curtailed if its use is determined to cause material injury to the allegedly injured right.

Regional administration

It works the same in regional administration, except:

- (1) The date against which a water right diverting from a particular APOD is measured is the curtailment cut-off date determined by IDWR based on its material injury analysis. For example, if IDWR determines that water rights with priority dates junior to 1/1/2000 must be curtailed to prevent injury to senior water rights, any water right senior to 1/1/2000 may be diverted from any APOD authorized as of 1/1/2000.
- (2) If the date of a water right's APOD authorization post-dates the curtailment cut-off date, use of a particular APOD may or may not be curtailed. It is not subject to curtailment if (a) it does not increase the injury compared to using a well within the curtailment zone that was authorized prior to the cut-off date, or (b) it causes no material injury (e.g., water is diverted from an APOD outside the curtailment zone).

Note that in conjunctive administration of ground and surface water, the cut-off date may be later than the priority date of the senior surface right making the call. This is because it may not be necessary to curtail every water right junior to the priority date of the injured right in order to prevent injury to that right.

Also note that a “curtailment zone” is not necessarily a two-dimensional map. This “zone” could be any set of criteria specified by IDWR for what wells or aquifer zones are subject to curtailment based on a particular cut-off date and hydraulic connectivity to allegedly injured senior water rights.¹

¹ In this memorandum, Veolia uses the term “curtailment zone” as shorthand to describe the area within which junior priority water rights are deemed subject to curtailment to prevent injury to senior priority water rights in a water rights administration process. The term is similar to the “area having a common ground water supply” concept in the Conjunctive Management Rules (IDAPA 37.03.11.010.01). However, the Director of IDWR has been found to have authority to curtail junior ground water rights without following the Conjunctive Management Rules or determining an area of common ground water supply. See *S. Valley Ground Water Dist. v. Idaho Dep’t of Water Res.*, 173 Idaho 688, 548 P.3d 734 (2024) (amended Jan. 12, 2024) (“*South Valley*”). In *South Valley*, the Idaho Supreme Court affirmed the Director’s designation of a “Potential Area of Curtailment,” *South Valley*, 548 P.3d at 757, which also appears similar to Veolia’s “curtailment zone” terminology. Veolia’s term “curtailment zone” is intended to capture, and be consistent with, the general concepts encapsulated in the terms “area of common ground water supply” or “potential area of curtailment.”

Illustrative examples (regional administration)

#1. POD and APODs located within the curtailment zone

If a water right's original POD is located within the curtailment zone and is not curtailed because the right is senior to the cut-off date:

- (a) Water may be diverted from all APODs within the curtailment zone that were authorized prior to the cut-off date (because the APODs were authorized prior to the priority dates of curtailed water rights).
- (b) Water may be diverted from an APOD within the curtailment zone that was authorized after the cut-off date if and only if use of that APOD does not materially increase the injury that the regional administration is intended to address. For example, the right holder may divert from either the original POD or an APOD approved after the cut-off date, if both have the same effect on the senior making the call (or the same effect on the aquifer itself, in the case of ground water level administration). But the holder could not divert from an APOD authorized after the cut-off date if, for example, it diverted water from a different aquifer zone with a more injurious effect than the original POD and/or APODs authorized before the cut-off date.
- (c) As noted in example #3 below, water rights may be diverted from a POD and/or APODs outside the curtailment zone. Such diversions are not subject to curtailment by the regional administration.

#2. POD located outside the curtailment zone **("bringing water in" is not allowed)**

Obviously, a water right may divert from its original PODs and/or any APODs located outside a curtailment zone regardless of the right's priority. If the original POD for that water right is located outside the curtailment zone and the right is senior to the cut-off date, it may also divert from all APODs within the curtailment zone that were authorized prior to the cut-off date. But water may not be diverted from any well within the curtailment zone that was authorized after the cut-off date.

#3. APODs located outside the curtailment zone **("taking water out" is allowed)**

A water right may be diverted from authorized APODs located outside of the curtailment zone even if the original POD and APODs within the curtailment zone are curtailed. This is because, by virtue of being excluded from the curtailment zone, such diversions are deemed not to cause material injury to the right making the call (in conjunctive administration of ground and surface water). Nor do they materially contribute to ground water declines within the curtailment zone (in the case of ground water level administration).

