

# **IDAPA 58 – DEPARTMENT OF ENVIRONMENTAL QUALITY**

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

**DOCKET NO. 58-0123-2401**

### **NOTICE OF RULEMAKING – TEMPORARY AND PROPOSED RULE**

**EFFECTIVE DATE:** The temporary rule is effective July 1, 2024.

**AUTHORITY:** In compliance with Sections 67-5221(1) and 67-5226(1), Idaho Code, notice is hereby given that this agency has adopted a temporary rule and has initiated proposed rulemaking. This action is authorized by Sections 39-105, 39-107, and 74-114(8), Idaho Code.

**PUBLIC HEARING SCHEDULE:** No hearings have been scheduled. Pursuant to Section 67-5222(2), Idaho Code, a public hearing will be held if requested in writing by twenty-five (25) persons, a political subdivision, or an agency. Written requests for a hearing must be received by the undersigned on or before July 17, 2024. If no such written request is received, a public hearing will not be held.

**DESCRIPTIVE SUMMARY:** This rulemaking updates IDAPA 58.01.23, Contested Case Rules and Rules for Protection and Disclosure of Records (DEQ rules), for consistency with IDAPA 62.01.01, Idaho Rules of Administrative Procedure, recently adopted by the Office of Administrative Hearings (OAH rules) pursuant to Idaho Code § 67-5280. The OAH rules were adopted as pending rules and submitted to the 2024 Idaho State Legislature for review and approved with an effective date of July 1, 2024.

Pursuant to Idaho Code § 67-5206(3), IDAPA 04.11.01, Idaho Rules of Administrative Procedure of the Attorney General (Attorney General rules), are no longer in full force and effect as of July 1, 2024, due to the promulgation of the OAH rules. The DEQ rules refer to the Attorney General rules and contain procedures that are now covered by OAH; therefore, it is necessary to update the DEQ rules. At its June 2024 Board meeting, the Idaho Board of Environmental Quality (Board) adopted temporary rules that are consistent with the OAH rules.

The proposed rule text is in legislative format. Language the agency proposes to add is underlined. Language the agency proposes to delete is struck out. It is these additions and deletions to which public comment should be addressed. If a pending rule is adopted by the Board and approved by concurrent resolution of the 2025 Idaho State Legislature, the final rule will become effective on July 1, 2025, unless otherwise specified in the concurrent resolution.

**TEMPORARY RULE JUSTIFICATION:** Pursuant to Section 67-5226(1)(b), Idaho Code, the Governor has found that temporary adoption of the rule is necessary for compliance with the deadline in amendments to governing law. IDAPA 62.01.01, Idaho Rules of Administrative Procedure (OAH rules), were adopted pursuant to Idaho Code § 67-5280 with an effective date of July 1, 2024. Temporary adoption of this rule docket ensures that the DEQ administrative procedural rules remain consistent with Idaho law.

**FISCAL IMPACT STATEMENT:** The following is a specific description, if applicable, of any negative fiscal impact on the state General Fund greater than ten thousand dollars (\$10,000) during the fiscal year resulting from this rulemaking: Not applicable.

**NEGOTIATED RULEMAKING:** Negotiated rulemaking was not conducted. DEQ determined that negotiated rulemaking is not feasible due to the simple nature of this rulemaking. This rulemaking updates the DEQ rules for consistency with the OAH rules.

**INCORPORATION BY REFERENCE:** Pursuant to Section 67-5229(2)(a), Idaho Code, the following is a brief synopsis of why the materials cited are being incorporated by reference into this rule: Not applicable.

**IDAHO CODE SECTION 39-107D STATEMENT:** This rule regulates an activity not regulated by the federal government. The federal government does not regulate administrative procedures for the state of Idaho. Section 39-107, Idaho Code, grants authority to the Board to adopt rules that are necessary to carry out the purposes of the Environmental Protection and Health Act, Chapter 1, Title 39, Idaho Code.

