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**IDAPA 58
TITLE 01
CHAPTER 23**

**58.01.23 - RULES OF ADMINISTRATIVE PROCEDURE
BEFORE THE BOARD OF ENVIRONMENTAL QUALITY**

000. LEGAL AUTHORITY.

Under Sections 39-105, 39-107 and 67-5206, Idaho Code, the Idaho Legislature has granted the Board of Environmental Quality the authority to promulgate these rules. (3-15-02)

001. TITLE, SCOPE, AND APPLICABILITY.

01. Title. These rules are shall be cited as IDAPA 58.01.23, “Rules of Administrative Procedure Before the Board of Environmental Quality.” (3-15-02)

02. Scope. These rules establish general standards for contested case proceedings, petitions for rulemaking, and declaratory ruling proceedings, and rulemaking procedures as required by law. (3-15-02)

03. Applicability of Contested Case Provisions. Section 39-107, Idaho Code, provides the opportunity to initiate a contested case proceeding. It provides that any person aggrieved by an action or inaction of the Department shall be afforded an opportunity for a fair hearing upon a request therefore in writing pursuant to Chapter 52, Title 67, Idaho Code. These rules govern such proceedings, except for personnel grievances and employment related actions. These are governed by IDAPA 15.04.01, “Rules of the Division of Human Resources and Personnel Commission,” and the DEQ Personnel Policies and Procedures Manual. (4-6-05)

002. WRITTEN INTERPRETATIONS.

As described in Section 67-5201(19)(b)(iv), Idaho Code, the Department of Environmental Quality may have written statements which pertain to the interpretation of these rules. If available, such written statements can be inspected and copied at cost at the Department of Environmental Quality, 1410 N. Hilton, Boise, Idaho 83706-1255. (3-15-02)

003. ADMINISTRATIVE PROCEDURES.

These rules govern administrative procedures before the Board of Environmental Quality. (3-15-02)

004. INCORPORATION BY REFERENCE.

These rules do not contain documents incorporated by reference. (3-15-02)

005. CONFIDENTIALITY OF RECORDS.

Information obtained by the Department under these rules is subject to public disclosure pursuant to the provisions of Chapter 3, Title 9, Idaho Code, and IDAPA 58.01.21, “Rules Governing the Protection and Disclosure of Records in the Possession of the Idaho Department of Environmental Quality.” (3-15-02)

006. APPLICABILITY OF RULES OF ADMINISTRATIVE PROCEDURE OF THE ATTORNEY GENERAL.

The Environmental Protection and Health Act, Title 39, Chapter 1, Idaho Code, provides specific authority for the Board to adopt contested case rules that are consistent with the rules adopted by the Attorney General under Section 67-5206(4), Idaho Code. To the extent possible given the statutory authority of, and the programs administered by, the Department, the contested case provisions in these rules are consistent with the provisions of IDAPA 04.11.01, “Idaho Rules of Administrative Procedures of the Attorney General” (Attorney General Rules). The majority of the Attorney General Rules are adopted; however, certain provisions of the Attorney General Rules are not adopted or are modified to reflect administrative practice before the Board and the Environmental Protection and Health Act. (3-15-02)

007. RULES OF GENERAL PROCEDURE AND DEFINITIONS.

Sections 007 through 013 establish provisions and definitions applicable to all proceedings governed by these rules. (3-15-02)

008. FILING AND SERVICE OF DOCUMENTS.

- 01. Filing of Documents.** (3-15-02)
- a.** All documents concerning actions governed by these rules shall be filed with the hearing coordinator at the following address: Hearing Coordinator, Department of Environmental Quality, 1410 N. Hilton, Boise, ID 83706-1255, FAX No. (208)373-0481. With the exception of petitions initiating a contested case, declaratory ruling, or rulemaking, pleadings and other documents may be filed by facsimile transmission (FAX). The originating party is responsible for retaining proof of filing by FAX. The documents are deemed to be filed on the date received by the hearing coordinator. Upon receipt of the filed document, the hearing coordinator will provide a conformed copy to the originating party. (3-20-04)
- b.** Upon receipt of a petition initiating a contested case, rulemaking, or declaratory ruling, the hearing coordinator shall serve the petition upon the Department. In any proceeding involving a permit, the hearing coordinator shall 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. (3-15-02)
- 02. Service of Documents.** From the time a party files its petition initiating a contested case, rulemaking or, declaratory ruling, that party must serve 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 044, 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 may serve courtesy copies upon the presiding officer. (3-15-02)
- 009. OFFICE -- OFFICE HOURS -- MAILING ADDRESS AND STREET ADDRESS.**
The state office of the Department of Environmental Quality and the office of the Board of Environmental Quality are located at 1410 N. Hilton, Boise, Idaho 83706-1255, telephone number (208) 373-0502. The office hours are 8:00 a.m. to 5:00 p.m. Monday through Friday. (3-15-02)
- 010. DEFINITIONS AND ABBREVIATIONS.**
- 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. (3-15-02)
- 02. Board.** The Idaho Board of Environmental Quality. (3-15-02)
- 03. Contested Case.** A proceeding resulting in an order, in which the legal rights, duties, licenses, privileges, immunities, or other legal interests of one (1) or more specific persons are required by law to be determined by the Board after an opportunity for a hearing. Contested case does not include rulemaking or Personnel grievances and employment related actions. (4-6-05)
- 04. Declaratory Ruling.** An interpretation by the Board, rendered pursuant to Section 67- 5232, Idaho Code, as to the applicability of any statute, order, or rule of the Board to a person's circumstances. (3-15-02)
- 05. Department or DEQ.** The Idaho Department of Environmental Quality. (3-15-02)
- 06. Director.** The Director of the Department of Environmental Quality. (3-15-02)
- 07. Hearing Coordinator.** The Person who coordinates, schedules, issues notices, and administers actions governed by these rules on behalf of the presiding officer. The hearing coordinator assigns a permanent docket number to each action for purposes of identification and acts as custodian of records for all information and documentation involving actions governed by these rules. The hearing coordinator's mailing address and phone number is: Department of Environmental Quality, 1410 N. Hilton, Boise, ID 83706-1255, (208)373-0418, FAX (208)373-0481. (3-15-02)
- 08. Hearing Officer.** A Person appointed or designated by the Board, who presides over actions

governed by these rules and who may act as the presiding officer. The hearing officer cannot be an employee of the Department. (3-15-02)

09. Idaho Administrative Bulletin. The Idaho Administrative Bulletin established in Chapter 52, Title 67, Idaho Code. (3-15-02)

10. Order. An agency action of particular applicability that determines the legal rights, duties, privileges, immunities, or other legal interests of one (1) or more specific persons. (3-15-02)

11. Party. Each person or agency named or admitted as a party. A party to a contested case shall be one (1) of the following: (3-15-02)

a. Petitioner. Any person aggrieved by an action or inaction of the Department who files, in accordance with these rules and Section 39-107, Idaho Code, a written petition for a determination of or appeal of his rights, duties, licenses or interests and any person who files a petition for a declaratory ruling or petition to initiate rulemaking. (3-15-02)

b. Respondent. Any person who responds to a petition filed in accordance with these rules. (3-15-02)

c. Intervenor. Any person, other than the petitioner or respondent, who is permitted to participate as a party pursuant to Sections 350 through 354. (3-15-02)

12. Person. Any individual, partnership, corporation, association, governmental subdivision, department, agency or instrumentality, or public and private organization or entity of any character. (3-15-02)

13. Petition. Pleadings initiating a contested case, rulemaking, or declaratory ruling, or to intervene filed in accordance with these rules. (3-15-02)

14. Pleadings. All documents filed by any party in a contested case proceeding. (3-15-02)

15. Presiding Officer(s). One (1) or more members of the Board or a duly appointed hearing officer. When more than one (1) officer sits at hearing, they may all jointly be presiding officers or may designate one (1) of them to be the presiding officer. (3-15-02)

011. LIBERAL CONSTRUCTION.

The rules in this chapter will be liberally construed to secure just, speedy and economical determination of all issues presented to the agency. Unless required by statute, or otherwise expressly provided in these rules or order of the presiding officer, the Idaho Rules of Civil Procedure and the Idaho Rules of Evidence do not apply to contested case proceedings conducted before the agency. (3-15-02)

012. IDENTIFICATION OF PLEADINGS.

Parties' pleadings addressing or pertaining to a given proceeding should be written under that proceeding's case caption and case number, if applicable. (3-15-02)

