ADMINISTRATOR'S MEMORANDUM

Application Processing No. 67

TO: **WATER MANAGEMENT DIVISION**

FROM: **NORMAN C. YOUNG, ADMINISTRATOR** NCY

RE: **PERMITTING REQUIREMENTS FOR PONDS**

DATE: **February 28, 2003**

This memorandum provides general guidance on the permitting requirements for impounding and using water in a pond. Its primary focus is to describe circumstance for which a water right is needed to retain and use water while impounded in a pond. This narrow focus is appropriate because it is generally understood and accepted that a water right is needed to divert water to a pond for beneficial use in the pond or to divert water from a pond for a beneficial use outside of the pond.

The direction provided in this memorandum is intended to clarify the Department's policy regarding ponds constructed or proposed to be constructed after the date of this memorandum and to changes in use of existing ponds, where the change in use occurs or is proposed to occur after the date of this memorandum. It is not intended to direct Department staff to initiate investigative or regulatory action for ponds existing prior to the date of this memorandum or to address the need for a claim to be filed in an ongoing adjudication of water rights. If a written complaint is filed with the Department showing probable injury to an existing water right where the injury is alleged to be related to the use of a pond developed prior to the date of this memorandum, staff is instructed to forward the complaint to the division administrator for case-by-case guidance.

A simple "yes" or "no" answer to the question "Is a permit needed?" often cannot be given because of the variety of circumstances associated with construction and use of ponds. Whether or not a permit is needed or can be issued is to be determined on a case-by-case basis by applying the concepts discussed in this memorandum.

GENERAL CONSIDERATIONS

A water right is required to use public water if: (1) it is diverted, (2) a beneficial use is made of the water and (3), traditionally, the diverter intends to protect the right to divert and use the water against later-in-time diversion and use from the source. However, the third parameter for requiring a water right is not now strictly applicable in Idaho because Section 42-201, Idaho Code, makes it unlawful to divert or use public water without a valid water right. Public water sources must be regulated to assure diversion occurs only in accordance with a valid water right. Excavation or other activities, incidental to the purposes of an activity, can create ponds or enlarge existing ponds resulting in the impoundment of water which the developer or owner does not intend to beneficially use and does not intend to defend their continued access to this water against subsequent appropriators. Even so, in accordance with Section 42-201, Idaho Code, a water right is needed for such incidental ponds or timely action must be taken to avoid impounding water.

CONSTRUCTED PONDS

Generally, a water right is needed to beneficially use water in a constructed pond. This is true for ponds constructed by: (1) excavation to create a basin that fills naturally with water, (2) excavation that is filled by physical action to divert water into the basin, (3) or by constructing an embankment or other structure to create a reservoir that fills or is filled with water. Prior to beginning construction of a pond, the developer must file an application for and receive a permit to appropriate water or file an application and receive an approval to transfer an existing water right for the purpose of pond. Water Appropriation Rule 35.03b (IDAPA 37.03.08) provides that the annual storage volume shown on an application shall not exceed the storage capacity of the structure unless the application describes a plan for refilling the reservoir. This would include any plan to replace water lost from a constructed pond due to evaporation and/or seepage. The application fee is based on the annual storage volume proposed in the application, which should include any proposed refills.

An application for a pond to be constructed by excavation below the ground water level to be filled naturally from ground water must include the annual volume required to replace evaporation losses in addition to the volume to be stored in the pond. Ponds constructed in this manner should list ground water as the source on the permit.

Off-stream storage ponds requiring additional flow-through water to maintain water quality require a flow component in addition to a the diversion-to-storage and storage components on the permit. For applications including uses quantified as a combination of rate and volume, the application fee is based on the amount providing the greater fee.

There are several circumstances that can alter the general statement that a water right is needed and can be issued to store water in a constructed pond. Some examples are described below.

Incidental Ponds

An excavation made for another purpose (e.g. gravel or mineral extraction) that fills naturally with water does not require a permit if the excavation will be filled in or otherwise reclaimed to obliterate the pond within a reasonable time. A permit is required if the resulting pond will be retained for aesthetics, recreation or other beneficial uses. For gravel or mineral extractions, a reclamation plan filed with the Department of Lands can provide information on the intended disposition of the excavation.

Diffused Surface Water

A water right permit is not required to construct and use a pond with diffused surface water as its sole source (see Adjudication Memo No. 11 for a detailed discussion of diffused surface water). Diffused surface water is not considered to be public water and is therefore not subject to appropriation. Diffused surface water is water on the surface of the land from precipitation and snowmelt prior to entering a natural watercourse. One example of the capture of diffused surface water is an excavation or embankment constructed to capture rainwater or snowmelt runoff from a subdivision or parking lot prior to the runoff entering a natural watercourse. A landowner is entitled to capture and use diffused surface water before it enters a natural stream, lake or other public source. However, if the diffused surface water is a source of supply to a natural watercourse and the landowner's use significantly depletes that supply, it may cause injury to a senior appropriator who may seek to enjoin the use.

Regulation/Distribution Ponds

A water right permit is not required to construct and use a pond or ponds that are part of a system used to distribute and use water in accordance with a valid water right if the pond or ponds do not impound a larger volume of water than authorized for diversion within a 24-hour period under the water right or rights associated with the project. One example would be a pond constructed as part of an irrigation system to provide a higher rate of flow over a short period of time as required in some border irrigation systems.