**ASSISTANCE ON TECHNICAL QUESTIONS:** For assistance on questions concerning this rulemaking, contact the undersigned. The web page for this docket is available at <https://www.deq.idaho.gov/public-information/laws-guidance-and-orders/rulemaking/contested-cases-docket-no-58-0123-2401/>.

**SUBMISSION OF WRITTEN COMMENTS:** Anyone may submit written comments regarding this proposed rule. The Department will consider all written comments received on or before July 24, 2024. Submit written comments to the undersigned.

Dated this 3rd day of July, 2024.

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**THE FOLLOWING IS THE TEMPORARY RULE AND THE PROPOSED TEXT  
OF DOCKET NO. 58-0123-2401**

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

**000. LEGAL AUTHORITY.**

~~Under Sections 39-105, 39-107, 67-5206, and 74-114(8), Idaho Code, the Idaho Legislature has granted the Board of Environmental Quality the authority to promulgate these rules.~~ (3-31-22)(7-1-24)T

**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.”~~ (3-31-22)

~~02. Scope. These rules establish general standards for contested case proceedings and procedures to safeguard trade secrets.~~ (3-31-22)

**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.~~ (3-31-22)

~~02. 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 and outline substantive, non-procedural requirements prior to and during any contested case 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.~~ (3-31-22)(7-1-24)T

**002. INFORMATION FOR FILING PETITION TO INITIATE CONTESTED CASE.**

Hearing coordinator contact and information for filing a petition to initiate a contested case is available at: <http://>

[deq.idaho.gov/public-information/laws-guidance-and-orders/petitions-for-review-and-precedential-orders/](http://deq.idaho.gov/public-information/laws-guidance-and-orders/petitions-for-review-and-precedential-orders/). (7-1-24)T

**003. 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: [IDAPA 62.01.01, Idaho Rules of Administrative Procedure.](#) (3-31-22)(7-1-24)T

01. ~~Liberal Construction.~~ Section 052; (3-31-22)
02. ~~Computation of Time.~~ Section 056; (3-31-22)
03. ~~Substitution, Withdrawal of Representative.~~ Section 205; (3-31-22)
04. ~~Defective, Insufficient or Late Pleadings.~~ Section 304; (3-31-22)
05. ~~Amendment, Withdrawal—Pleadings.~~ Section 305; (3-31-22)
06. ~~Intervention.~~ Sections 350, 351 and 354; (3-31-22)
07. ~~Disqualification of Hearing Officers.~~ Section 412; (3-31-22)
08. ~~Scope of Authority of Hearing Officers.~~ Section 413; (3-31-22)
09. ~~Ex Parte Communications.~~ Section 417; (3-31-22)
10. ~~Prehearing Conference.~~ Sections 510—514; (3-31-22)
11. ~~Discovery Related Prehearing Procedures.~~ Sections 520—532; (3-31-22)
12. ~~Hearings.~~ Sections 550—566; (3-31-22)
13. ~~Evidence.~~ Sections 600—606; (3-31-22)
14. ~~Settlements.~~ Sections 610—614; (3-31-22)
15. ~~Record of Decision.~~ Sections 650—651; (3-31-22)
16. ~~Defaults.~~ Sections 700—702; (3-31-22)
17. ~~Interlocutory Orders.~~ Sections 710—711; (3-31-22)
18. ~~Final Orders.~~ Section 740; (3-31-22)
19. ~~Orders Not Designated.~~ Section 750; (3-31-22)
20. ~~Modification of Orders.~~ Section 760; (3-31-22)
21. ~~Clarification of Orders.~~ Section 770; and (3-31-22)
22. ~~Stay of Orders.~~ Section 780. (3-31-22)

**004. (RESERVED)**

**005. DEFINITIONS.**

The terms “board,” “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. (3-31-22)