013. COMPUTATION OF TIME.

In computing any period of time prescribed or allowed by these rules or by order of the presiding officer, the date of the act, event, or default after which the designated period of time begins to run is not to be included. The last day of the period so computed is to be included, unless it is a Saturday, a Sunday or a legal holiday, in which event the period runs until the end of the next day which is neither a Saturday, a Sunday nor a holiday. When the period of time prescribed or allowed is less than seven (7) days, intermediate Saturdays, Sundays and holidays shall be excluded in the computation. (3-15-02)

014. -- 042. (RESERVED)

043. RULES GOVERNING DECLARATORY RULING AND CONTESTED CASE PROCEEDINGS.

Sections 043 through 048 establish provisions governing declaratory ruling and contested case proceedings. (3-15-02)

044. INITIAL PLEADING BY PARTY -- LISTING OF REPRESENTATIVES.

The initial pleading of each party to a contested case and declaratory ruling 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 required to be served with official documents in order to expedite the proceeding and reasonably manage the burden of service upon the parties. (3-15-02)

045. REPRESENTATION OF PARTIES.

01. Appearances and Representation. Unless otherwise authorized or required by law, appearances and representation of parties or other persons at contested case or declaratory ruling proceedings must be as follows: (3-15-02)

a. 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. (3-15-02)

b. A general partnership may be represented by a partner or an attorney. (3-15-02)

c. A corporation, or any other business entity other than a general partnership, shall be represented by an attorney. (3-15-02)

d. A municipal corporation, local government agency, unincorporated association or nonprofit organization shall be represented by an attorney. (3-15-02)

e. A state, federal or tribal governmental entity or agency shall be represented by an attorney. (3-15-02)

02. Representation. The representatives of parties at a hearing, and no other persons or parties, are entitled to examine witnesses and make or argue motions. (3-15-02)

046. (RESERVED)

047. PUBLIC NOTICE OF PETITION FOR CONTESTED CASE AND DECLARATORY RULING.

Within fourteen (14) days of the date a petition for contested case or declaratory ruling is filed with the Board, the Board shall give reasonable notice to the public. The methods for giving notice shall include, at a minimum, the following: (3-20-04)

01. Publication. Publishing 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. The legal notice shall describe the nature of the action initiated by the filing of the petition and shall include the date the petition was filed, the date by which petitions to intervene must be filed, and a method by which interested persons can obtain a copy of the petition. (3-20-04)

02. Mail. Mailing a copy of the legal notice prepared in accordance with Subsection 047.01 to persons on any mailing list developed by the Department relating to the subject matter of the petition for contested case or declaratory ruling. (3-20-04)

048. SUBSTITUTION OF REPRESENTATIVE -- WITHDRAWAL OF REPRESENTATIVE.

A party's representative may be changed and a new representative may be substituted by notice to all parties so long as the proceedings are not unreasonably delayed. The presiding officer may permit substitution of representatives at

the hearing in the presiding officer's discretion. Persons representing a party who wish to withdraw their representation of a party in a proceeding must immediately file a motion to withdraw representation and serve that motion on the party represented and all other parties. (3-15-02)

049. RULES GOVERNING DECLARATORY RULING PROCEEDINGS.

Sections 049 through 052 establish provisions governing declaratory ruling proceedings. (3-15-02)

050. FORM AND CONTENTS OF PETITION FOR DECLARATORY RULINGS.

Any person petitioning for a declaratory ruling on the applicability of a statute, rule or order administered by the Department must comply with this rule. (3-15-02)

01. Form. The petition shall: (3-15-02)

a. Identify the petitioner and state the petitioner's interest in the matter; (3-15-02)

b. State the declaratory ruling that the petitioner seeks; and (3-15-02)

c. Indicate the statute, order, rule, or other controlling law, and the factual allegations upon which the petitioner relies to support the petition. (3-15-02)

02. Legal Assertions. Legal assertions in the petition may be accompanied by citations of cases and/or statutory provisions. (3-15-02)

03. Filing. The petitioner shall file the original and two (2) copies of the petition with the hearing coordinator in accordance with Section 008. (3-20-04)

051. (RESERVED)

052. PETITIONS FOR DECLARATORY RULINGS TO BE DECIDED BY ORDER.

01. Final Agency Action. The Board's decision on a petition for declaratory ruling on the applicability of any statute, rule or order administered by the Department is a declaratory ruling and a final agency action within the meaning of Section 67-5255, Idaho Code. (3-15-02)

02. Content. The Board's order issuing the declaratory ruling shall contain or must be accompanied by a document containing the following paragraphs or substantially similar paragraphs: (3-15-02)

a. This is a final agency action issuing a declaratory ruling. (3-15-02)

b. Pursuant to Sections 67-5270 and 67-5272, Idaho Code, any person aggrieved by this declaratory ruling may appeal to district court by filing a petition for judicial review in the District Court in the county in which: (4-7-11)

i. A hearing was held; (3-15-02)

ii. The declaratory ruling was issued; (3-15-02)

iii. The party seeking review resides, or operates its principal place of business in Idaho; or (4-7-11)

iv. The real property or personal property that was the subject of the declaratory ruling is located. (3-15-02)

c. The petition for judicial review must be filed within twenty-eight (28) days of the service date of the declaratory ruling. See Section 67-5273, Idaho Code. (4-7-11)

053. -- 098. (RESERVED)

099. RULES GOVERNING CONTESTED CASE PROCEEDINGS.

Sections 099 through 791 establish provisions governing contested case proceedings. (3-15-02)

100. TIME PERIOD FOR FILING PETITION TO INITIATE CONTESTED CASE.

The individual program rules for time limitations within which certain actions must be taken or documents filed shall be followed. In the event there is no provision in the Idaho Code or other specific rule, an aggrieved person shall have thirty-five (35) days from the date of the action or inaction of the Department to file a petition initiating a contested case. (3-15-02)

101. DEPARTMENT ACTION NOT STAYED.

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. This section does not apply to Department action governed by Section 67-5254(1), Idaho Code. The stay may be ordered upon appropriate terms. (3-20-04)

102. PETITIONER HAS BURDEN OF PROOF.

Unless otherwise provided by statute, the petitioner in a contested case has the burden of proving by a preponderance of the evidence, the allegations in the petition. (3-15-02)

103. DISMISSAL OF INACTIVE CONTESTED CASES.

In the absence of a showing of good cause for retention, any contested case in which no action has been taken for a period of six (6) months shall be dismissed. At least fourteen (14) days prior to such dismissal, the notice of the pending dismissal shall be served on all parties by mailing the notice to the last known addresses most likely to give notice to the parties. (3-15-02)

104. -- 206. (RESERVED)

207. CONDUCT REQUIRED.

Representatives of parties and parties appearing in a proceeding must conduct themselves in an ethical and courteous manner. (3-15-02)

208. TAKING OF APPEARANCES -- PARTICIPATION BY DEPARTMENT STAFF.

The presiding officer at a formal hearing or prehearing conference will take appearances to identify the representatives of all parties or other persons. In all proceedings in which the department staff will participate, or any report or recommendation of the department staff will be considered or used in reaching a decision, at the timely request of any party the department staff must appear at any hearing and be available for cross-examination. (3-15-02)

209. RESERVED.

210. PLEADINGS IN CONTESTED CASES LISTED -- MISCELLANEOUS.

Pleadings in contested cases may include petitions, responses, motions, and objections. Affidavits may also be filed. A party's initial pleading in any proceeding must comply with Section 044. All pleadings filed during the proceeding must be filed in accordance with Sections 008 and 300 through 302. A party may adopt or join in any other party's pleading. Two (2) or more separately stated grounds, claims or answers concerning the same subject matter may be included in one (1) pleading. (3-15-02)

211. PETITIONS TO INITIATE CONTESTED CASE -- DEFINED -- FORM AND CONTENTS.

01. Defined. The pleading initiating a contested case is called a "petition." (3-15-02)

02. Form and Contents. The form and contents of a petition initiating contested cases shall: (3-15-02)

a. Fully state the facts upon which it is based, including the specific alleged action or inaction of the Department; (3-15-02)

- based;
- b.** Refer to the particular provisions of statute, rule, order or other controlling law upon which it is (3-15-02)
 - c.** State the relief sought; and (3-15-02)
 - d.** State the name of the person petitioned against (the respondent), if any. (3-15-02)
 - e.** State the basis for the petitioner's legal standing to initiate the contested case. (3-15-02)
- 03. Filing.** The petitioner shall file the original and two (2) copies of the petition with the hearing coordinator in accordance with Section 008. (3-20-04)

