

**Department of Environmental Quality Comments on  
Proposed Rule Docket 62-0101-2301  
Comment Deadline October 25, 2023**

**General Comment:**

In July 2023, the Department of Environmental Quality (DEQ) reviewed the Office of Administrative Hearings (OAH) negotiated rule draft and submitted comments. DEQ appreciates that OAH accepted several of the comments submitted. In this set of proposed rule comments, DEQ restates the July 2023 comments that were not accepted and includes additional detail.

**Specific Comments:**

**Comment 1 – Section 002, Definitions:**

The definition of “presiding officer” is unclear, particularly with respect to agency board members or agency heads. For example, if an OAH hearing officer decides a contested case, which is then appealed to DEQ’s Board, both could be referred to as the “presiding officer.” In addition, the Chief Administrative Hearing Officer would not appoint an agency board member or agency head to preside over a case that has been transferred from DEQ to OAH. Also, “hearing officer” is already defined in statute. Therefore, DEQ recommends removing the definition of “presiding officer”; inserting the term “hearing officer,” as defined in Section 67-5201, Idaho Code; and replacing “presiding officer” with “hearing officer” throughout the rule. For consistency with these suggestions, DEQ recommends deleting the introductory sentence in Section 250.

**002. DEFINITIONS (RULE 2).**

~~03. “Presiding officer.” One (1) or more members of the agency board, the agency head, or duly appointed hearing officer(s) who are authorized by statute or rule to preside at a contested case hearing. When more than one officer sits at hearing, they may all jointly be presiding officers or may designate one of them to be the presiding officer. “Hearing officer.” As defined in Section 67-5201, Idaho Code.~~

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**250. APPOINTMENT OF HEARING OFFICERS (RULE 250).**

~~A hearing officer is a presiding officer, other than the agency head, in a contested case proceeding. Subject to governing statutes and rules, a hearing officer may be appointed by an agency head.~~

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**Comment 2 - Sections 350 and 351, Filing and Service:**

The filing and service requirements proposed by OAH are contrary to the instructions issued by OAH to the parties for the two DEQ contested cases transferred to OAH in January 2023: *In the Matter of Permit to Construct Issued to Perpetua Resources, Inc.*, Agency Case No. 0101-22-01/OAH Case No. 23-245-01, and *L & R Group, LLC v DEQ*, Agency Case No. 0106-23-01/OAH Case No. 23-245-02. Because OAH had not yet promulgated procedural rules, OAH provided filing and service instructions via the January 3, 2023, Notice of Appointment of Hearing Officer and January 19, 2023, Scheduling Order in the Perpetua case, and the January 11, 2023, Notice of Appointment of Hearing Officer in the L & R case. According to these instructions, documents are to be filed with OAH at the email address: [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.

Under OAH’s proposed rules, documents would be filed with the presiding officer which means, that in some cases, an independent contractor hearing officer, rather than a designated OAH employee, would be responsible for maintaining and organizing the record intended to be transmitted to the agency. A requirement to file documents with OAH rather than, or in addition to, a presiding/hearing officer would more likely result in a complete record that is organized and maintained in a uniform and consistent manner.

The Idaho Rules of Administrative Procedure of the Attorney General, IDAPA 04.11.01 (AG Rules), were used as model rule language and describe what is meant by “officer” with respect to filing contested case documents. As used in the following example AG Rules, “officer” most likely does not mean “presiding or hearing officer” as those terms are used in the OAH Rules.

- AG Rule 006 requires “all filings to be made with one (1) **officer**, for example the agency director or the agency secretary, or may generally provide that all documents will be . . . filed with an **officer** designated for the specific rulemaking or contested case.”
- AG Rule 053 provides that “all written communication . . . intended to be part of an official record . . . must be filed with the **officer** designated by the agency.”
- AG Rule 300 provides that, “original and necessary copies . . . must be filed with the **officer** designated by the agency to receive filing in the case.”

For cases filed with DEQ (prior to assigning to OAH), “officer” refers to the DEQ hearing coordinator. For cases assigned to OAH, “officer” would refer to the Office of Administrative Hearings.

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 email or U.S. mail to OAH) and upon whom documents are served (e.g., the hearing officer, any other person designated by the agency, and all parties). The following suggested revisions are consistent with the instructions issued by OAH in January 2023 for the two DEQ contested cases.

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.

**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~~ Office of Administrative Hearings by email at [filings@oah.idaho.gov](mailto:filings@oah.idaho.gov); by U.S. mail at P . O . Box 83720, Boise, ID 83720-0104; or in person at 816 W. Bannock St., Ste. 203, Boise, ID. ~~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.