**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. (3-31-22)

**02. Petition.** The pleading initiating a contested case. (3-31-22)

~~**03. Pleadings.** Documents filed in a contested case. (3-31-22)~~

~~**04. Presiding Officer(s).** One (1) member of the board or a duly appointed hearing officer. (3-31-22)~~

~~006. -- 00741. (RESERVED)~~

~~**008. FILING AND SERVICE OF DOCUMENTS.**~~

~~**01. Filing of Documents.** (3-31-22)~~

~~**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/>. (3-31-22)~~

~~**b.** Upon receipt of a petition initiating a contested case, the hearing coordinator will: (3-31-22)~~

~~**i.** Provide confirmation of filing date to the originating party; (3-31-22)~~

~~**ii.** Serve the petition upon the Department; and (3-31-22)~~

~~**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. (3-31-22)~~

~~**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. (3-31-22)~~

~~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/>. (3-31-22)~~

~~**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/>. (3-31-22)~~

~~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.~~

~~(3-31-22)~~

~~**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:~~

~~(3-31-22)~~

~~**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;~~

~~(3-31-22)~~

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

~~(3-31-22)~~

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

~~(3-31-22)~~

~~**a.** A corporation, or any other business entity other than a general partnership;~~

~~(3-31-22)~~

~~**b.** A municipal corporation, local government agency, unincorporated association or nonprofit organization; and~~

~~(3-31-22)~~

~~**e.** A state, federal or tribal governmental entity or agency~~

~~(3-31-22)~~

~~**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:~~

~~(3-31-22)~~

~~**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~~

~~(3-31-22)(7-1-24)T~~

~~**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.~~

~~(3-31-22)~~

**(BREAK IN CONTINUITY OF SECTIONS)**

~~**062. 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.~~

~~(3-31-22)~~

~~**063. 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.~~

~~(3-31-22)~~

0642. -- 159. (RESERVED)

(BREAK IN CONTINUITY OF SECTIONS)

~~161. RESPONSE.~~

The response must: (3-31-22)

~~01. Content. (3-31-22)~~

~~a. Separately admit or deny to each factual averment in the petition; (3-31-22)~~

~~b. Separately admit or deny the applicability of each legal authority asserted in the petition; (3-31-22)~~

~~c. Fully state any additional facts necessary to the decision of the contested case; (3-31-22)~~

~~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 (3-31-22)~~

~~e. State the relief sought; and (3-31-22)~~

~~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. (3-31-22)~~

~~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. (3-31-22)~~

~~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. (3-31-22)~~

1631. -- 351. (RESERVED)

352. ~~TIMELY FILING OF~~ PETITIONS TO INTERVENE - **PROCEEDINGS INVOLVING A PERMIT.**

~~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. (3-31-22)~~

~~02. Proceedings Involving a Permit. A permit applicant or permit holder may intervene as a matter of right in any contested case in which the permit is contested. 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 upon the permit applicant or permit holder. (3-31-22)(7-1-24)T~~

~~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. Intervenor orders are bound by orders and notices entered earlier in the proceeding. (3-31-22)~~

~~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. (3-31-22)~~

~~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. (3-31-22)~~

~~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. (3-31-22)~~

~~411.—719. **(RESERVED)**~~

~~720. **RECOMMENDED ORDERS.**~~

~~01. **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. (3-31-22)~~

~~02. **Content.** Every recommended order will include a schedule for Board review and contain the following paragraphs: (3-31-22)~~

~~a. This is a recommended order of the presiding officer and will not become final without action of the Board.; and (3-31-22)~~

~~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. (3-31-22)~~

~~721.—729. **(RESERVED)**~~

~~730. **PRELIMINARY ORDERS.**~~

~~01. **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. (3-31-22)~~

~~02. **Content.** Every preliminary order will contain the following paragraphs: (3-31-22)~~

~~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 (3-31-22)~~

~~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. (3-31-22)~~

~~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. (3-31-22)~~

~~731~~**353.** -- 899. (RESERVED)