212. RESPONSES IN CONTESTED CASES -- DEFINED -- FORM AND CONTENTS.

- 01. Defined.** The pleading filed by the respondent in response to the petition initiating the contested case is called a "response." (3-15-02)
- shall:
- 02. Form and Contents.** The form and contents of a response to a petition initiating a contested case shall:
- a.** Separately admit or deny to each factual averment in the petition; (3-15-02)
 - 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 decision of the contested case; (3-15-02)
 - d.** Refer to any additional provisions of statute, rule, order or other controlling law upon which it is based; and (3-15-02)
 - e.** State the relief sought. (3-15-02)
- 03. Filing and Service.** Responses to petitions must be filed and served on all parties of record 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 Sections 700 through 702. (3-20-04)

213. MOTIONS -- DEFINED -- FORM AND CONTENTS.

- 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. (3-15-02)
- 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 must state the grounds for denying the request. Unless otherwise provided by the presiding officer, motions for summary judgment shall be 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. (3-15-02)

214. -- 299. (RESERVED)

300. FORM OF PLEADINGS.

- 01. Pleadings.** All pleadings, except those on agency forms, submitted by a party and intended to be

part of an agency record should: (3-15-02)

a. Be submitted on white eight and one-half inch (8 1/2") by eleven inch (11") paper copied on one (1) side only; (3-15-02)

b. State the case caption, case number, if applicable, and title of the document; (3-15-02)

c. Include on the upper left corner of the first page the name(s), mailing and street address(es), and telephone and FAX number(s) of the person(s) filing the document or the person(s) to whom questions about the document can be directed; and (3-15-02)

d. Have at least one inch (1") left and top margins. (3-15-02)

02. Form. Documents complying with this rule will be in the following form:

Name of Representative
Mailing Address of Representative
Street Address of Representative (if different)
Telephone Number of Representative
FAX Number of Representative (if there is one)
Attorney/Representative for (Name of Party)

BEFORE THE BOARD OF ENVIRONMENTAL QUALITY

(Title of Proceeding)

(CASE NO.)

(TITLE OF DOCUMENT)

(3-15-02)

301. (RESERVED)

302. PROOF OF SERVICE.

Every document meeting the requirements for service set out in Section 008 must be attached to or accompanied by proof of service by the following or similar certificate:

I hereby certify that on this (insert date), a true and correct copy of the foregoing (insert name of document) was served on the following as indicated below:

(insert names and addresses of parties and method of delivery (first class U.S. mail, facsimile, hand-delivery, or overnight express))

(Signature) (3-15-02)

303. DEFECTIVE, INSUFFICIENT OR UNTIMELY PLEADINGS.

Defective, insufficient or untimely pleadings shall not be considered unless the presiding officer determines that good cause exists, but the presiding officer shall not consider a petition that is filed outside the time limit set forth in Section 100 unless all parties agree to the tolling of the time limit. (4-7-11)

304. AMENDMENTS TO PLEADINGS -- WITHDRAWAL OF PLEADINGS.

The presiding officer may allow any pleading to be amended or corrected or any omission to be supplied. Pleadings will be liberally construed, and defects that do not affect substantial rights of the parties will be disregarded. A party desiring to withdraw a pleading must file a notice of withdrawal of the pleading and serve all parties with a copy. Unless otherwise ordered by the presiding officer, the notice is effective fourteen (14) days after filing. (3-15-02)

305. -- 349. (RESERVED)

350. INTERVENTION.

Persons not petitioners or respondents to a proceeding who claim a direct and substantial interest in the proceeding may petition for an order from the presiding officer granting intervention to become a party. (3-15-02)

351. FORM AND CONTENTS OF PETITIONS TO INTERVENE.

Petitions to intervene must comply with Sections 008, 044, and 300. The petition must set forth the name and address of the potential intervenor, state the direct and substantial interest of the potential intervenor in the proceeding, and state briefly why the intervention would not unduly broaden the issues and cause delay or prejudice to the parties. If affirmative relief is sought, the petition must state the relief sought and the basis for granting it. (3-20-04)

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 or declaratory ruling as provided in Section 047 unless a different time is provided by order or notice. (3-20-04)

02. Proceedings Involving a Permit. In any proceeding 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. (3-15-02)

03. Petitions Not Timely Filed. Petitions not timely filed must state a substantial reason for delay. The presiding officer may deny or conditionally grant petitions to intervene that are not timely filed for failure to state good cause for untimely filing, to prevent 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. (3-15-02)

353. OBJECTIONS TO PETITIONS TO INTERVENE.

Any party opposing a petition to intervene, must file the objection within seven (7) days after receipt of the petition to intervene and serve the objection upon all parties of record and upon the person petitioning to intervene. Responses shall be filed within seven (7) days after service of the objection. (4-7-11)

354. GRANTING PETITIONS TO INTERVENE.

01, General. If a 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, a permit applicant or permit holder may intervene as a matter of right in any contested case in which the permit is contested. (4-7-11)

02. Intervenor Response. Within fourteen (14) days of the service date of the order granting the petition to intervene, the intervenor shall file a response to the petition initiating the contested case. The response shall be in the form and content set out in Subsection 212.02. (4-7-11)

355. REVIEW OF ORDERS GRANTING OR DENYING INTERVENTION.

Any party may petition the Board to review an order granting or denying intervention. Petitions for review shall be filed within fourteen (14) days of the service date of the order. Responses shall be filed within fourteen (14) days after service of the petition for review. The Board may schedule oral argument in the matter before issuing a decision. (4-7-11)

356. -- 409. (RESERVED)

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

One (1) or more members of the Board may act as the presiding officer in a contested case. The Board may appoint a hearing officer to act as the presiding officer on behalf of the Board. Hearing officers may be (but need not be) attorneys. Hearing officers who are not attorneys should ordinarily be persons with technical expertise or experience in issues before the Board. The hearing coordinator shall administer the appointment of the hearing officer. Notice of appointment of a hearing officer and notice of those Board members who will act as presiding officers shall be served on all parties. (3-15-02)

411. (RESERVED)

412. DISQUALIFICATION OF OFFICERS HEARING CONTESTED CASES.

Presiding officers, including hearing officers appointed by the Board, may be disqualified as provided in Section 67-5252, Idaho Code. (3-15-02)

413. SCOPE OF AUTHORITY OF PRESIDING OFFICERS.

Unless the Board otherwise provides, presiding officers have the following authority: (3-15-02)

01. Authority to Schedule Cases. Authority to schedule cases, including authority to issue notices of prehearing conference and of hearing, as appropriate; (3-15-02)

02. Authority to Schedule and Compel Discovery. Authority to schedule, limit or compel discovery and to require advance filing of expert testimony; (3-15-02)

03. Authority to Preside at Hearings. Authority to preside at and conduct hearings, accept evidence into the record, rule upon objections to evidence, and otherwise oversee the orderly presentations of the parties at hearing; and (3-15-02)

04. Authority to Issue a Written Decision. Authority to issue a written decision, including a narrative of the proceedings before the presiding officer and findings of fact, conclusions of law, and preliminary or recommended orders. (3-15-02)

414. (RESERVED)

415. CHALLENGES TO STATUTES.

A presiding officer in a contested case has no authority to declare a statute unconstitutional. However, when a court of competent jurisdiction whose decisions are binding precedent in the state of Idaho has declared a statute or rule unconstitutional and the presiding officer finds that the same state statute or rule or a substantively identical state statute or rule that would otherwise apply has been challenged in the proceeding before the presiding officer, then the presiding officer shall decide the proceeding in accordance with the precedent of the court. (3-15-02)

416. REVIEW OF RULES.

When an order is issued by the Board in a contested case, the order may consider and decide whether a rule is within the Board's substantive rulemaking authority. The Board may also review whether a rule has been promulgated according to proper procedure, if noncompliance with procedural requirements is raised within the time limits set forth in Section 67-5231, Idaho Code. The Board may delegate to a presiding officer the authority to recommend a decision on issues of whether a rule is within the Board's substantive rulemaking authority or whether the rule has been promulgated according to proper procedure or may retain all such authority itself. (3-15-02)

417. EX PARTE COMMUNICATIONS.

Unless required for the disposition of a matter specifically authorized by statute to be done ex parte, a presiding officer serving in a contested case shall not communicate, directly or indirectly, regarding any substantive issue in the contested case with any party, except upon notice and opportunity for all parties to participate in the communication. The presiding officer may communicate ex parte with a party concerning procedural matters (e.g., scheduling). When a presiding officer becomes aware of a written ex parte communication regarding any substantive issue from a party or representative of a party during a contested case, the presiding officer shall place a copy of the communication in the file for the case and order the party providing the written communication to serve a copy of the written communication upon all parties of record. Written communications from a party showing service upon all other parties are not ex parte communications. (3-15-02)

418. -- 499. (RESERVED)

