

Negotiated Rulemaking Summary

IDAPA 20.03.17 – Rules Governing Leases on State-Owned Navigable Waterways

Previous title: *Rules Governing Leases on State-Owned Submerged Lands and Formerly Submerged Lands*

Docket No. 20-0317-2201

Following Executive Order 2020-01: Zero-Based Regulation, this rule chapter is scheduled to be repealed and replaced in 2022 for review during the 2023 legislative session.

The Idaho Department of Lands (IDL) manages the beds of navigable lakes and rivers for the benefit of the public. IDAPA 20.03.17 establishes a consistent process to authorize specific encroachments on state-owned submerged lands and collect annual rent for their use. These uses typically include marinas, community docks, non-navigational encroachments, and oversized private docks that occupy the state's lakes.

Negotiated rulemaking for these rules was approved by the State Board of Land Commissioners on February 15, 2022. The Notice of Intent to Promulgate Rules – Zero-Based Regulation Negotiated Rulemaking was published in the Idaho Administrative Bulletin on April 6, 2022.

Stakeholder Outreach

The department's outreach for negotiated rulemaking included the following:

- Published the Notice of Negotiated Rulemaking in the Idaho Administrative Bulletin
- Created a rulemaking webpage to post documents, scheduling information, and comments (<https://www.idl.idaho.gov/rulemaking/docket-20-0317-2201/>)
- Issued a press release
- Emailed 143 customers and other interested parties
- Mailed postcards to 236 customers

Negotiated Rulemaking Public Meetings

Negotiated rulemaking meetings were held on April 27 and May 18, 2022 to discuss draft changes to the rules and receive comments from interested parties. A total of 18 non-agency affiliated people attended these meetings. Much of the discussion centered on artificial high water mark versus ordinary high water mark. As defined in the rules, leasing would only occur on lands below the ordinary high water mark where the state owns the beds of the navigable waters.

Written Comments

Two sets of written comments were received. The department reviewed and considered all comments received and provided informative responses in the attached [Response to Comments on Draft Negotiated Rule](#).

Concluding Negotiated Rulemaking

With no issues left unresolved, the department concluded the negotiated rulemaking process and submitted the rule changes for publication as a proposed rule in the September 7, 2022, edition of the Idaho Administrative Bulletin. Key documents from the rulemaking record are available at <https://www.idl.idaho.gov/rulemaking/docket-20-0317-2201/>, including written public comments, research materials, and the proposed rule text in legislative format to allow the reader to easily identify changes.

Response to Comments on Draft Negotiated Rule
 IDAPA 20.03.17, Rules Governing Leases on State-Owned Navigable Waterways

Comment	Rule Section	Response	Commenter
<p>I am concerned that the proposed rule changes exceed the state’s authority and conflict with the Lake protection Act 58-1301, Idaho code 42-101, Idaho code 58-1201 the Public Trust Doctrine, Idaho code 58-1310, Idaho Code 58-1311 and the State Constitution by asserting ownership of private property. Why is definition of "artificial high water mark" deleted?</p>	<p>General and 010.01</p>	<p>1. No conflict is present because these rules do not apply to private property above the ordinary high water mark of navigable waterways. The definition of "Artificial high water mark" is proposed for deletion because it is not actually used in the rule. Under the guidance for Executive Order 2020-01, definitions that are not used in a rule must be deleted from that rule. The leasing authority under this rule is clearly limited to "state-owned navigable waterways" as stated in Subsection 001.01. "State-owned navigable waterways" are then defined in Subsection 010.15: "As used in these rules, the beds of all navigable waterways up to the natural or ordinary high water mark as of the date Idaho was admitted into statehood. This includes any such bed that was formerly submerged and subsequently filled and is now uplands because of human activity (e.g., dikes, berms, jetties) or by natural processes, and includes islands within navigable waterways resulting from human activity or by natural processes."</p>	<p>Ralph Sletager 5/2/2022</p>
<p>Can the state treat lakes, rivers and streams the same? For example, on Lake Pend Oreille there is an easement to store water on private property in between the Ordinary High Water and the Artificial High Water in the summer. Many docks and encroachments are over private land not public land. Riparian owners have the “right” to wharf out to the line of navigability to exercise their riparian rights. These rights date back to English common law. Can the state charge rent for a property owner using his/her property?</p>	<p>Title</p>	<p>2. See above explanation under Response #1 for the change in terminology. IDL does not currently charge rent for those portions of an encroachment over private submerged lands, and the proposed rule changes will continue that practice.</p>	<p>Ralph Sletager 5/2/2022</p>