Similarly, a water right permit is not required to construct and use a pond or ponds to collect and re-use irrigation runoff as long as the water is used on the lands from which the runoff occurred for the use authorized under an existing right. Collection must occur prior to the runoff entering a natural watercourse where it becomes available for public appropriation. The principal use of the pond or ponds in these cases must be for purposes of distributing and using or

re-using the water under the existing right. If the principal use is some other beneficial use, a water right for storage in the pond is required.

Wastewater Treatment

Based upon the concepts in the Department's interim industrial waste water policy (see Application Processing Memo No. 61 dated September 27, 1996), a water right permit is not needed to construct and use a pond that is necessary to comply with water quality standards and treatment requirements for a beneficial use that already has a water right. The policy does not include a restriction on pond size.

Domestic Exemption

A water right permit is not required to construct and use a pond that meets the statutory requirements for exemption for domestic uses (Sections 42-111 and 42-227, Idaho Code). If the pond is excavated and fills naturally with ground water or is constructed in any manner and is filled by pumping ground water, the total use of the pond and the other domestic uses exempted from permitting must not exceed 13,000 gallons per day for uses under part (1)(a) of Section 42-111, Idaho Code or 0.04 cubic feet per second and 2,500 gallons per day for uses under part (1)(b). Determination of the water use for a pond should take into account the fill rate of the pond (for ponds not filled naturally with ground water), evaporation and seepage from the pond, flow-through water to refresh the pond, and any other water used or discharged from the pond. Evaporation should be based upon a typical maximum daily evaporation rate rather than an annual average rate.

The attached spreadsheet was developed to estimate domestic water use to help determine an allowable pond size for domestic exemptions (**Note that the allowable surface area for a pond exempt from the water right permit requirement is determined by application of this spreadsheet and is not necessarily ½ acre**). The spreadsheet calculates a maximum daily water use in gallons per day by accounting for in-house, lawn and garden, pond, and other related domestic uses.

If a water user desires to file an application for permit for a pond even though the use meets the statutory requirements for exemption for domestic uses, the use would normally be approved as a domestic use with a standard diversion rate and no storage component. The application fee would be based on the diversion rate. An application for permit for a use complying in all respects with the requirements to be exempt from permitting under the domestic exemption may be processed unless otherwise provided in the management plan adopted for a ground water management area, critical ground water area or moratorium area.

Other Considerations

Ponds constructed and beneficially used prior to the mandatory permit dates can claim a beneficial use right. A beneficial use right could also have been established if the claimant can show that the right was commenced before the mandatory permit dates and the appropriation was completed with due diligence after the mandatory dates (see Adjudication Memo No. 23). For example, if a pond was excavated for gravel extraction prior to 1963, but was not used for aesthetics or recreation until after that date, a right could have been established as long as the use was completed in a reasonable period of time. The priority date of such rights is the date the appropriation was completed.

Approval is required under the Safety of Dams Act (Section 42-1709, *et. seq.*, Idaho Code, if the impoundment meets the requirements to be classified as a dam (Ref. Dam Safety Rule 10.06, IDAPA 37.03.06).

The Department should actively investigate citizen complaints concerning new construction and use of ponds. If the pond is not exempt from permitting requirements, the Department should seek an appropriate application for permit or transfer of an existing water right if processing of an application for permit cannot proceed because of a moratorium order or other designation affecting the area. The owner of the pond may be required to provide appropriate mitigation to offset reduction in water available to prior rights.

NATURAL PONDS

Generally, a water right is not needed and cannot be issued to protect, in place, the waters of a natural pond. Natural ponds include those formed and existing under natural conditions and those that were created when natural basins filled with seepage or return flows from water lost by irrigation and other development projects. Because a physical diversion does not occur when a beneficial use is made of water in a natural pond, a water right is not needed and cannot be issued.

There are several circumstances that result in an answer different from the general statement that a water right is not needed and cannot be issued. First, under Chapter 15, Title 42, Idaho Code, the Water Resource Board is authorized to obtain a right (exempt from filing fees) for a minimum lake level without the need to divert the water. This provision can be used to appropriate, in place, the waters of a natural pond. If a pond is characterized as "private water" under Section 42-212, Idaho Code, the appropriation can only be made with the permission of the owner of the land on which the pond is located.

A second circumstance that could require a water right permit is expansion of the water holding capacity of a natural pond by excavating to deepen it or increase its surface area or by constructing an embankment or other structure to raise the

water level in the pond. A water right permit is required for the additional increment of water contained in the pond. The water right permit can only be issued for the additional storage created, not the entire volume of the pond. The application fee would be based on the volume added to the pond and any refills as proposed in the application. If a water right permit is not obtained, a stream alteration permit or lake protection permit is required for the excavation or other work done in the pond.

A similar circumstance arises from excavation of a stream channel either to deepen or widen it or by adding a check structure in the stream to create a pond. If the purpose is to provide for beneficial use of the ponded water, including uses such as aesthetics or recreation, a water right permit is needed for the increment of water (including any proposed refills) added by the excavation or structure. If a water right permit is not obtained, a stream alteration permit may be required.

Water Appropriation Rule 35.01c (IDAPA 37.03.08) provides that the use of a natural lake (or pond) for watering livestock without the use of a constructed diversion works is exempt from permitting requirements. If a water user desires to file an application for permit even though the use is exempt from permitting requirements under this rule, the use would normally be approved as stockwater with an appropriate diversion rate and no storage component. The application fee would be based on the diversion rate.