500. ALTERNATIVE RESOLUTION OF CONTESTED CASES.

The Idaho Legislature encourages informal means of alternative dispute resolution (ADR) and the parties to a contested case may agree to use ADR. For contested cases, the means of ADR include, but are not limited to,

settlement negotiations, mediation, fact finding, minitrials, and arbitration, or any combination of them. (3-15-02)

501. NEUTRALS.

When alternate dispute resolution (ADR) is agreed by the parties to be used for all or a portion of a contested case, a neutral may be used to assist the parties in resolving their disputed issues. The neutral may be an employee of another state agency or any other individual who is acceptable to the parties to the proceeding. A neutral shall have no official, financial, or personal conflict of interest with respect to the issues in controversy, unless such interest is disclosed in writing to all parties and all parties agree that the neutral may serve. (3-15-02)

502. -- 509. (RESERVED)

510. PREHEARING CONFERENCE.

01. Prehearing Conference. As soon as reasonably possible after the Department files its response to the petition for contested case, the presiding officer shall, upon written or other sufficient notice to all parties, hold a prehearing conference for the following purposes: (3-15-02)

a. To determine deadlines for the information exchange required by Section 540, other discovery if allowed and prehearing motions. The presiding officer shall attempt to set deadlines and a schedule that results in a preliminary or recommended order within one hundred eighty (180) days of the date the petition is filed. (3-15-02)

b. To determine limits, if any, on other discovery if allowed, including without limitation, limits on the number of depositions or discovery requests and the areas of inquiry. (3-15-02)

c. To formulate or simplify the issues; (3-15-02)

d. To obtain admissions or stipulations of fact and of documents; (3-15-02)

e. To arrange for exchange of proposed exhibits or prepared expert testimony; (3-15-02)

f. To limit the number of witnesses; (3-15-02)

g. To determine the procedure at the hearing; and (3-15-02)

h. To determine any other matters which may expedite the orderly conduct and disposition of the proceeding. (3-15-02)

02. Additional Prehearing Conferences. Additional prehearing conferences may be held, to address any of the issues listed in Subsection 510.01, at the request of any party or at the presiding officer's own initiative, if the presiding officer determines additional prehearing conferences would be useful. (3-15-02)

511. RECORD OF CONFERENCE.

Prehearing conferences may be held formally (on the record) or informally (off the record). Agreements by the parties to the conference may be put on the record during formal conferences and shall be reduced to writing and filed with the hearing coordinator after formal or informal conferences. (3-15-02)

512. ORDERS RESULTING FROM PREHEARING CONFERENCE.

The presiding officer shall issue a prehearing order or notice based upon the results of the agreements reached at or rulings made at a prehearing conference. A prehearing order will control the course of subsequent proceedings unless modified by the presiding officer for good cause. (3-15-02)

513. -- 528. (RESERVED)

529. EXHIBIT NUMBERS.

The presiding officer assigns exhibit numbers to each party. (3-15-02)

530. -- 539. (RESERVED)

540. EXCHANGE OF INFORMATION, OTHER DISCOVERY.

01. Information Exchange. In accordance with the prehearing order issued by the presiding officer pursuant to Section 512, each party shall file and serve on all other parties an information exchange document. Documents and exhibits identified in the information exchange document shall be exchanged by the parties in accordance with the prehearing order but, unless otherwise determined by the presiding officer, need not be filed. The information exchange document shall include the following: (3-15-02)

- a.** The names of any experts or other witnesses intended to be called at the hearing, together with a brief narrative summary of their expected testimony, or a statement that no witnesses will be called; and (3-15-02)
- b.** A description of all documents and exhibits intended to be introduced into evidence at the hearing; and (3-15-02)
- c.** An identification of any expert reports and prepared testimony; and (3-15-02)
- d.** A list of all persons with specific knowledge regarding disputed issues of material fact asserted in the petition or the response to the petition. (3-15-02)

02. Additional Discovery. Discovery in addition to the information exchange provided for in Subsection 540.01 may be allowed by the presiding officer in the prehearing order or in response to a motion by any party. In determining whether to allow additional discovery, the presiding officer shall consider the following: (3-15-02)

- a.** Whether the discovery will unreasonably delay the proceeding or unreasonably burden other persons or parties; (3-15-02)
- b.** Whether the information sought is most reasonably obtained from the party or person to whom it is directed and that party or person has refused to provide the information voluntarily; (3-15-02)
- c.** Whether the information sought has significant probative value on a disputed issue of material fact relevant to the contested case. (3-15-02)

03. Scope of Additional Discovery Allowed. If additional discovery is allowed, unless otherwise expressly provided in these rules or order of the presiding officer, the scope and methods of discovery are governed by the Idaho Rules of Civil Procedure. (3-15-02)

04. Supplementation of Information Exchange and Discovery. A party who has made an information exchange or who has exchanged information in response to a request for information or a discovery order, shall promptly supplement or correct the exchange when the party learns that the information exchanged or response provided is incomplete, inaccurate or outdated, and the additional or corrected information has not otherwise been disclosed to the other party. (3-15-02)

541. SUBPOENAS.

Pursuant to Section 39-107(3), Idaho Code, the presiding officer shall have the power to issue subpoenas for the attendance of witnesses and the production of papers, books, accounts, documents and testimony. The presiding officer may, if a witness refuses to attend or testify, or to produce any papers required by such subpoenas, report to the district court in and for the county in which the proceeding is pending, by petition, setting forth that due notice has been given of the time and place of attendance of said witnesses, or the production of said papers, that the witness has been properly summoned, and that the witness has failed and refused to attend or produce the papers required by this subpoena before the presiding officer, or has refused to answer questions propounded to him in the course of said proceedings, and ask an order of said court compelling the witness to attend and testify and produce said papers before the presiding officer. The court, upon the petition of the presiding officer, shall enter an order directing the witness to appear before the court at a time and place to be fixed by the court in such order, the time to be not more than ten (10) days from the date of the order, and then and there shall show cause why he has not attended and testified or produced said papers before the presiding officer. A copy of said order shall be served upon said witness.

If it shall appear to the court that said subpoena was regularly issued by the presiding officer and regularly served, the court shall thereupon order that said witness appear before the presiding officer at the time and place fixed in said order, and testify or produce the required papers. Upon failure to obey said order, said witness shall be dealt with for contempt of court. (3-15-02)

542. FILING AND SERVICE OF DISCOVERY-RELATED DOCUMENTS.

Discovery requests and responses thereto shall not be filed with the hearing coordinator. The party serving discovery requests or responses thereto shall file with the hearing coordinator a notice of when the discovery requests or responses were served and upon whom. (3-15-02)

543. DEPOSITIONS, PREPARED TESTIMONY AND EXHIBITS.

Unless otherwise specified in an order pursuant to Section 512, all parties shall serve on all other parties any depositions, prepared expert testimony and/or exhibits to be presented at hearing not later than seven (7) days prior to the hearing. Assigned exhibits numbers should be used in all prepared testimony. (3-15-02)

544. SANCTIONS FOR FAILURE TO OBEY ORDER COMPELLING DISCOVERY.

The presiding officer may impose all sanctions recognized by statute or rules for failure to comply with an order compelling discovery. (3-15-02)

545. PROTECTIVE ORDERS.

01. General Authority. The presiding officer may issue protective orders limiting access to information generated or requested during settlement negotiations, discovery, or hearing, including but not limited to orders to protect a party or person from annoyance, embarrassment, oppression or undue burden or expense, orders to avoid an unreasonable delay in the proceedings, or orders to limit discovery of information that has no significant probative value on a disputed issue of material fact relevant to the contested case. (3-15-02)

02. Trade Secrets and Other Confidential Information. Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the presiding officer may issue an order to protect trade secrets that are to be held confidential as provided in Section 9-342A, Idaho Code, or other confidential research, development or commercial information. The order may include, but need not be limited to, requirements that the trade secrets or other confidential information not be disclosed or be disclosed only in a designated way. The presiding officer's decision regarding a motion for such a protective order is an interlocutory or intermediate agency action that may be immediately reviewable in district court under Section 790 of these rules and Section 67-5271, Idaho Code. (3-15-02)

03. In Camera Review. The presiding officer may review information that is the subject of a motion for a protective order without the presence of parties or persons to whom access to the information has been requested to be limited. (3-15-02)

546. -- 549. (RESERVED)

550. NOTICE OF HEARING.

01. Form and Content. All parties in a contested case proceeding shall receive notice that shall include: (3-15-02)

a. A statement of the time, place and nature of the hearing; (3-15-02)

b. A statement of the legal authority under which the hearing is to be held; (3-15-02)

c. A short and plain statement of the matters asserted or the issues involved; and (3-15-02)

d. A statement that the hearing will be conducted in a facility meeting the accessibility requirements of the Americans with Disabilities Act and that assistance can be provided upon request to the hearing coordinator at least seven (7) days before the date set for hearing. (3-15-02)

