


## Rulemaking: DEQ Comments on Docket 62-0101-2301

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To:General <general@oah.idaho.gov>

 1 attachments (189 KB)

DEQ Comments on Docket 62-0101-2301.pdf;

Attached are DEQ's comments on Docket 62-0101-2301. Please contact me if you have any questions.

Thank you,

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**Our mission:** To protect human health and the quality of Idaho's air, land, and water.

# Idaho Department of Environmental Quality Comments on Docket 62-0101-2301

## July 27, 2023

The Idaho Department of Environmental Quality (DEQ) has reviewed the negotiated rule draft for docket 62-0101-2301 and provides the following comments.

### General Comment:

DEQ recommends that the Office of Administrative Hearings (OAH) consider postponing rulemaking for these rules until agencies and OAH can further consider how agency-specific contested case rules will be impacted by and interact with OAH rules. As an agency with its own contested case rules, DEQ is concerned that the promulgation of OAH rules at this time will cause unnecessary confusion for stakeholders who have the right to petition agency decisions. Pursuant to Section 67-5282(1)(e), Idaho Code, OAH is not required to promulgate these rules or to do so in any specific time frame. Therefore, we recommend OAH postpone this rulemaking.

### Specific Comments:

#### **Comment 1 - Subsection 001.02, Scope:**

DEQ recommends inserting language that refers to the agency-specific procedural rules and the OAH website.

001. TITLE AND SCOPE (RULE 1).

01. Title. This chapter is titled "Idaho Rules of Administrative Procedure."

02. Scope. Every state agency that conducts "contested cases" as defined by Section 67-5240, Idaho Code, must use these rules ~~unless otherwise required by governing federal law~~ **in conjunction with agency-specific procedural rules that may apply to contested cases before certain agencies. Once a petition is filed with the agency, the agency assigns the case to the Office of Administrative Hearings if applicable. Information regarding assigning cases to the Office of Administrative Hearings is available at <https://oah.idaho.gov/agencies/>.**

Including the suggested language would facilitate a smooth transition from [IDAPA 04.11.01, Idaho Rules of Administrative Procedure of the Attorney General](#), to the Office of Administrative Hearings' draft rules of administrative procedure (OAH rules); clarify the relationship between the OAH rules and agency-specific procedural rules addressed in Section 800; and minimize confusion as to what rules apply. A person seeking to file a petition for contested case with a specific state agency would likely not be familiar with OAH and its role in contested cases. The potential petitioner would likely be familiar with the specific agency, its administrative rules, and website.

DEQ is one of the agencies that has adopted procedural rules with agency-specific provisions, [Contested Case Rules and Rules for Protection and Disclosure of Records \(IDAPA 58.01.23\)](#). Below DEQ provided a

few examples of agency-specific provisions to demonstrate the importance of clarifying how the OAH rules will be used in conjunction with agency-specific rules.

**58.01.23.060. Time Period for Filing Petition.** Unless provided in Idaho Code or a rule administered by the Department, the petition must be filed thirty-five (35) days from the date of the action or inaction of the Department.

**58.01.23.008.01. Filing and Service of Documents.**

**58.01.23.352.02. Timely Filing of Petitions to Intervene, Proceedings Involving a Permit.**

The hearing coordinator serves the petition on the permit applicant or permit holder and a notice informing him that he has 21 days to intervene in the proceeding (if the permit applicant or permit holder is not the petitioner).

**58.01.23.352.01. Timely Filing of Petitions to Intervene, General.** Petitions to intervene must be filed within fourteen (14) days of publication of the notice of filing of the petition initiating a contested case as provided in Section 042 of these rules unless a different time is provided by order or notice.

**58.01.23.042. Public Notice of Petition.** The hearing coordinator publishes a legal notice in the newspaper and posts the petition on the DEQ website. This is notice to the public of the petition and rules for intervention.

**58.01.23.061. Stay of Department Actions.** Action or inaction of the department is not stayed unless, upon a motion, it is so ordered by the hearing officer.

#### **Comment 2 – Section 003 Definitions:**

The definition of “presiding officer” is unclear, particularly with respect to agency board members or agency heads. DEQ recommends removing the definition for “presiding officer” and using the term “hearing officer,” as defined in Section 67-5201, Idaho Code, throughout the rule.

#### **Comment 3 - Section 002, Incorporation by Reference:**

DEQ recommends striking Section 002. The incorporation by reference of agency-specific rules does not follow the process described in Section 67-5229, Idaho Code. Further, in Comment 1 DEQ suggests language that aligns agency-specific procedural rules with the OAH rules. For this rulemaking, incorporation by reference is not necessary.

