

MEMORANDUM

TO: Sean Costello

FROM: Christopher H. Meyer *che*
Michael P. Lawrence *MPL*

RE: Comments on Strawman 2

DATE: July 7, 2021

These comments on IDWR's proposed revisions to its rules of procedure are submitted on behalf of SUEZ Water Idaho. Prior comments (on Strawman 1) were submitted on 5/26/2021.

SUEZ commends IDWR for the extensive and thoughtful effort that has gone into these revisions. The Department's responses to prior comments reflect the serious attention that you and others have paid to the comments submitted. The end result will not only be a shorter set of rules but, much more importantly, clearer and more effective rules. That will save time, money, and aggravation for both the agency and the regulated community.

The numbering below uses the revised section numbers in Strawman 2.

002.08. DEFINITIONS (Exceptions)

The new definition of Exceptions (and elimination of reference to internal appeals) is helpful.

Given that this is now a defined term, the Department may wish to consider eliminating use of the term exceptions in other contexts, notably, Rule 220.02.f (suggested edit: "~~Any exception to the time limits in this rule may be granted by the~~ The presiding officer may issue a scheduling order with different structure and timing than provided in these rules or provide for extensions of time or other adjustments to the scheduling order for good cause shown."); Rule 603 (suggested edit: "~~Formal exceptions~~ Written objections to rulings admitting or excluding evidence are unnecessary and need not be taken in order to preserve the issue for appellate review.")

002.15. DEFINITIONS (Presiding officer)

100.01. INFORMAL AND FORMAL PROCEEDING (Presiding officer)

We think it would be helpful to have a clear demarcation of when a presiding officer is appointed. Neither the current nor the proposed rules describe how or when the presiding officer is to be designated. Other things (notably ex parte communications) key off of whether or not a presiding officer is designated. So this is important for parties to understand.

Note, by the way, there is language in Rule 100.01 regarding “a formally designated presiding officer.” This is confusing. Is there such a thing as an “informally” designated presiding officer?

We think it will be simpler and clearer if the appointment of a presiding officer signaled and corresponded to the initiation of the formal proceedings. If an agency staff person is designated to conduct informal proceedings prior to the initiation of formal proceedings, the rules could refer to such a person as an “agency official” (or some such) rather than a “presiding officer.”

100. INFORMAL AND FORMAL PROCEEDING (categories of proceedings)

101. INFORMAL PROCEEDING (categories of proceedings)

The first sentence of Rule 100 says: “Contested case proceedings before the agency shall be conducted as either informal or formal proceedings.” (By the way, perhaps the rule should be re-numbered to give a subsection number to this sentence for purposes of reference.)

This sentence implies that every contested case—including every application, protested or not—will involve either one or the other (informal or formal proceedings). In other words, this sentence suggests that everything that is not a formal proceeding is an informal proceeding. But that conflicts with Rule 101.01 which says that informal proceedings may be commenced by issuance of a Notice of Informal Settlement Conference. If that is the case, what precedes the informal proceeding?

We suggest that Rule 101.01 be revised to say that an informal proceeding is initiated by the filing of an application. In other words, everything prior to formal proceedings are informal proceedings. (This would supersede the provision in Rule 101.01 saying that informal proceedings are initiated by issuance of a notice by the agency. However, retention of the provision requiring attendance at a settlement conference may be useful in protested matters).

If this broad definition of informal proceeding is not what the Department has in mind, then we suggest this be made clear and that a third category of “super informal” agency action be described to address unprotested matters or protested matters prior to the issuance of a Notice of Informal Settlement Conference.

We don’t care which way the Department goes on this; we are just seeking clarity. In sum, it would seem that the rules should either:

- (1) Expand the definition of informal proceedings to include any agency processing of an application, etc. that is not a formal proceeding—i.e., to include uncontested matters.

or

- (2) Describe a third stage or category of agency action that is even more informal—i.e., uncontested matters or the stage prior to the Notice of Informal Settlement Conference.

100. INFORMAL AND FORMAL PROCEEDINGS (interplay of proceedings)

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102. FORMAL PROCEEDINGS (interplay of proceedings)

Rule 100.03 implies a sequencing in which the agency begins with informal proceedings and then moves permanently to formal proceedings (if no settlement is achieved at the informal stage). We suggest that the rules should provide greater flexibility. Two examples:

- (1) Even after formal proceedings are initiated, the Presiding Officer should be able to call a “time out” and allow the parties to return to informal proceedings in order to engage in off-the-record discussions aimed at settlement. In our view, the agency should have some discretion (at least where the parties stipulate) to allow the Presiding Officer or some other agency official to be present at and to participate in such discussions (without a transcript or other record). We don’t really need a rule to allow the parties to talk to each other. What is valuable and important is to allow the parties to get some informal, non-binding feedback from pertinent agency staff.
- (2) If after formal proceedings are initiated all the Protestants withdraw their protests, the agency should be able fall back into some level of informal proceeding. (As we discussed above, we don’t know if that would be deemed an informal proceeding or a third category contested case involving no “proceeding” at all.)

053. FILING AND SERVICE OF DOCUMENTS

We welcome the changes to Rule 53.01, which now allows filing by email from the outset and allows email filing until 11:59 p.m. on the day of the deadline. (By the way, there appears to be some typographical/language problems with the first sentence in 53.01.b.)