02. Time for Service. The Notice of Hearing shall be served on all parties at least fourteen (14) days before the date set for hearing, unless the presiding officer finds by order that it is necessary or appropriate that the hearing be held earlier. (3-15-02)

551. HOW HEARINGS HELD.

Hearings may be held in person or by telephone or television or other electronic means if each participant in the hearing has an opportunity to participate in the entire proceeding while it is taking place. (3-15-02)

552. LOCATION OF HEARINGS AND ADA REQUIREMENTS.

All hearings concerning actions governed by these rules shall be held in facilities meeting the accessibility requirements of the Americans with Disabilities Act, shall be open to the public, and shall be held in a location reasonably convenient to all parties to the proceeding. The location shall be arranged by the hearing coordinator. (3-15-02)

553. CONFERENCE AT HEARING.

In any proceeding the presiding officer may convene the parties before the hearing or recess the hearing to discuss formulation or simplification of the issues, admissions of fact or identification of documents to avoid unnecessary proof, exchanges of documents, exhibits or prepared testimony, limitation of witnesses, establishment of order of procedure, and other matters that may expedite orderly conduct of the hearing. The presiding officer shall state the results of the conference on the record. (3-15-02)

554. PRELIMINARY PROCEDURE AT HEARING.

Before taking evidence, the presiding officer will call the hearing to order, take appearances of parties, and act upon any pending motions or petitions. The presiding officer may allow opening statements as necessary or appropriate to explain a party's presentation. (3-15-02)

555. CONSOLIDATION OF PROCEEDINGS.

The presiding officer may consolidate two (2) or more proceedings for hearing upon finding that they present issues that are related and that the rights of the parties will not be prejudiced. In consolidated hearings, the presiding officer determines the order of the proceeding. (3-15-02)

556. STIPULATIONS.

Parties may stipulate among themselves to any fact at issue in a contested case by written statement filed with the presiding officer or presented at hearing or by oral statement at hearing. A stipulation binds all parties agreeing to it only according to its terms. The presiding officer may regard a stipulation as evidence or may require proof by evidence of the facts stipulated. The presiding officer is not bound to adopt a stipulation of the parties, but may do so. If the presiding officer rejects a stipulation, it will do so before issuing a final order, and it will provide an additional opportunity for the parties to present evidence and arguments on the subject matter of the rejected stipulation. (3-15-02)

557. ORDER OF PROCEDURE.

The presiding officer may determine the order of presentation of witnesses and examination of witnesses. Unless otherwise determined by the presiding officer, the petitioner shall present its case first, followed by the respondent's case. (3-15-02)

558. TESTIMONY UNDER OATH.

All testimony presented at hearings will be given under oath or affirmation. (3-15-02)

559. PARTIES AND PERSONS WITH SIMILAR INTERESTS.

If two (2) or more parties or persons have substantially like interests or positions, to expedite the proceeding and avoid duplication, the presiding officer may limit the number of them who testify, examine witnesses, or make and argue motions and objections. (3-15-02)

560. CONTINUANCE OF HEARING.

The presiding officer may continue proceedings for further hearing for good cause shown. (3-15-02)

561. ORAL ARGUMENT.

The presiding officer may set and hear oral argument on any matter in the contested case on reasonable notice according to the circumstances. (3-15-02)

562. BRIEFS -- MEMORANDA -- PROPOSED ORDERS OF THE PARTIES -- STATEMENTS OF POSITION.

In any contested case, any party may ask to file briefs, memoranda, proposed orders or statements of position, and the presiding officer may request briefs, proposed orders, or statements of position. (3-15-02)

563. -- 599. (RESERVED)

600. RULES OF EVIDENCE -- EVALUATION OF EVIDENCE.

The presiding officer at hearing is not bound by the Idaho Rules of Evidence. No informality in any proceeding or in the manner of taking testimony invalidates any order. The presiding officer, with or without objection, may exclude evidence that is irrelevant, unduly repetitious, inadmissible on constitutional or statutory grounds, or on the basis of any evidentiary privilege provided by statute or recognized in the courts of Idaho. All other evidence may be admitted. The Department's experience, technical competence and specialized knowledge may be used in evaluation of evidence. (3-15-02)

601. DOCUMENTARY EVIDENCE.

Documentary evidence may be received in the form of copies or excerpts. Upon request, parties shall be given an opportunity to compare the copy with the original if available. To be admissible, document copies must be authentic. (3-15-02)

602. OFFICIAL NOTICE -- DEPARTMENT STAFF MEMORANDA.

Official notice may be taken of any facts that could be judicially noticed in the courts of Idaho and generally recognized technical or scientific facts within the Department's specialized knowledge. Parties shall be notified of the specific facts or material noticed and the source thereof, including any staff memoranda and data. Notice should be provided either before or during the hearing, and must be provided before the issuance of any order that is based in whole or in part on facts or material noticed. Parties must be afforded a timely and meaningful opportunity to contest and rebut the facts or material so noticed. When the presiding officer proposes to notice staff memoranda or reports, a responsible staff member shall be made available for cross-examination if any party so requests. (3-15-02)

603. DEPOSITIONS.

Depositions may be offered into evidence. (3-15-02)

604. OBJECTIONS -- OFFERS OF PROOF.

Grounds for objection to the admission or exclusion of evidence must be stated briefly at the time the evidence is offered. An offer of proof for the record consists of a statement of the substance of the excluded evidence. When a party objects to the admission of evidence, the presiding officer will rule on the objection. (3-15-02)

605. PREPARED TESTIMONY.

The presiding officer may order a witness's prepared testimony previously distributed to all parties to be included in the record of hearing as if read. Admissibility of prepared testimony is subject to Section 600. Upon request of any party, the witness shall be available for cross-examination on the prepared testimony. (3-15-02)

606. EXHIBITS.

Unless already provided before the hearing in accordance with these rules, a copy of each documentary exhibit must be furnished to each party present and to the presiding officer. Copies must be of good quality. Exhibits offered at hearing are subject to appropriate and timely objection. Exhibits to which no objection is made are automatically admitted into evidence unless otherwise excluded by the presiding officer under Section 600. (3-15-02)

607. -- 609. (RESERVED)

610. CONFIDENTIALITY OF SETTLEMENT NEGOTIATIONS.

Evidence of furnishing, offering, or promising to furnish, or accepting, offering, or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for, invalidity of, or amount of the claim or any other claim. Evidence of

conduct or statements made in compromise negotiations is likewise not admissible. This section does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This section does not require exclusion if the evidence is offered for another purpose, such as proving bias or prejudice of a witness or negating a contention of undue delay. Compromise negotiations encompass mediation. (3-15-02)

611. SUGGESTION FOR OR INQUIRY ABOUT SETTLEMENTS.

Through notice or order or on the record at prehearing conference or hearing, the presiding officer may inquire of the parties in any proceeding whether settlement negotiations are in progress or are contemplated or may invite settlement of an entire proceeding or certain issues. (3-15-02)

612. CONSIDERATION OF SETTLEMENTS.

When one (1) or more parties to a proceeding is not a party to the settlement or when the settlement presents issues of significant implication for other persons, the settlement agreement shall be presented to the presiding officer for approval. The presiding officer may hold an evidentiary hearing to consider the reasonableness of the settlement and whether acceptance of the settlement is consistent with the Board's charge under the law. (3-15-02)

613. BURDENS OF PROOF REGARDING SETTLEMENTS.

Proponents of a proposed settlement carry the burden of showing that the settlement is in accordance with the law. The presiding officer may require the development of an appropriate record in support of or opposition to a proposed settlement as a condition of accepting or rejecting the settlement. (3-15-02)

614. SETTLEMENT NOT BINDING.

The presiding officer is not bound by settlement agreements that are not unanimously accepted by all parties or that have significant implications for persons not parties. In these instances, the presiding officer will independently review any proposed settlement to determine whether the settlement is in accordance with the law. (3-15-02)

615. -- 649. (RESERVED)

650. RECORD FOR DECISION.

01. Official Record. The Board shall maintain an official record for each contested case and (unless a statute provides otherwise) base its decision in a contested case on the official record for the case. (3-15-02)

