

Negotiated Rule Draft No. 2, Docket No. 58-0123-2101

Dated June 2, 2021 (clean version revised)

This rule has been drafted in accordance with [Executive Order No. 2020-01, Zero-Based Regulation](#) and is negotiated in conjunction with Docket No. 58-0121-2101.

The revisions shown in track changes are based on DEQ review and the April 27, 2021, meeting discussion.

Written comment deadline for this draft – June 24, 2021

**58.01.23 – CONTESTED CASE RULES AND
RULES FOR PROTECTION AND DISCLOSURE OF RECORDS**

000. LEGAL AUTHORITY.

Under Sections 39-105, 39-107, ~~and~~ 67-5206, and 74-114(8), Idaho Code, the Idaho Legislature has granted the Board of Environmental Quality the authority to promulgate these rules.

001. TITLE, AND SCOPE, ~~AND~~ APPLICABILITY.

01. Title. These rules are titled IDAPA 58.01.23, “Contested Case Rules and Rules for Protection and Disclosure of Records.”

02. Scope. These rules establish general standards for contested case proceedings and procedures to safeguard trade secrets.

002. RULES FOR CONTESTED CASES.

01. Purpose. The purpose of Sections 002 through 730 is to provide procedures for contested cases as required under Idaho Code § 39-107.

0302. Applicability. Any person aggrieved by an action or inaction of the Department may file a petition to initiate a contested case pursuant to [Chapter 52, Title 67, Idaho Code](#). These rules govern such proceedings, except that Idaho Pollutant Discharge Elimination System permit decisions are governed by [IDAPA 58.01.25, “Rules Regulating the Idaho Pollutant Discharge Elimination System Program,”](#) Section 204.

0023. IDAHO RULES OF ADMINISTRATIVE PROCEDURE OF THE ATTORNEY GENERAL.

For purposes of contested case procedures, other than specifically provided for in these rules, refer to [IDAPA 04.11.01, “Idaho Rules of Administrative Procedure of the Attorney General,”](#) which include, but are not limited to, the following sections:

- 01. Liberal Construction.** Section 052;
- 02. Computation of Time.** Section 056;
- 03. Substitution, Withdrawal of Representative.** Section 205;

04. **Defective, Insufficient or Late Pleadings.** Section 304;
05. **Amendment, Withdrawal - Pleadings.** Section 305;
06. **Intervention.** Sections 350, 351 and 354;
07. **Disqualification of Hearing Officers.** Section 412;
08. **Scope of Authority of Hearing Officers.** Section 413;
09. **Ex Parte Communications.** Section 417;
10. **Prehearing Conference.** Sections 510 – 514;
11. **Discovery-Related Prehearing Procedures.** Sections 520 – 532;
12. **Hearings.** Sections 550 – 566;
13. **Evidence.** Sections 600 – 606;
14. **Settlements.** Sections 610 – 614;
15. **Record of Decision.** Sections 650 – 651;
16. **Defaults.** Sections 700 – 702;
17. **Interlocutory Orders.** Sections 710 – 711;
18. **Final Orders.** Section 740;
19. **Orders Not Designated.** Section 750;
20. **Modification of Orders.** Section 760;
21. **Clarification of Orders.** Section 770; and
22. **Stay of Orders.** Section 780.

~~003.~~ 004. (RESERVED)

005. DEFINITIONS.

The terms “board,” ~~and~~ “department,” and “director” have the meaning provided for those terms in [Section 39-103, Idaho Code](#). The terms “contested case,” “order,” “party,” and “person” have the meaning provided for those terms in [Section 67-5201, Idaho Code](#).

01. Aggrieved Person or Person Aggrieved. Any person or entity with legal standing to challenge an action or inaction of the Department, including but not limited to permit holders and applicants for permits challenging Department permitting actions.

02. Petition. The pleading initiating a contested case.

03. Pleadings. Documents filed in a contested case.

04. Presiding Officer(s). One (1) member of the board or a duly appointed hearing officer.

006. – 007. (RESERVED)

008. FILING AND SERVICE OF DOCUMENTS.

01. Filing of Documents.

a. All documents must be filed with the hearing coordinator and may be filed by email, U.S. mail, hand-delivery, or fax. The hearing coordinator assigns case docket numbers, maintains case records, and issues notices on behalf of the Board. Information for filing documents is available at

<http://deq.idaho.gov/public-information/laws-guidance-and-orders/petitions-for-review-and-precedential-orders/>.

b. Upon receipt of a petition initiating a contested case, the hearing coordinator will:

i. Provide confirmation of filing date to the originating party;

ii. Serve the petition upon the Department; and

iii. In any proceeding involving a permit, serve upon the permit applicant or permit holder the petition and a notice informing the permit applicant or permit holder that they have twenty-one (21) days after the date of service of the petition to intervene in the proceeding and that they may be bound by any decision rendered in the proceeding.