Successive APOD expansion

The APOD condition's roll-back process allows IDWR to take into account the successive expansion of APODs over time. For many rights, there is just one original POD, but some rights have two or more APODs from the outset. And in many cases, additional APODs have been added to water rights after their original licensing. For example, in Veolia's case, prior to IMAP approval, additional APODs have been authorized for some water rights by SRBA decree (accomplished transfers). The IMAP will add more APODs. And more APODs could be added in the future.

The roll-back analysis always asks the same question: what points of diversion were authorized for a water right on the relevant date?

For example, Veolia's water right no. 63-7641 has a priority date of 8/17/1972. It was originally licensed with one POD (Hidden Valley Well No. 1 located in T02N, R01E, S03, SESE). It was partially decreed on 11/18/2009 with 12 APODs (11 plus the original POD). If a regional administration curtailment had a cut-off date after 8/17/2009 (*i.e.*, later than the date of the partial decree when 11 additional APODs were added) but earlier than the date of IMAP approval, water could be diverted under this right from all 12 APODs authorized under the partial decree irrespective of the impact on the surface right making the call. This is because the right is senior to the cut-off date and all rights with priority dates subsequent to the 2009 partial decree were developed subject to the decree's APOD authorization. In addition, water could be diverted from 69 APODs newly authorized under the IMAP if and only if doing so had no greater effect on the water right making the call than diverting from the 8/17/2009 APODs.

If a regional administration curtailment had a cut-off date of 8/17/2009 or earlier (*i.e.*, the partial decree date or earlier) but later than the priority date of 8/17/1972, water could be diverted under this right from the original POD. In addition, water could be diverted at all subsequently authorized APODs (11 by partial decree plus the 69 added by the IMAP approval) if and only if doing so had no greater effect on the water right making the call than diverting from the original POD.

IDWR'S DRAFT APOD CONDITIONS

Condition 13 in the draft approval for water right no. 63-11990:

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 the Edgeview well located in T03N R01E S16 SENE.

Condition 13 in the draft approval for water right no. 63-11990:

This transfer authorizes the following additional wells as points of diversion under this right as of the date of approval. Hidden Valley 1 well located in T02N R01E S3 SESE, Hidden Valley 2 well located in T02N R01E S3 NESW, JR Flat well located in T02N R02E S2 NWNW, Tenmile well located in T02N R02E S17 SENE, Raptor well located in T02N R02E S17 NWNW, Pleasant Valley well located in T02N R02E S21 NENW, Pioneer well located in T02N R02E S22 NWNE, Bali Hai well located in T03N R01E S3 SENE, Maple Hills 1 well located in T03N R01E S14 NENE, Maple Hills 2 well located in T03N R01E S14 NENE, Brook Hollow well located in T03N R01E S15 SENE, Paradise 1 well located in T03N R01E S15 NESE, Country Square well located in T03N R01E S23 NWNW, Countryman well located in T03N R01E S23 SENW, Sherman Oaks well located in T03N R01E S23 SESE, Cole well located in T03N R01E S24 NESE, Victory well located in T03N R01E S27 NENE, Five Mile 12 well located in T03N R01E S27 NWSW, Lagrange well located in T03N R01E S34 NESW, Amity well located in T03N R01E S36 NWNE, Sunset W well located in T03N R01E S36 NESE, Central Park well located in T03N R02E S2 NENW, Idaho well located in T03N R02E S4 SWSW, Twenty-Seventh well located in T03N R02E S4 SWSW, Fisk well located in T03N R02E S6 SESE, Bethel well located in T03N R02E S7 SWSW, Arctic well located in T03N R02E S8 NENE, Clinton well located in T03N R02E S8 NESW, Sixteenth St well located in T03N R02E S9 SENW, Longmeadow well located in T03N R02E S13 SWNW, Beacon well located in T03N R02E S14 SENW, Cliffside well located in T03N R02E S15 NWNW, Roosevelt 1 well located in T03N R02E S16 NWNW, Roosevelt 3 well located in T03N R02E S16 NWNW, Cassia