#### **Comment 4 – Section 800, Other Agency-Specific Contested Case Rules:**

With the language suggested by DEQ in Comment 1, the last sentence in 800.01 is not necessary. Agency-specific procedural rules would apply to contested cases (in conjunction with the OAH rules).

800. OTHER AGENCY-SPECIFIC CONTESTED CASE RULES (RULE 800).

01. Mandatory application. Some agencies have promulgated their own contested case rules to comply with applicable federal law or specific requirements of Idaho law applicable to the agency or programs it administers. ~~Upon request of the agency at any point in the proceedings, the presiding officer shall adopt and apply any such agency-specific rules.~~

#### **Comment 5 - Sections 350 and 351, Filing and Service:**

DEQ recommends revising the provisions for filing and service of documents so they clearly identify how and with whom documents are “filed” (e.g., via OAH email) and upon whom documents are “served”

(e.g., the presiding officer and all parties). DEQ also recommends moving the filing and service instructions to the General Provisions at the top of the OAH rules.

Note: This set of filing/service instructions applies to contested cases once they have been transferred from the agency to OAH. The petition initiating the contested case would be filed with the agency per the agency's procedural rules.

The language highlighted below in Sections 350 and 351 is inconsistent with the filing and service instructions OAH issued to the parties in January 2023 for DEQ contested cases 0101-22-01 and 0106-23-01. Because OAH had not yet promulgated procedural rules, OAH provided filing and service instructions via the Notice of Appointment of Hearing Officer and follow up Notice of Telephonic Scheduling Conference. According to these instructions, documents are to be filed with OAH at [filings@oah.idaho.gov](mailto:filings@oah.idaho.gov) and served upon the hearing officer, person designated by the agency (hearing coordinator), and all parties (not "filed with the presiding officer and any other person designated by the agency to receive filings").

350. FILING –NUMBER OF COPIES – ELECTRONIC SUBMISSION – FAX PROHIBITED (RULE 350). An original and necessary copies (if any are required by the agency) of all documents intended to be part of an agency record must be filed with the presiding officer and any other person designated by the agency to receive filings in the case. If authorized by the presiding officer or the agency, e-mail or other electronic submission of documents will satisfy this requirement. No party shall be required to file, submit, or receive any documents via facsimile machine.

351. SERVICE BY PARTIES (RULE 351). All documents submitted by a party and intended to be part of the agency record for decision must be served upon the representatives of each party of record concurrently with filing with the presiding officer and any other person designated by the agency to receive filings in the case. The presiding officer may direct that some or all of these documents be served on interested or affected persons who are not parties. The presiding officer may also direct the means of service the parties are to use during a contested case proceeding.

**Comment 6 – Section 600, Agency Record:**

Per the discussion above regarding Sections 350 and 351, contested case documents are filed with OAH at [filings@oah.idaho.gov](mailto:filings@oah.idaho.gov) and served on the hearing officer, the person designated by the agency (i.e., hearing coordinator), and all parties. Because the documents are filed with OAH, not with the hearing officer or agency hearing coordinator, OAH, not the hearing officer, would be the entity responsible for providing a copy of the contested case record to the agency. DEQ recommends revising 600 as follows:

600. AGENCY RECORD (RULE 600).

01. Requirement. The agency shall maintain an official record of each contested case as provided for in Section 67-5249, Idaho Code.

02. ~~Presiding Officers~~ **Office of Administrative Hearings**. ~~Presiding officers~~ **The Office of Administrative Hearings** shall provide the agency with the ~~presiding officer's copy of the~~ **official** agency record within a reasonable time after the expiration of the time for any motion for reconsideration of a recommended or preliminary order, or at such other time as the agency may request.

**Comment 7:**

DEQ recommends removing the following sections entirely because they are beyond the scope of OAH's duties and responsibilities.

100. CONTRAST BETWEEN AGENCY'S PROSECUTORIAL/INVESTIGATIVE AND ADJUDICATORY FUNCTIONS (RULE 100).

101. PUBLIC INQUIRIES ABOUT OR RECOMMENDATIONS FOR AGENCY ISSUANCE OF A PETITION (RULE 101).

102. AGENCY PROCEDURES AFTER ISSUANCE OF A PETITION (RULE 102).

103. ASSISTANCE WITH AGENCY HEAD'S CONSIDERATION OF RECOMMENDED OR PRELIMINARY ORDER (RULE 103).

156. CONSENT ORDERS AND OTHER SETTLEMENTS (RULE 156).