02. Service of Documents. From the time a party files its petition, that party and all other parties must serve all future documents intended to be part of the agency record upon all other parties or representatives designated pursuant to Section 040 of these rules unless otherwise directed by order or notice or by the presiding officer. The presiding officer may order parties to serve past documents filed in the case upon those representatives. The parties will serve courtesy copies upon the presiding officer.

009. -- 019. (RESERVED)

020. FORM OF PLEADINGS.

A pleading template for documents to be filed in a contested case is available at <https://www.deq.idaho.gov/public-information/laws-guidance-and-orders/petitions-for-review-and-precedential-orders/>

021. PROOF OF SERVICE.

Every document meeting the conditions for service set out in Subsection 008.02 of these rules must be accompanied by proof of service. A certificate of service template is available at <https://www.deq.idaho.gov/public-information/laws-guidance-and-orders/petitions-for-review-and-precedential-orders/>

022. -- 039. (RESERVED)

040. INITIAL PLEADING BY PARTY – LISTING OF REPRESENTATIVES.

The initial pleading of each party must name the party's representative(s) for service and state the representative's(s') address(es) for purposes of receipt of all official documents. No more than two (2) representatives for service of documents may be listed in an initial pleading. Service of documents on the named representative(s) is valid service upon the party for all purposes in that proceeding. If no person is explicitly named as the party's representative, the person signing the pleading will be considered the party's representative. If an initial pleading is signed by more than one (1) person without identifying the representative(s) for service of documents, the presiding officer may select the person(s) upon whom documents are to be served. If two (2) or more parties or persons file identical or substantially like initial pleadings, the presiding officer may limit the number of parties or persons to be served with official documents in order to expedite the proceeding and reasonably manage the burden of service upon the parties.

041. REPRESENTATION OF PARTIES.

The representatives of the parties, and no other persons, are entitled to examine witnesses at a hearing or to make or argue motions. Unless otherwise authorized by law:

01. Natural Person. A natural person may represent himself or herself or be represented by an attorney or, if the person lacks full legal capacity to act for himself or herself, then by a legal guardian or guardian ad litem or representative of an estate;

02. General Partnership. A general partnership may be represented by a partner or an attorney; and

03. Represented by Attorney. The following must be represented by an attorney:

- a. A corporation or any other business entity other than a general partnership;
- b. A municipal corporation, local government agency, unincorporated association or nonprofit organization; and
- c. A state, federal or tribal governmental entity or agency.

042. PUBLIC NOTICE OF PETITION.

Within fourteen (14) days of the date a petition is filed with the Board, the Board will give reasonable notice to the public. The methods for giving notice will include, at a minimum, the following:

01. Publication. Publish a one-time legal notice in the newspaper of general circulation in the county in which the petitioner resides or in which the facility or other subject of the petition is located and post the petition on the agency's website at <http://deq.idaho.gov/public-information/laws-guidance-and-orders/petitions-for-review-and-precedential-orders/>. The legal notice will describe the nature of the action initiated by the filing of the petition and will include the date the petition was filed, the deadline for filing petitions to intervene, and a method by which interested persons may obtain a copy of the petition; and

02. Mail. Deliver via email, or First Class U.S. mail if email address is not available, a copy of the legal notice prepared in accordance with Subsection 042.01 of these rules to persons on any mailing list developed by the Department relating to the subject matter of the petition.

043. -- 059. (RESERVED)

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.

061. STAY OF DEPARTMENT ACTIONS.

An action or inaction of the Department, or any portion thereof, which is the subject of a proceeding governed by these rules, is not stayed unless, upon a motion filed by a party, it is so ordered by the presiding officer upon appropriate terms. This section does not apply to Department action governed by Section 67-5254(1), Idaho Code.

