

# Recommendation Memo

**State of Idaho**

**Department of Water Resources**

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**Date:** March 1, 2021

**To:** Idaho Water Resource Board

**Thru:** Gary Spackman, Director, and Mat Weaver, Deputy Director

**From:** Garrick Baxter, DAG; Sean Costello DAG

**Subject:** Memorandum re: Rules of Procedure of the Idaho Department of Water Resources, IDAPA 37.01.01 with Retrospective Analysis and Recommendation.

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## Executive Order 2020-01

Executive Order No. 2020-01 (the “EO”) requires the Idaho Department of Water Resources (“IDWR”) and the Idaho Water Resource Board (“IWRB”) (collectively “Agencies”) to review of all rule chapters under the Agencies’ purview by 2026. The review must be a critical and comprehensive review. EO at 2.

Pursuant to the schedule already determined by the Division of Financial Management (“DFM”) and the Agencies, the Rules of Procedure of the Idaho Department of Water Resources (“Procedural Rules”; IDAPA 37.01.01) must be analyzed in the first year of the review process.

Therefore, the EO requires the Agencies to review the Procedural Rules to determine whether they should be repealed altogether or re-promulgated. If the Agencies desire to re-promulgate the Procedural Rules, the Agencies must retrospectively analyze the rules and determine whether the rules need to be re-promulgated, and, if so, to recommend an approach. *Id.*

This Recommendation Memorandum (“Memo”) provides analysis and recommendations for the Director and Board.

## The Idaho Administrative Procedures Act and Enabling Statutes

Idaho’s Administrative Procedures Act (“Idaho APA”) requires the Attorney General to promulgate procedural rules that “shall apply to all agencies that do not *affirmatively promulgate alternative procedures.*” Idaho Code § 67-5206(5)(a) (emphasis added). Therefore, the Agencies have the option of either utilizing the Idaho Rules of Administrative Procedure of the Attorney General (“OAG Rules”) (IDAPA 04.11.01) or to “affirmatively promulgate alternative procedures.” *Id.* In 1993 the Agencies chose to promulgate their own alternative Procedural Rules at IDAPA 37.01.01.

The enabling statutes related to the Procedural Rules providing the specific authority for the Agencies to promulgate the Procedural Rules are as follows:

1. The Director has the general authority to promulgate, adopt, modify, repeal and enforce rules implementing or effectuating his powers and duties (Idaho Code § 42-1805(8));
2. Hearings before the Director shall be conducted in accordance with rules of procedure promulgated by the Director (Idaho Code § 42-1701A); and
3. The Board has the authority to issue procedural and operative rules as may be necessary for the conduct of its business (Idaho Code § 42-1734(19)).

Therefore, the legislature has expressly provided authority to the Agencies to promulgate procedural rules in order to provide process and procedure in order to conduct their business.

### **Retrospective Analysis**

In order to analyze the Procedural Rules pursuant to the EO, the Agencies, through the Agencies' Rules Regulation Officer, assigned a team of IDWR employees and OAG personnel (the "Team") to analyze the costs, benefits, and needs relative to the Procedural Rules. That team consisted of two Deputy Attorney Generals and a paralegal assigned to the Agencies, IDWR's Eastern Regional Manager (who conducts many agency hearings as hearing officer), and the IDWR's Hearing Officer Coordinator, who previously served as a contract hearing officer.

The Team first concluded the Agencies must have procedural rules in place whether or not the Agencies Procedural Rules are repealed. If repealed and *not* replaced, the OAG Rules would become the default procedural rules for the Agencies. Therefore, the critical underlying issue of the analysis became weighing the costs and benefits of the Agencies using the OAG Rules or using procedural rules specific to them. As a result, the Team analyzed:

- a. Whether the Procedural Rules should be repealed altogether with the Agencies left to use the OAG Rules; or
- b. Whether the Procedural Rules should be re-promulgated via negotiated rulemaking pursuant to the EO and the Idaho APA.

The team, individually and collectively, then actively weighed the pros and cons of each approach. In summary, the Team concluded the Procedural Rules should be re-promulgated through the negotiated rulemaking process.

More specifically, the Team concluded while the Agencies have the authority to adopt their own procedural rules, the grant of authority is not open-ended. The Agencies' Procedural Rules, just as the OAG's, are enabled by, and must implement, the Idaho APA. Therefore, it would not be prudent for the Agencies to repeal and replace the Procedural Rules with a fundamentally new set of procedural rules. Any altogether new rule set would still be bound by the intent and substantive legal elements of the Idaho APA.

The Team additionally concluded it would not be prudent to repeal and *not* replace the Procedural Rules with some set of rules specific to the Agencies. Admittedly, a repeal of the Procedural Rules may appear to decrease regulatory burdens or complexity, as it decreases the length and substance of the Administrative Code. However, the Team concluded the benefits of providing specific, simplified procedural rules specific to the Agencies for contested cases and hearings before them outweighs the benefits of defaulting to the generic OAG Rules. It is further unclear whether and when the OAG Rules will be substantively updated, which has not been holistically revamped since 1993.

In conclusion, the Team's analysis showed that a set of procedural rules specific to the Agencies should be re-promulgated because: (a) the Procedural Rules have been used in appearances and contested cases before the Agencies for decades and are familiar to Idaho legal practitioners and water users; (b) there are unique agency requirements (e.g., hearings pursuant Idaho Code § 42-1701A, which are distinct from any requirements in the OAG Rules) where implementation and notice in specific procedural rules would benefit those appearing before the Agencies; (c) certain portions of the OAG Rules (such as those sections related to rulemaking) could simply be referenced in the Procedural Rules, which would simplify and condense the Agencies' specific rules; and (d) specific rules would allow the addition of modern, technologically enabled electronic filing systems that are not otherwise addressed in the OAG Rules.

### **Recommendation**

The Team recommends the re-promulgation of the Procedural Rules through the EO negotiated rulemaking process. By doing so, the Procedural Rules could: (a) be simplified, condensed, and modernized; (b) implement unique statutory requirements required of the Agencies; (d) create specific filing requirements best suited to the Agencies; and (e) allow attorneys and pro se litigants that appear, or may appear, before the Agencies to be able to contribute public commentary and meaningfully participate in addressing amending procedures before the Agencies.

The Team concludes and recommends the benefits of having Agencies' specific Procedural Rules will continue to be realized by re-promulgation of the Procedural Rules via negotiated rulemaking in order to allow simplification, public input, modernization, and increased agency procedural specification.