well located in T03N R02E S16 NESE, Cassia 2 well located in T03N R02E S16 NESE, Hilton well located in T03N R02E S17 NESW, Franklin Park well located in T03N R02E S18 NWNE, Hummel well located in T03N R02E S18 NESW, Kirkwood well located in T03N R02E S19 NENE, Overland well located in T03N R02E S19 NENW, Hillcrest well located in T03N R02E S20 SENE, Taggart 1 well located in T03N R02E S21 NENE, Taggart 2 well located in T03N R02E S21 NENE, Chamberlain 1 well located in T03N R02E S22 NWNE, Chamberlain 2 well located in T03N R02E S22 NWNE, Broadway well located in T03N R02E S22 SESE, Warm Springs Mesa 2 well located in T03N R02E S24 SWNE, Warm Springs Mesa 3 well located in T03N R02E S24 SWNE, Logger well located in T03N R02E S24 SWNW, River Run well located in T03N R02E S24 SWSE, Centennial well located in T03N R02E S25 NWSE, Bergeson well located in T03N R02E S26 NESE, Bif well located in T03N R02E S27 NWSE, Vista well located in T03N R02E S28 NENE, Country Club well located in T03N R02E S28 NWNW, Swift 1 well located in T03N R02E S30 SWSE, Mac well located in T03N R02E S32 NWNW, Byrd well located in T03N R02E S33 NENW, Market well located in T03N R02E S35 NENW, Terteling well located in T03N R02E S36 SWNE, Barb Durham 2 well located in T03N R03E S28 SWNW, Barber 1 well located in T03N R03E S29 SENE, Floating Feather well located in T04N R01E S5 SESW, Redwood Creek well located in T04N R01E S7 L2(SWNW), Island Woods 1 well located in T04N R01E S16 L5(NWSW), Island Woods 2 well located in T04N R01E S21 NWNW, H.P. well located in T04N R01E S27 SENE, McMillan well located in T04N R01E S28 SWSW, Frontier well located in T04N R01E S34 NESW, Settlers well located in T04N R01E S35 NENW, Goddard well located in T04N R01E S36 NENW, Spurwing well located in T04N R01W S23 NESW, Foxtail (aka Fox Tail #2) well located in T04N R01W S24 SWSE, Swift 2 well located in T04N R02E S31 SWSE, Westmoreland well located in T04N R02E S31 NWSW, Willow Lane 1 well located in T04N R02E S32 NWNW, Willow Lane 2 well located in T04N R02E S32 SWNW, Willow Lane 3 well located in T04N R02E S32 SWNW, Veterans well located in T04N R02E S32 SESE.

VEOLIA'S PROPOSAL
(Combining IDWR's two APOD conditions into one)
(Based on water right no. 63-11990)

[Veolia proposes the condition language set out below in **bold**. Explanatory material is in square brackets. If adopted, the condition language in **bold** should be merged into a single, long APOD condition. Here, it is broken out into ¶¶ 1-8 in order to facilitate explanation and discussion of the proposal.]

¶ 1: The basic principle:

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, the analysis of material injury may take into account the dates on which points of diversion were authorized for this right. The purpose of this condition is to allow the right holder to divert water at authorized points of diversion that were not initially associated with this right, but only when doing so does not cause material injury to other rights.

[No substantive change is intended from IDWR's standard condition 208. Instead of just listing the original POD, Veolia's proposed language states the basic principle that subsequently authorized APODs may be "rolled back" in the context of administration and treated differently to the extent necessary. Note that this language does not dictate how material injury will be evaluated at the time of administration.]

[One could stop with the language set out in ¶ 1 above. However, Veolia believes it would be better to include the further explanation in ¶¶ 2-3 below at a minimum, and ideally the explanation in ¶ 4.]

¶ 2: Well interference administration – priority date:

In well interference administration, material injury may be evaluated taking into account which points of diversion were authorized under this right as of the priority date of the water right alleged to be injured.

¶ 3: Regional administration – cut-off date:

In a regional administration, material injury may be evaluated taking into account which points of diversion were authorized under this right as of the priority date to which junior rights are subject to curtailment (the cut-off date).