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Definition of navigable waterways? Different than navigable waters. Clean water Act? Idaho code 36-1601 was an attempt to change the navigable water definition. Navigable waters was defined in 1890 at statehood. See 58-1201 below.	001.01	3. See above explanation under Response #1 for the change in terminology. This has no relation to the Clean Water Act, which is a federal statute written for a completely different issue. Idaho Code § 36-1601 is a Fish and Game statute that also has no bearing on these rules. The proposed definition in Subsection 010.15 references navigable waterways at statehood and borrows existing language from the current definition of "Formerly Submerged Lands" in Subsection 010.11.	Ralph Sletager 5/2/2022
Concerns implied about Subsection 001.02	001.02	4. This subsection was moved up from Subsection 025.10. It has been in this location since the rule was first adopted in 1997, although the wording has been slightly altered since then. This rule is not in conflict with the Lake Protection Act, as that act provides a regulatory oversight for all lake encroachments. This rule, however, exercises an ownership right over both state-owned navigable lakes and rivers.	Ralph Sletager 5/2/2022
Why are appeals eliminated?	002	5. They are not eliminated. This deletion was done under the guidance of Executive Order 2020-01. Appeals are still available under Title 67, Chapter 52, Idaho Code, and IDAPA 20.01.01. Removing those references from the rule does not affect their applicability to appeals under this rule, and Title 67, Chapter 52, Idaho Code is now referenced on the new cover sheet that all rule chapters have. See https://adminrules.idaho.gov/rules/current/20/200317.pdf	Ralph Sletager 5/2/2022
Why is the definition of "ordinary high water mark" different than the one in 20.03.04 (Encroachment rules)?	010.11	6. The definition is the same one used in IDAPA 20.03.09, "Easements on State-Owned Navigable Waterways", and more closely follows the definition in Idaho Code § 58-1202(2). IDL prefers this wording because it is more applicable to both rivers and lakes, whereas the definition in 20.03.04.010.23 only applies to lakes. Also, definitions apply only to the chapter, act, or rule in which they appear (Maguire v. Yanke, 99 Idaho 829, 836, 590 P.2d 85, 92 (1978)), so no conflict occurs with the different definitions.	Ralph Sletager 5/2/2022
Are out of state people not qualified to do business (or) qualify for a permit?	010.12	7. Individuals are always qualified to do business, regardless of being in-state or out-of-state, as that individual. When they wish to do business as a corporation, partnership, limited liability company, association, trust, unincorporated organization, or other legal entity they must first take the necessary steps to be qualified to do their business in the State of Idaho.	Ralph Sletager 5/2/2022

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Potential conflict with the Lake Protection Act's definition of "riparian or littoral rights".	010.13	8. No conflict is present because these rules do not get their authority from the Lake Protection Act. The authority of these rules is shown in Section 000. Definitions apply only to the chapter, act, or rule in which they appear (Maguire v. Yanke, 99 Idaho 829, 836, 590 P.wd 85, 92 (1978)).	Ralph Sletager 5/2/2022
Potential conflicts with the definition of "state-owned navigable waterways".	010.15	9. See Response #1 above. These rules apply to both lakes and rivers, so the Lake Protection Act's definitions are not suitable for this rule.	Ralph Sletager 5/2/2022
Five or 10 years is not bankable or enough time to recoup a commercial investment. What difference does it make to the state? Why not a longer-term plan?	010.17	10. A temporary permit is for short duration uses that typically do not require commercial loans. A marina or similar commercial investment that will last 10 or more years would require a lease.	Ralph Sletager 5/2/2022
Concerns implied about Subsection 025.03 and how encroachment permit decisions are made on private submerged lands above the ordinary high water mark.	025.03	11. These rules are not concerned with issuing lake encroachment permits. The rules apply only to the leasing of lakes and rivers below the ordinary high water mark, and seek to provide a predictable method for IDL to generate revenue from specific commercial and private uses of these waterways. In almost all cases, permits have already been obtained before a lease is applied for.	Ralph Sletager 5/2/2022
Concerns implied about Subsection 025.08 and how the line of navigability is related to the low water mark, and how these might affect the waiver of lease requirements.	025.08	12. The line of navigability and the low water mark have no bearing on the location of the ordinary high water mark that determines the limit of applicability of these rules. The phrase "for water craft customarily in use on that particular lake" is ambiguous, has not been used by any potential lessee in an effort to waive lease requirements, and is not needed in this rule. IDL commonly waives lease requirements where need is demonstrated. As required by Executive Order 2020-01, unused or unnecessary language should be removed from the rule.	Ralph Sletager 5/2/2022
This appears to provide that leases may be required for encroachments already authorized by existing permits issued decades ago. This appears overbroad and potentially in excess of IDL's authority.	001.02	13. This subsection was moved up from Subsection 025.10. It has been in this location since the rule was first adopted in 1997, although the wording has been slightly altered since then. This rule is not overbroad and allows the state to generate revenue from commercial or private uses of navigable waterways. This rule is just exercising the state's ownership rights over both state-owned navigable lakes and rivers. Legally permitted encroachments are not in jeopardy due to this rule, but if an encroachment does not fall under an exception listed in Section 020, then a lease may be required in addition to the encroachment permit.	John F. Magnuson 5/25/2022