02. Contents of Record. The record for a contested case shall include: (3-15-02)

- a.** All notices of proceedings; (3-15-02)
- b.** All petitions, responses, motions, and objections filed in the proceeding; (3-15-02)
- c.** All intermediate or interlocutory rulings of the presiding officer; (3-15-02)
- d.** All evidence received or considered (including all transcripts or recordings of hearings and all exhibits offered or identified at hearing); (3-15-02)
- e.** All offers of proof, however made; (3-15-02)
- f.** All briefs, memoranda, proposed orders of the parties or of the presiding officers, statements of position, statements of support, and exceptions filed by parties; (3-15-02)
- g.** All evidentiary rulings on testimony, exhibits, or offers of proof; (3-15-02)
- h.** All staff memoranda or data submitted in connection with the consideration of the proceeding; (3-15-02)
- i.** A statement of matters officially noticed; and (3-15-02)

- j. All preliminary orders and final orders. (3-15-02)

651. RECORDING OF HEARINGS.

All hearings shall be recorded by a certified court reporter and transcribed at the Department's expense. Any party may have a copy of the transcript prepared at its own expense. (3-15-02)

652. -- 699. (RESERVED)

700. NOTICE OF PROPOSED DEFAULT ORDER.

If a party fails to appear at the time and place set for hearing or fails to timely file a response as set out in Section 212, the presiding officer may serve upon all parties a notice of proposed default order. The notice shall include a statement of the grounds for the proposed order. (3-15-02)

701. FOURTEEN DAYS TO RESPOND TO PROPOSED DEFAULT ORDER.

Within fourteen (14) days after service of the notice of proposed default order, the party against whom it was issued may file a written petition requesting the proposed order to be vacated. The petition shall state the grounds relied upon. (3-15-02)

702. DEFAULT ORDER.

The presiding officer shall either issue or vacate the default order promptly after the expiration of the time within which the party may file a petition as provided in Section 701. If the presiding officer issues a default order, the officer shall conduct any further proceedings necessary to complete the adjudication without the participation of the party in default and shall determine all issues in the adjudication, including those affecting the defaulting party. (3-15-02)

703. -- 709. (RESERVED)

710. INTERLOCUTORY ORDERS.

Interlocutory orders are orders that do not decide all previously undecided issues presented in a proceeding, except the presiding officer may by order decide some of the issues presented in a proceeding and provide in that order that its decision on those issues is final and subject to review, but is not final on other issues. Unless an order contains or is accompanied by a document containing one (1) of the statements set forth in Sections 730 or 740 or a statement substantially similar, the order is interlocutory. The following orders are always interlocutory: orders joining, consolidating or separating issues, proceedings or parties; orders granting or denying intervention (an order regarding intervention, however, may be reviewed by the Board as provided in Section 355); orders scheduling prehearing conferences, discovery, hearing, oral arguments or deadlines for written submissions; and orders limiting, compelling or refusing to compel discovery. (3-20-04)

711. RECONSIDERATION OF INTERLOCUTORY ORDERS.

Any party may file a motion for reconsideration of an interlocutory order within fourteen (14) days after service of the order. The presiding officer issuing an interlocutory order may rescind, alter or amend any interlocutory order on the presiding officer's own motion, but will not on the presiding officer's own motion review any interlocutory order affecting any party's substantive rights without giving all parties notice and an opportunity for written comment. (3-20-04)

712. -- 719. (RESERVED)

720. RECOMMENDED ORDERS.

01. Definition. Recommended orders are orders issued by the presiding officer that will become a final order of the Board only after review by the Board pursuant to Section 67-5244, Idaho Code. (3-15-02)

02. Content. Every recommended order must include a schedule for review of the order by the Board and must contain or be accompanied by a document containing the following paragraphs or substantially similar paragraphs: (4-7-11)

- a. This is a recommended order of the presiding officer. It will not become final without action of the

Board. (3-15-02)

b. The Board shall 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 shall 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. (4-7-11)

03. No Motions for Reconsideration. Motions for reconsideration of any recommended order shall not be considered. (3-15-02)

721. -- 729. (RESERVED)

730. PRELIMINARY ORDERS.

01. Definition. Preliminary orders are orders issued by the presiding officer that will become a final order of the Board unless reviewed by the Board pursuant to Section 67-5245, Idaho Code. (3-15-02)

02. Content. Every preliminary order must contain or be accompanied by a document containing the following paragraphs or substantially similar paragraphs: (3-15-02)

a. This is a preliminary order of the presiding officer. It can and will become final without further action of the Board unless any party appeals to the Board by filing with the hearing coordinator a petition for review of the preliminary order; (4-7-11)

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 with the hearing coordinator 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. (4-7-11)

c. If any party files a petition for review of the preliminary order, the Board shall 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 shall 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. (4-7-11)

d. Pursuant to Sections 67-5270 and 67-5272, Idaho Code, if this preliminary order becomes final, any party aggrieved by the final order or orders previously issued in this case may appeal the final order and all previously issued orders in this case to district court by filing a petition for judicial review in the district court of the county in which: (4-7-11)

- i. A hearing was held, (3-15-02)
- ii. The final agency action was taken, (3-15-02)
- iii. The party seeking review of the order resides, or operates its principal place of business in Idaho, or (3-15-02)
- iv. The real property or personal property that was the subject of the agency action is located. (3-15-02)

e. The petition for judicial review must be filed within twenty-eight (28) days of this preliminary order becoming final. See Section 67-5273, Idaho Code. The filing of a petition for judicial review in district court

does not itself stay the effectiveness or enforcement of the order under review. (4-7-11)

03. No Motions for Reconsideration. Motions for reconsideration of any preliminary order shall not be considered. (3-15-02)

731. -- 739. (RESERVED)

740. FINAL ORDERS.

01. Definition. Final orders are preliminary orders that have become final under Section 730 pursuant to Section 67-5245, Idaho Code, or orders issued by the Board pursuant to Section 67-5246, Idaho Code. An order shall be considered a final order pursuant to Section 67-5246, Idaho Code, if issued after a decision by the number of Board members necessary to constitute a quorum. Emergency orders issued under Section 67-5247, Idaho Code, shall be designated as final orders if the Board will not issue further orders or conduct further proceedings in the matter. (3-15-02)

02. Content. Every final order issued by the Board must contain or be accompanied by a document containing the following paragraphs or substantially similar paragraphs: (3-15-02)

a. This is a final order of the Board. (3-15-02)

b. Pursuant to Sections 67-5270 and 67-5272, Idaho Code, any party aggrieved by this final order or orders previously issued in this case may appeal this final order and all previously issued orders in this case to district court by filing a petition for judicial review in the district court of the county in which: (4-7-11)

i. A hearing was held; (3-15-02)

ii. The final agency action was taken; (3-15-02)

iii. The party seeking review of the order resides, or operates its principal place of business in Idaho; or (3-15-02)

iv. The real property or personal property that was the subject of the agency action is located. (3-15-02)

c. The petition for judicial review must be filed within twenty-eight (28) days of the service date of this final order. See Section 67-5273, Idaho Code. The filing of a petition for judicial review in district court does not itself stay the effectiveness or enforcement of the order under review. (4-7-11)

03. No Motions for Reconsideration. Motions for reconsideration of any final order shall not be considered. (3-15-02)

741. -- 749. (RESERVED)

750. ORDER NOT DESIGNATED.

If an order is not designated as recommended, preliminary or final at its issuance, but is designated as recommended, preliminary or final after its issuance, its effective date for purposes of judicial review is the service date of the order of designation. If a party believes that an order not designated as a recommended order, preliminary order or final order according to the terms of these rules should be designated as a recommended order, preliminary order or final order, the party may move to designate the order as recommended, preliminary or final, as appropriate. (4-7-11)

751. -- 779. (RESERVED)

780. STAY OF ORDERS.

The filing of the petition for review does not itself stay the effectiveness or enforcement of the Board action. The Board may grant, or the reviewing court may order, a stay upon appropriate terms. (3-15-02)

781. -- 789. (RESERVED)

790. RIGHT OF JUDICIAL REVIEW.

Pursuant to Section 67-5270, Idaho Code, any person aggrieved by a final order of the Board in a contested case is entitled to judicial review. Pursuant to Section 67-5271, Idaho Code, a person is not entitled to judicial review of an agency action in district court until that person has exhausted all administrative remedies available with the Board, but a preliminary, procedural, or intermediate agency action or ruling is immediately reviewable in district court if administrative review of the final agency action would not provide an adequate remedy. (4-7-11)

791. PETITION FOR JUDICIAL REVIEW.

01. Filing and Service. The petition for judicial review must be filed with the hearing coordinator as set out in Section 008 and with the district court and served on all parties. Pursuant to Section 39-107(6), Idaho Code, the petition for judicial review shall also be served upon the Chairman of the Board, the Director of the Department, and upon the Attorney General of the State of Idaho. Pursuant to Section 67-5272, Idaho Code, petitions for judicial review may be filed in the District Court of the county in which: (4-7-11)