¶ 4: Further clarification regarding regional administration:

In a regional administration, if the original point or points of diversion associated with this right are located within the curtailment zone and the right is not subject to curtailment due to its priority, water under this right may also be diverted from any authorized point of diversion that is (1) outside the curtailment zone, (2) within the curtailment zone and authorized prior to the cut-off date, or (3) within the curtailment zone and authorized on or after the cut-off date if doing so does not materially increase the injury that the regional administration is intended to address. If the original point or points of diversion are located outside the curtailment zone, water may be diverted from an authorized point of diversion within the curtailment zone only if that point of diversion was authorized prior to the cut-off date. Points of diversion authorized for this right outside the curtailment zone are not affected by a regional curtailment even if points of diversion within the curtailment zone are curtailed. Rights within the curtailment zone means those rights that are subject to curtailment based on the cut-off date and geographic or other criteria bearing on material injury.

[The language in ¶ 4 defines how the APOD condition works, as explained in greater detail in the APOD Principles on page 3. We believe that the principles set out in ¶ 4 are fixed and fundamental to the concept of material injury. We have endeavored to spell it out as succinctly as possible, and do so consistent with the goal of not constraining how material injury may be evaluated in the future. We appreciate that putting this much detail into a condition is unusual and that IDWR may not wish to be pinned down as to how this condition will be applied in the future. Veolia, on the other hand, very much wants to pin this down. If we are not able to reach agreement on this, ¶ 4 could be modified or omitted without impairing the rest of Veolia's proposed condition language.]

¶ 5: Historic APOD info—no modification intended:

[Turning to the historic APOD information discussed in ¶¶ 5-8, it is not really necessary to include any of this information in the APOD condition. All of this could be determined at the time of administration. However, Veolia suggests that it be included in the APOD condition as a convenience for the Department and interested parties in the event of future administration. Veolia believes that if the condition lists any of this historic APOD information, it should list all of it, to avoid confusion over what history is relevant.]

The information set out in the remainder of this condition is provided for convenience to facilitate future administration. In the event of a discrepancy between the information below and other official records of the Department, the other official records control.

[This cautionary language to important. Unlike other aspects of the transfer approval—which are intended to change elements or aspects of the right—the inclusion of this historic material is for informational purposes only and is not intended to change anything. If there is a discrepancy, it is inadvertent error. In the unlikely event that the historic information set out for any particular right is actually intended to correct erroneous information in the prior record, this statement should be adjusted accordingly.]

¶ 6: The original POD(s):

Ground water was first diverted under this right from the Edgeview well located in T03N R01E S16 SENE.

¶ 7: Intervening APODs:

[For some rights there is intervening history of additional APODs prior to the IMAP. In that case, the condition should reference those intervening APOD approvals.]

In <identify transfer number or partial decree> the following additional point(s) of diversion were authorized as of <date>: <well name> located in <township, section & range>, etc.

[For example, no. 63-2506 was decreed with 42 APODs on 11/18/2009, and no. 63-7641 was decreed with 12 APODs on 11/18/2009. Those would be listed here on the transfer approvals for those rights.]

¶ 8: Additional IMAP APODs:

[The following list should be limited to those APODs added by the IMAP approval. APODs added before IMAP approval should be set out in ¶ 7. IDWR's draft has not followed this approach. Instead IDWR's draft lists all of the 81 APODs except the original POD or PODs, even when other APODs were authorized previously by partial decree or otherwise. For ease of reading (and proofing), we urge the following numbered format.]

Transfer 89499 authorized the following additional wells as points of diversion under this right as of the date of approval:

- 1. Hidden Valley 1 well located in T02N R01E S3 SESE.**
- 2. Hidden Valley 2 well located in T02N R01E S3 NESW.**
- 3. JR Flat well located in T02N R02E S2 NWNW.**
- 4. Tenmile well located in T02N R02E S17 SENE.**
- 5. Raptor well located in T02N R02E S17 NWNW.**
- 6. Pleasant Valley well located in T02N R02E S21 NENW.**
- 7. Pioneer well located in T02N R02E S22 NWNE.**
- 8. Bali Hai well located in T03N R01E S3 SENE.**
- 9. Maple Hills 1 well located in T03N R01E S14 NENE.**
- 10. Maple Hills 2 well located in T03N R01E S14 NENE.**
- 11. Brook Hollow well located in T03N R01E S15 SENE.**
- 12. Paradise 1 well located in T03N R01E S15 NESE.**
- 13. Country Square well located in T03N R01E S23 NWNW.**
- 14. Countryman well located in T03N R01E S23 SENW.**
- 15. Sherman Oaks well located in T03N R01E S23 SESE.**
- 16. Cole well located in T03N R01E S24 NESE.**
- 17. Victory well located in T03N R01E S27 NENE.**
- 18. Five Mile 12 well located in T03N R01E S27 NWSW.**
- 19. Lagrange well located in T03N R01E S34 NESW.**
- 20. Amity well located in T03N R01E S36 NWNE.**
- 21. Sunset W well located in T03N R01E S36 NESE.**
- 22. Central Park well located in T03N R02E S2 NENW.**
- 23. Idaho well located in T03N R02E S4 SWSW.**
- 24. Twenty-Seventh well located in T03N R02E S4 SWSW.**
- 25. Fisk well located in T03N R02E S6 SESE.**
- 26. Bethel well located in T03N R02E S7 SWSW.**
- 27. Arctic well located in T03N R02E S8 NENE.**
- 28. Clinton well located in T03N R02E S8 NESW.**
- 29. Sixteenth St well located in T03N R02E S9 SENW.**
- 30. Longmeadow well located in T03N R02E S13 SWNW.**