0612. PETITIONER HAS BURDEN OF PROOF.

Unless otherwise provided by statute, the petitioner has the burden of proving by a preponderance of the evidence, the allegations in the petition.

0623. DISMISSAL OF INACTIVE CASES.

In the absence of a showing of good cause for retention, any case in which no action has been taken for a period of six (6) months will be dismissed. At least fourteen (14) days prior to such dismissal, the notice of the pending dismissal will be served on all parties by mailing the notice to the last known addresses most likely to give notice to the parties.

0634. -- 159. (RESERVED)

160. PETITION.

The petition must:

01. Content.

a. Fully state the facts upon which it is based, including the specific alleged action or inaction of the Department;

b. Refer to the particular provisions of statute, rule, order or other controlling law upon which it is based. Legal assertions will be accompanied by citations of cases and statutory provisions;

c. State the relief sought; and

d. State the basis for the petitioner's legal standing to initiate the contested case; and

02. Filing. Be filed in accordance with Section 008 of these rules.

161. RESPONSE.

The response must:

01. Content.

a. Separately admit or deny to each factual averment in the petition;

b. Separately admit or deny the applicability of each legal authority asserted in the petition; (3-15-02)

c. Fully state any additional facts necessary to the decision of the contested case;

d. Refer to any additional provisions of statute, rule, order or other controlling law upon which it is based. Legal assertions will be accompanied by citations of cases and statutory provisions; and

e. State the relief sought; and

02. Filing. Be filed within twenty-one (21) days after service of the petition, unless an order or stipulation modifies the time within which a response may be made, or a motion to dismiss is filed within twenty-one (21) days. When a response is not timely filed under this rule, the presiding officer may enter a default order pursuant to [IDAPA 04.11.01, "Idaho Rules of Administrative Procedure of the Attorney General,"](#) Sections 700 through 702.

162. MOTIONS.

01. Defined. All pleadings requesting the Board or presiding officer to take any action in a contested case, except petitions, are called "motions." Motions include, but are not limited to, those allowed by the Idaho Rules of Civil Procedure.

02. Procedure on Prehearing Motions. The presiding officer may consider and decide prehearing motions with or without oral argument or hearing. If oral argument or hearing on a motion is requested and denied, the presiding officer will state the grounds for denying the request. Unless otherwise provided by the presiding officer, motions for summary judgment are governed by the Idaho Rules of Civil Procedure, including the form, standard for determining, procedure and time frames for filing and responding. For any other motion, unless otherwise provided by the presiding officer, when a motion has been filed, all parties seeking similar substantive or procedural relief must join in the motion or file a similar motion within seven (7) days after receiving the original motion. The party(ies) responding to the motion(s) will have fourteen (14) days to respond. The presiding officer may allow an opportunity for the movant to file a reply brief.

163. -- 351. (RESERVED)

352. TIMELY FILING OF PETITIONS TO INTERVENE.

01. 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.

02. Proceedings Involving a Permit. Petitions to intervene by the permit applicant or permit holder must be filed within twenty-one (21) days after service of the initiating petition as provided in Subsection 008.01.b.iii. of these rules.

03. Petitions Not Timely Filed. The presiding officer may deny or conditionally grant a petition to intervene if the petition is not timely filed and does not state good cause for untimely filing, or if granting the petition unconditionally would cause disruption, prejudice to existing parties or undue broadening of the issues, or for other reasons. Intervenors are bound by orders and notices entered earlier in the proceeding.

353. GRANTING PETITIONS TO INTERVENE.

01. General. If a timely petition to intervene shows direct and substantial interest in any part of the subject matter of a proceeding, does not unduly broaden the issues, and will not cause delay or prejudice to the parties, the presiding officer may grant intervention, subject to reasonable conditions. In addition, upon timely filing of a petition in accordance with Subsection 352.02 of these rules, a permit applicant or permit holder may intervene as a matter of right in any contested case in which the permit is contested.

02. Intervenor Response. Within fourteen (14) days of the service date of the order granting the petition to intervene, the intervenor must file a response to the petition initiating the contested case and include the content in Subsection 161.01 of these rules.

354. -- 409. (RESERVED)

410. BOARD MEMBERS AS PRESIDING OFFICERS, APPOINTMENT OF HEARING OFFICERS.

One (1) member of the Board may act as the presiding officer. The Board may appoint a hearing officer to act as the presiding officer on behalf of the Board. The hearing coordinator will administer the appointment of the hearing officer. Notice of appointment of a hearing officer or notice of a Board member who will act as presiding officer will be served on all parties.