In Section 351, DEQ suggests continuing to serve documents upon the parties, hearing officer, and “any other person designated by the agency” as has been the practice in the two DEQ contested cases. In August 2023, a petitioner in a DEQ/OAH contested case filed a petition for judicial review in district court. Because the DEQ hearing coordinator had been served with all documents as they were filed with OAH, she had a complete record that she was able to verify by comparing with the OAH docket sheet when it was time to prepare the record for the court. DEQ recommends the following revisions:

**351. SERVICE BY PARTIES (RULE 351).**

~~Concurrently with filing with the Office of Administrative Hearings, A~~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~~hearing officer, and any other person designated by the agency to receive ~~filings documents~~ in the case. The ~~presiding~~hearing officer may direct that some or all of these documents be served on interested or affected persons who are not parties. The ~~presiding~~hearing officer may also direct the means of service the parties are to use during a contested case proceeding.

**Comment 3 – Revisions for Consistency with Sections 350 and 351:**

DEQ recommends the following revisions to Sections 005, 155, 625, and 626 for consistency with recommended revisions in Sections 350 and 351.

**005. COMMUNICATIONS WITH AGENCY (RULE 5).**

All communications that are intended to be part of an official record for a decision in a contested case must be filed with the ~~presiding officer~~ Office of Administrative Hearings. Unless otherwise provided by statute, rule, order, or

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notice, documents are considered filed when received by the ~~presiding officer~~ Office of Administrative Hearings, not when mailed or otherwise transmitted.

**155. STIPULATIONS REGARDING FACTS (RULE 155).**

Parties may stipulate among themselves to any fact at issue in a contested case by written statement filed with the ~~presiding officer~~ Office of Administrative Hearings or presented by oral statement at hearing. A stipulation binds all parties agreeing to it only according to its terms. The agency may regard a stipulation as evidence or may require proof by evidence of the facts stipulated. The ~~presiding hearing~~ officer is not bound to adopt a stipulation of the parties, but may do so. If adopted, the ~~presiding hearing~~ officer may regard a stipulation as evidence, or may require additional proof by evidence of the facts stipulated. If the ~~presiding hearing~~ officer rejects a stipulation, they will do so before issuing their order, and will provide an additional opportunity for the parties to present evidence and arguments on the subject matter of the rejected stipulation.

**625. RECOMMENDED ORDERS (Rule 625).**

**02. Content.** Except where otherwise provided by statute or rule, every recommended order must contain the following paragraphs or substantially similar paragraphs:

a. This is a recommended order of the ~~presiding hearing~~ officer. It will not become final without action of the agency head. If you disagree with this recommended order, you may file a “motion for reconsideration” with the ~~presiding officer~~ Office of Administrative Hearings, or you may file “exceptions” with the agency head. You are allowed to file both.

**626. PRELIMINARY ORDERS (Rule 626).**

**02. Content.** Except as otherwise provided by statute or rule, every preliminary order must contain the following paragraphs or substantially similar paragraphs:

b. If you disagree with this preliminary order, you may file a “motion for reconsideration” with the ~~presiding officer~~ Office of Administrative Hearings, or you may file “exceptions” and/or a “petition for review” with the agency head. You are allowed to file all of these.

**Comment 4 – Section 600, Agency Record:**

Per DEQ’s recommended revisions for Sections 350 and 351, contested case documents would be filed with OAH and served on the hearing officer, the person designated by the agency (hearing coordinator), and all parties. Because the documents would be filed with OAH, not with the hearing officer, OAH, not the hearing officer, would be the entity responsible for providing a copy of the contested case record to the agency.

The last sentence of Subsection 600.02 states that OAH shall provide a copy of the agency record to the agency “if the presiding officer is one assigned by [OAH].” It is DEQ’s understanding that all presiding officers are assigned (appointed) by the Chief Administrative Hearing Officer and that some of those presiding officers are OAH employees while some are independent contracted hearing officers. Whether the presiding officer is an OAH employee or independent contracted hearing officer, Section 600 should be revised so that OAH, not the presiding officer, is the entity responsible for providing a copy of the agency record to the agency in all cases. DEQ recommends the following revisions:

**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~~ Office of Administrative Hearings’ copy of the 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. ~~If the presiding officer is one assigned by the Office of Administrative Hearings, the Office of Administrative Hearings shall provide such copy of the agency record to the agency.~~

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**Comment 5**

DEQ recommends removing the following sections entirely because they appear to be 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).