- a. The hearing was held; (3-15-02)
- b. The final agency action was taken; (3-15-02)
- c. The party seeking review of the agency action resides; or (3-15-02)
- d. The real property or personal property that was the subject of the agency action is located. (3-15-02)

02. Filing Deadline. Pursuant to Section 67-5273, Idaho Code, a petition for judicial review of a final order in a contested case must be filed within twenty-eight (28) days of the service date of the final order. (3-15-02)

792. -- 798. (RESERVED)

799. RULES GOVERNING PROCEEDINGS ON PETITIONS TO INITIATE RULEMAKING.

Sections 799 through 802 establish provisions governing proceedings on petitions to initiate rulemaking. (3-15-02)

800. FORM AND CONTENTS OF PETITION TO INITIATE RULEMAKING.

This rule addresses petitions to initiate rulemaking as described by Section 67-5230, Idaho Code. (3-15-02)

- 01. Requirement.** Any person petitioning for initiation of rulemaking must comply with this rule. (3-15-02)
- 02. Form and Contents.** The form and contents of a petition to initiate rulemaking shall: (3-20-04)
 - a. Identify the petitioner and state the petitioner's interest(s) in the matter; (3-15-02)
 - b. Describe the nature of the rule or amendment to the rule urged to be promulgated and the petitioner's suggested rule or amendment; and (3-15-02)
 - c. Indicate the statute, order, rule, or other controlling law, and the factual allegations upon which the petitioner relies to support the proposed rulemaking. Legal assertions in the petition may be accompanied by citations of cases and/or statutory provisions. (3-15-02)
- 03. Filing.** The petitioner shall file the original and two (2) copies of the petition with the hearing coordinator in accordance with Section 008. (3-20-04)

801. BOARD RESPONSE TO PETITION.

- 01. Action of Board.** The Board shall have until the first regularly scheduled meeting that takes place

fourteen (14) or more days after submission of the petition to initiate rulemaking proceedings in accordance with Sections 67-5220 through 67-5225, Idaho Code, and these rules or deny the petition in writing, stating its reasons for the denial. (3-15-02)

02. Denial. If the petition is denied, the written denial shall state: (3-15-02)

a. The Board has denied your petition to initiate rulemaking. This denial is a final agency action within the meaning of Section 67-5230, Idaho Code. (3-15-02)

b. Pursuant to Section 67-5270, Idaho Code, any person aggrieved by this final agency action may seek review of the denial to initiate rulemaking by filing a petition for judicial review in the District Court of the county in which: (4-7-11)

i. The hearing was held; (3-15-02)

ii. This final agency action was taken; (3-15-02)

iii. The party seeking review resides, or operates its principal place of business in Idaho; or (3-15-02)

iv. The real property or personal property that was the subject of the denial of the petition for rulemaking is located. (3-15-02)

c. The petition for judicial review must be filed within twenty-eight (28) days of the service date of this denial of the petition to initiate rulemaking. (4-7-11)

802. NOTICE OF INTENT TO INITIATE RULEMAKING CONSTITUTES ACTION ON PETITION.

The Board may initiate rulemaking proceedings in response to a petition to initiate rulemaking by issuing a notice of intent to promulgate rules in accordance with Section 67-5220, Idaho Code, on the subject matter of the petition if it wishes to obtain further comment whether a rule should be proposed or what rule should be proposed. Publication of a notice of intent to promulgate rules satisfies the Board's obligations to take action on the petition and is not a denial of a petition to initiate rulemaking. (3-15-02)

803. -- 807. (RESERVED)

808. RULES GOVERNING RULEMAKING PROCEDURES.

Sections 808 through 860 establish provisions governing rulemaking procedures. (3-15-02)

809. FORMAL AND INFORMAL RULEMAKING.

Formal rulemaking refers only to rulemaking procedures associated with formal notice of proposed rulemaking, receipt of and consideration of written or oral comment on the record in response to notice of proposed rulemaking, and adoption of rules. Informal rulemaking refers to informal procedures for development of, comment upon, or review of rules for later formal consideration. No rule may come into effect solely as a result of informal rulemaking. Agreements coming from informal rulemaking must be finalized by formal rulemaking. (3-15-02)

810. LEGISLATIVE PREFERENCE FOR NEGOTIATED RULEMAKING PROCEDURES.

This rule addresses informal, negotiated rulemaking as described by Section 67-5220, Idaho Code. The Department, when feasible, shall proceed by informal, negotiated rulemaking in order to improve the substance of proposed rules by drawing upon shared information, expertise and technical abilities possessed by the affected persons; to arrive at a consensus on the content of the rule; to expedite formal rulemaking; and to lessen the likelihood that affected persons will resist enforcement or challenge the rules in court. (3-15-02)

811. PUBLICATION IN IDAHO ADMINISTRATIVE BULLETIN.

If the Department determines that informal, negotiated rulemaking is feasible, it shall publish in the Idaho Administrative Bulletin a notice of intent to promulgate a rule. If the Department determines that informal, negotiated rulemaking is not feasible, it shall proceed to formal rulemaking as provided in this chapter and explain in its notice of proposed rulemaking why informal rulemaking is not feasible. Reasons why the Department may find that informal, negotiated rulemaking is not feasible include, but are not limited to, the need for temporary rulemaking, the

simple nature of the proposed rule change, the lack of identifiable representatives of affected interests, or determination that affected interests are not likely to reach a consensus on a proposed rule. The determination of the Department whether to use informal, negotiated rulemaking is not reviewable. (4-4-13)

812. CONTENTS OF NOTICE OF INTENT TO PROMULGATE RULES.

The notice of intent to promulgate rules shall announce that the Department intends to proceed by way of informal, negotiated rulemaking to develop a proposed rule and shall include: (3-15-02)

01. Subject Matter. A brief, nontechnical statement of the subject matter to be addressed in the proposed rulemaking. (3-15-02)

02. Authority. The statutory authority for the rulemaking. (3-15-02)

03. Obtain Copy. An explanation how to obtain a preliminary draft of the proposed rules, if one is available. (3-15-02)

04. Issues. The principal issues involved and the interests which are likely to be significantly affected by the rule. (3-15-02)

05. Department Contacts. The person(s) designated to represent the Department. (3-15-02)

06. Method of Participation. An explanation how a person may participate in the informal, negotiated rulemaking. (3-15-02)

07. Schedule. A proposed schedule for written comments or for a public meeting of interested persons, and a target date, if one (1) exists, to complete negotiation and to publish a proposed rule for notice and comment. (3-15-02)

813. PUBLIC MEETINGS.

The Department may convene public meetings of interested persons to consider the matter proposed by the Department and to attempt to reach a consensus concerning a proposed rule with respect to the matter and any other matter the parties determine is relevant to the proposed rule. Person(s) representing the Department may participate in the deliberations. (3-15-02)

814. NEGOTIATED RULEMAKING SUMMARY.

The Department shall prepare a written summary of unresolved issues, key information considered and conclusions reached during and as a result of the negotiated rulemaking and make that summary available to persons who attended the negotiated rulemaking meetings. (4-4-13)

815. DEPARTMENT CONSIDERATION OF CONSENSUS REACHED BY PARTIES.

The Department may accept in whole or in part or reject the consensus reached by the parties in publishing a proposed rule for notice and comment. (3-15-02)

816. -- 829. (RESERVED)

830. REQUIREMENTS FOR NOTICE OF PROPOSED RULEMAKING.

01. Content. Every notice of proposed rulemaking shall include: (3-15-02)

a. A statement of the subject matter of the proposed rules; (3-15-02)

b. A statement of the specific statutory authority for the proposed rules, including a citation to a specific federal statute or regulation if that is the basis of authority or requirement for the rulemaking; (3-15-02)

c. A statement in nontechnical terms of the substance of the proposed rules, and, if the Department intends to take oral testimony on the proposed rule, the location, date and time of the oral presentations; (3-15-02)

- d.** A statement whether the Department intends to conduct oral presentations concerning the proposed rules, and, if not, what persons must do in order to request an oral presentation; (3-15-02)
- e.** The address to which written submissions concerning the proposed rules must be mailed; (3-15-02)
- f.** The name and telephone number of an Department contact to whom questions about the proposed rules may be referred; (3-15-02)
- g.** The deadline for written comment on the proposed rules and for asking for an opportunity for an oral presentation concerning the proposed rules; (3-15-02)
- h.** If negotiated rulemaking was not conducted, an explanation of the agency's determination that negotiated rulemaking was not feasible; (4-4-13)
- i.** A summary of the proposed rules; and (3-15-02)
- j.** The name, mailing address and telephone number of an Department contact person for the rulemaking. (3-15-02)