411. -- 719. (RESERVED)

720. RECOMMENDED ORDERS.

01. Definition Board Reviews. A recommended order is an order issued by the presiding officer that will become a final order only after review by the Board pursuant to [Section 67-5244, Idaho Code](#). A recommended order that becomes a final order is a final agency action and may be subject to judicial review pursuant to [Section 39-107\(6\), Idaho Code](#).

02. Content. Every recommended order will include a schedule for Board review and contain the following paragraphs:

a. This is a recommended order of the presiding officer and will not become final without action of the Board; and

b. The Board will allow all parties an opportunity to file briefs in support or taking exceptions to the recommended order and may schedule oral argument in the matter before issuing a final order. The hearing coordinator will issue a notice setting out the briefing schedule and date and time for oral argument. The Board will issue a final order within fifty-six (56) days of receipt of the written briefs or oral argument, whichever is later, unless waived or extended by the parties or for good cause shown. The Board may hold additional hearings or may remand the matter for further evidentiary hearings if further factual development of the record is necessary before issuing a final order.

721. -- 729. (RESERVED)

730. PRELIMINARY ORDERS.

01. Definition Board May Review. A preliminary order is an order issued by the presiding officer that will become a final order unless reviewed by the Board pursuant to [Section 67-5245, Idaho Code](#). A preliminary order that becomes a final order is a final agency action and may be subject to judicial review pursuant to [Section 39-107\(6\), Idaho Code](#).

02. Content. Every preliminary order will contain the following paragraphs:

a. This is a preliminary order of the presiding officer and will become final without further action of the Board unless any party appeals to the Board by filing a petition for review of the preliminary order; and

b. Within fourteen (14) days of the service date of this preliminary order, any party may take exceptions to any part of this preliminary order by filing a petition for review of the

preliminary order. Otherwise, this preliminary order will become a final order of the Board. The basis for review must be stated in the petition. The Board may review the preliminary order on its own motion.

03. Review of Preliminary Orders. If any party files a petition for review of the preliminary order, the Board will allow all parties an opportunity to file briefs in support of or taking exceptions to the preliminary order and may schedule oral argument in the matter before issuing a final order. The hearing coordinator will issue a notice setting out the briefing schedule and date and time for oral argument. The Board will issue a final order within fifty-six (56) days of receipt of the written briefs or oral argument, whichever is later, unless waived or extended by the parties or for good cause shown. The Board may hold additional hearings or may remand the matter for further evidentiary hearings if further factual development of the record is necessary before issuing a final order.

731. -- ~~9899~~. (RESERVED)

900. RULES FOR PROTECTION AND DISCLOSURE OF RECORDS IN THE POSSESSION OF THE DEPARTMENT.

The purpose of Section 900 is to provide measures to safeguard trade secrets as required under Section 74-114(8), Idaho Code.

01. Safeguarding of Trade Secret Information.

a. No Department officer or employee may disclose any information subject to a trade secret claim except as specifically mandated by statute.

b. Access to information subject to a trade secret claim by Department employees, contractors, or other representatives will be limited to access necessary to carry out duties on behalf of the Department.

c. Any information subject to a trade secret claim and received by the Department will be placed in a clearly marked, confidential section of the file.

d. The Department will train all new employees, and periodically train existing employees, in the proper filing, tracking and physical handling of records subject to a trade secret claim, and in the procedures established by these rules, Section 74-114, Idaho Code, and any relevant policies adopted by the Department. Training will be as frequent and extensive as deemed necessary by the Director.

02. Notice of a Continuing Claim. Release of information pursuant to Section 74-114(4), Idaho Code, will include a notice of a continuing claim. The Department will:

a. Give notice of a continuing trade secret claim by noting its existence in a cover letter, or by other effective means if a cover letter is impractical, at the time the record is disclosed;

b. Notify the person receiving the information, subject to a continuing trade secret claim, that the Department's disclosure does not waive the claim nor authorize any further disclosure by the person receiving the record; and

c. Disclose a record under Section 74-114(4), Idaho Code, only if the person receiving the record agrees in writing to exercise all means legally available to protect the relevant record or portion of the record from further disclosure.

~~731~~901. -- 999.(RESERVED)