31. Beacon well located in T03N R02E S14 SENW.
32. Cliffside well located in T03N R02E S15 NWNW.
33. Roosevelt 1 well located in T03N R02E S16 NWNW.
34. Roosevelt 3 well located in T03N R02E S16 NWNW.
35. Cassia well located in T03N R02E S16 NESE.
36. Cassia 2 well located in T03N R02E S16 NESE.
37. Hilton well located in T03N R02E S17 NESW.
38. Franklin Park well located in T03N R02E S18 NWNE.
39. Hummel well located in T03N R02E S18 NESW.
40. Kirkwood well located in T03N R02E S19 NENE.
41. Overland well located in T03N R02E S19 NENW.
42. Hillcrest well located in T03N R02E S20 SENE.
43. Taggart 1 well located in T03N R02E S21 NENE.
44. Taggart 2 well located in T03N R02E S21 NENE.
45. Chamberlain 1 well located in T03N R02E S22 NWNE.
46. Chamberlain 2 well located in T03N R02E S22 NWNE.
47. Broadway well located in T03N R02E S22 SESE.
48. Warm Springs Mesa 2 well located in T03N R02E S24 SWNE.
49. Warm Springs Mesa 3 well located in T03N R02E S24 SWNE.
50. Logger well located in T03N R02E S24 SWNW.
51. River Run well located in T03N R02E S24 SWSE.
52. Centennial well located in T03N R02E S25 NWSE.
53. Bergeson well located in T03N R02E S26 NESE.
54. Bif well located in T03N R02E S27 NWSE.
55. Vista well located in T03N R02E S28 NENE.
56. Country Club well located in T03N R02E S28 NWNW.
57. Swift 1 well located in T03N R02E S30 SWSE.
58. Mac well located in T03N R02E S32 NWNW.
59. Byrd well located in T03N R02E S33 NENW.
60. Market well located in T03N R02E S35 NENW.
61. Terteling well located in T03N R02E S36 SWNE.
62. Barb Durham 2 well located in T03N R03E S28 SWNW.
63. Barber 1 well located in T03N R03E S29 SENE.
64. Floating Feather well located in T04N R01E S5 SESW.
65. Redwood Creek well located in T04N R01E S7 L2(SWNW).
66. Island Woods 1 well located in T04N R01E S16 L5(NWSW).
67. Island Woods 2 well located in T04N R01E S21 NWNW.

- 68. H.P. well located in T04N R01E S27 SENE.**
- 69. McMillan well located in T04N R01E S28 SWSW.**
- 70. Frontier well located in T04N R01E S34 NESW.**
- 71. Settlers well located in T04N R01E S35 NENW.**
- 72. Goddard well located in T04N R01E S36 NENW.**
- 73. Spurwing well located in T04N R01W S23 NESW.**
- 74. Foxtail (aka Fox Tail #2) well located in T04N R01W S24 SWSE.**
- 75. Swift 2 well located in T04N R02E S31 SWSE.**
- 76. Westmoreland well located in T04N R02E S31 NWSW.**
- 77. Willow Lane 1 well located in T04N R02E S32 NWNW.**
- 78. Willow Lane 2 well located in T04N R02E S32 SWNW.**
- 79. Willow Lane 3 well located in T04N R02E S32 SWNW.**
- 80. Veterans well located in T04N R02E S32 SESE.**