02. Availability of Information. This information will be published in the Idaho Administrative Bulletin and be available directly from the Department. The notice of proposed rulemaking must be accompanied by a document showing the text of the proposed rule in legislative format. (3-15-02)

831. INFORMAL PHASES OF FORMAL RULEMAKING.

In addition to the formal phases of rulemaking proceedings, the Department may schedule meetings after the formal proposal of rules to explain the operation of the rules proposed. (3-15-02)

832. COMMENTS ON PROPOSED RULES.

Deadlines for comment upon proposed rules or amendments to proposed rules will be set forth in the Idaho Administrative Bulletin. Comments should be made to the officers listed in the notices of proposed rulemaking published in the Idaho Administrative Bulletin. Further information concerning individual rulemaking should be directed to the contact person listed for that rulemaking in the Idaho Administrative Bulletin. (3-15-02)

833. PETITIONS FOR ORAL PRESENTATION.

01. Requirement. Any person petitioning for an opportunity for an oral presentation in a substantive rulemaking must substantially comply with this rule. (3-15-02)

02. Content. The petition shall: (3-15-02)

- a.** Identify the petitioner and state the petitioner's interests in the matter, (3-15-02)
- b.** Describe the nature of the opposition to or support of the rule or amendment to the rule proposed to be promulgated by the Department, and (3-15-02)
- c.** Indicate alternative proposals of the petitioner and any statute, order, rule or other controlling law or factual allegations upon which the petitioner relies to support the request for the opportunity to provide an oral presentation. Legal assertions in the petition may be accompanied by citations of cases and/or statutory provisions. (3-15-02)

03. Oral Presentation. Within fourteen (14) days after receiving a petition for an oral presentation, the Department shall schedule the oral presentation or deny it. The Department shall provide an opportunity for oral presentation if requested by twenty-five (25) persons, a political subdivision, or another agency, but no oral presentation need be provided when the Department has no discretion as the substantive content of a proposed rule because the proposed rule is intended solely to comply with a controlling judicial decision or court order, or with the provisions of a statute or federal rule that has been amended since the adoption of the rule. If oral presentation is granted, notice of the oral presentation shall be published in the Idaho Administrative Bulletin. If oral presentation is

denied, the denial shall state the grounds for denial. (3-15-02)

834. THE RULEMAKING RECORD.

The Department shall maintain a record of each rulemaking proceeding. (3-15-02)

01. Contents. The record for a rulemaking proceeding shall include: (3-15-02)

a. Copies of all publications in the Idaho Administrative Bulletin relating to that rulemaking proceeding; (3-15-02)

b. All written petitions, submissions, and comments received by the Department, and the Department's responses to those petitions, submissions and comments; (3-15-02)

c. All written materials considered by the Department in connection with formulating the proposal or adoption of the rule; (3-15-02)

d. A record of any oral presentations, any transcriptions of oral presentations, and any memoranda summarizing the contents of such presentations; and (3-15-02)

e. Any other materials or documents prepared in conjunction with the rulemaking, including any summaries prepared for the Department in considering the rulemaking. (3-15-02)

02. Recording or Reporting. All oral presentations shall be recorded on audiotape or videotape or may be taken by a qualified court reporter at the Department's expense. The Department may provide for a transcript of the proceeding at its own expense. Persons may have a transcript of an oral presentation prepared at their own expense. (3-15-02)

835. ADOPTION AND PUBLICATION OF PENDING RULES FOLLOWING COMMENT OR ORAL PRESENTATION.

01. Adoption. After the expiration of the written comment period for rulemaking and following any oral presentation on the rulemaking, but no sooner than seven (7) days after the expiration of the comment period, the Board shall consider fully all issues presented by the written and oral submissions respecting the proposed rule before adopting a pending rule. (3-15-02)

02. Publication. Upon the Board's adoption of a pending rule, the Department shall publish the text of the pending rule in the bulletin, except that with the permission of the coordinator, the Department need not publish the full text of the pending rule if no significant changes have been made from the text of the proposed rule as published in the bulletin, but the notice of adoption of the pending rule must cite the volume of the bulletin where the text is available and must note all changes that have been made. In addition, the Department must publish in the bulletin a concise explanatory statement containing: (3-15-02)

a. The reasons for adopting the pending rule; (3-15-02)

b. A statement of any change between the text of the proposed rule and the text of the pending rule with an explanation of the reasons for any changes; (3-15-02)

c. The date on which the pending rule will become final and effective pursuant to Section 67-5224(5), Idaho Code; (3-15-02)

d. A statement that the pending rule may be rejected, amended or modified by concurrent resolution of the Legislature; (3-15-02)

e. An identification of any portion of the pending rule imposing or increasing a fee or charge and stating that this portion of the pending rule shall not become final and effective unless affirmatively approved by concurrent resolution of the Legislature; and (3-15-02)

f. A statement how to obtain a copy of the Department's written review of and written responses to the written and oral submissions respecting the proposed rule. (3-15-02)

03. Rule Imposing or Increasing Fees. When any pending rule imposes a new fee or charge or increases an existing fee or charge, the Department shall provide the coordinator with a description of that portion of the rule imposing a new fee or charge or increasing an existing fee or charge, along with a citation of the specific statute authorizing the imposition or increase of the fee or charge. (3-15-02)

836. FINAL RULES.

Pending rules may become final rules, or may be rejected, amended or modified by concurrent resolution of the Legislature, as provided in Section 67-5224, Idaho Code. (3-15-02)

837. -- 839. (RESERVED)

840. PROCEDURE FOR ADOPTION OF TEMPORARY RULES.

01. Gubernatorial Finding. The Board may adopt temporary rules upon the Governor's finding that protection of the public health, safety, or welfare, compliance with deadlines in amendments to governing law or federal programs, or conferring a benefit requires a rule to become effective before it has been submitted to the Legislature for review. No temporary rule imposing a fee or charge may become effective before it has been approved, amended or modified by concurrent resolution of the Legislature unless the Governor finds that the fee or charge is necessary to avoid immediate danger that justifies the imposition of the fee or charge. (3-15-02)

02. Effective Date. Temporary rules take effect according to the effective date specified in the rules. Temporary rules may be immediately effective. (3-15-02)

03. Expiration. In no case may a temporary rule remain in effect beyond the conclusion of the next succeeding regular session of the Legislature unless the rule is approved, amended or modified by concurrent resolution, in which case the rule may remain in effect until the time specified in the resolution or until the rule has been replaced by a final rule that has become effective pursuant to Section 67-5224(5), Idaho Code. (3-15-02)

04. Notice and Publication. The Department shall give such notice as is practicable in connection with adoption of a temporary rule. Temporary rules will be published in the first available issue of the Idaho Administrative Bulletin. (3-15-02)

05. Associated Proposed Rule. Concurrently with promulgation of a temporary rule, or as soon as reasonably possible thereafter, the Department must begin rulemaking procedures by issuing a proposed rule on the same subject matter as the temporary rule, unless the temporary rule will expire by its own terms or by operation of law before a proposed rule could become final. (3-15-02)

841. -- 849. (RESERVED)

850. CORRECTION OF TYPOGRAPHICAL, TRANSCRIPTION OR CLERICAL ERRORS IN PENDING RULES.

The Board may amend pending rules to correct typographical errors, transcription errors, or clerical errors, in the manner approved by the Administrative Rules Coordinator. These amendments will be incorporated into the pending rule upon their publication in the Idaho Administrative Bulletin. (3-15-02)

851. -- 859. (RESERVED)

860. PETITION FOR JUDICIAL REVIEW OF AN ADMINISTRATIVE RULE OF THE DEPARTMENT.

Pursuant to Section 67-5270, Idaho Code, any person aggrieved by an administrative rule of the Department (either temporary or final) may seek judicial review in district court. (4-7-11)

01. Filing and Service. The petition for judicial review must be filed with the hearing coordinator as set out in Section 008 and with the district court and served on all parties. Pursuant to Section 39-107(6), Idaho Code,

the petition for judicial review shall also be served upon the Chairman of the Board, the Director of the Department, and upon the Attorney General of the State of Idaho. Pursuant to Section 67-5272, Idaho Code, petitions for review may be filed in the District Court of the county in which: (4-7-11)

- a. The hearing was held; (3-15-02)
 - b. The final agency action was taken; (3-15-02)
 - c. The party seeking review of the agency action resides, or operates its principal place of business in Idaho; or (3-15-02)
 - d. The real property or personal property that was the subject of the agency action is located. (3-15-02)
- 02. Time.** Pursuant to Section 67-5273, Idaho Code, a petition for judicial review of a final rule (except for a challenge to procedures used in promulgating the rule) may be filed at any time. (3-15-02)

861. -- 999. (RESERVED)

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