We continue to urge the Department to allow service by email from the outset, rather than requiring an order from the presiding officer. We appreciate that not all parties have access to email or wish to use it. It would seem that this could be accommodated by a provision stating that in any party’s initial filing they shall either provide an email that may be used for service or elect not to do so. And, once the case is underway, parties should be allowed to “change their mind” by filing a notice (opting in, opting out, or providing a different email address). All of this could be addressed under Rules 53.02 and 53.03.

However, a party who declines to provide an email should not be allowed to serve others by email or to file by email. If they want the benefit of email convenience, they must make that convenience available to others and to the agency.

220. MOTIONS (modifications to briefing schedule)

In our comments on Strawman 1, we suggested adding a provision allowing the presiding officer to depart from the briefing set out in the rule. You rejected this suggestion on the basis that the rule already allows that flexibility. We don't see that it does. We only see a provision in Rule 220.02.f allowing the presiding officer to make an exception to time limits.

We suggest that the presiding officer should be more broadly authorized to order a completely different briefing arrangement—e.g., one that calls for surreply briefs, simultaneous filing of briefs, joint briefs by certain parties, or anything else (perhaps limited to agreement of the parties or perhaps not). Maybe this authority is implicit, but that is not obvious. Indeed, explicitly authorizing changes to time limits, implies that that is the only modification that is authorized. In any event, we see no downside to a more explicit authorization for broad modification to all briefing matters.

We repeat the suggestion for Rule 220.02.f that we made above under Rule 002.08:

~~Any exception to the time limits in this rule may be granted by the~~ The presiding officer may issue a scheduling order with different structure and timing than provided in these rules or provide for extensions of time or other adjustments to the scheduling order for good cause shown.

301. NOTICE OF PETITION FOR DECLARATORY RULING

At the last Zoom meeting, IDWR asked that we provide further background explanation for our previously proposed amendment to the rule on declaratory rulings.

Loosely speaking, declaratory rulings are the administrative equivalent of declaratory judgments issued by courts pursuant to the Uniform Declaratory Judgment Act, Idaho Code §§ 10-1201 to 10-1217. The IAPA contains two authorizations for “declaratory rulings.” Idaho Code § 67-5232 (with respect to the applicability of statutes and rules); Idaho Code § 67-5255 (with respect to the applicability of orders). This is the Idaho counterpart to the provision for declaratory rulings in the federal APA. 5 U.S.C. § 554(e). In addition to its provisions for declaratory rulings (by agencies), the IAPA contains its own authorization for judicial declaratory relief actions seeking a determination as to the “validity or applicability of a rule.” Idaho Code § 67-5278.

We believe that petitions for declaratory rulings are best understood as a two-step process, similar to a petition for reconsideration before the Idaho Supreme Court. The first step is to determine whether the agency will engage on the subject (i.e., grant the petition); the second (if the petition is granted) is to invite briefing, intervention, etc. and ultimately issue a final order addressing the substance of the petition.

The Department and the public would benefit from a rule clarifying that the Department has discretion whether to address the merits of a petition for declaratory ruling. It may, for example, simply deny the petition and be done with it—without addressing the merits. But, if it decides to entertain the petition, it should take some step to acknowledge that it is allowing the matter to proceed. In doing so, it has necessarily initiated a contested case, because the end result will be a final order.

Idaho Code § 67-5255(2) states: “A petition for a declaratory ruling does not preclude an agency from initiating a contested case in the matter.” This provision has led to confusion. We believe the only sensible thing it can mean is that the agency may either grant the petition and initiate a contested case that takes up the matter as presented in the petition, or, if it denies the petition, it is not precluded from initiating its own contested case addressing the issue in a format and context of its own choosing.¹

This is the reason we previously proposed the following language of Rule 301.a:

It is discretionary with the agency whether or not to entertain a petition for declaratory ruling under I.C. §§ 67-5232 or 67-5255. The agency shall timely respond to a petition for declaratory ruling by stating whether it will entertain the petition. If the agency decides to entertain the petition, it shall initiate a contested case and may employ either formal or informal proceedings. Alternatively, if the agency declines to entertain the petition, it may instead initiate its own contested case framing the issue as it deems appropriate.

If the petition is denied, does that denial constitute an appealable final order? We believe that it should not be designated an appealable final order. First, it does not meet the definition of “order” in the IAPA because no legal rights are determined by the decision not to issue a recommended order. “‘Order’ means 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.” Idaho Code § 67-5201(12). Second, this makes sense as a practical matter. If Aunt Mabelle files a petition for declaratory ruling every Thursday, it would seem that the Department should be able to decide not to entertain some or all of the petitions, without judicial recourse. Nor does it appear to us that denial of petition for declaratory ruling would fall within Idaho Code § 42-1701A (because the thing sought is not “a permit, license, certificate, approval, registration, or similar form of permission.” Accordingly, we suggest that the rule so state.²

¹ A recent decision (the “Dock Case”) by an IDL hearing officer reached a different result. We have shared that decision and the relevant briefing with Garrick Baxter. We will provide it again to you, Sean. In any event, this decision shows the costly effect of lack of clarity regarding whether declaratory ruling cases are contested cases or not.

² In the event the Department declines to entertain a legitimate petition for declaratory ruling, the petitioner should be able to seek redress through a declaratory judgment action on the same subject in district court. Because no final order was issued by the Department, this would not be a petition for judicial review of the Department’s decision to decline addressing the original petition for declaratory ruling. Rather, it would fall under the Idaho’s

Another area of confusion is whether persons should be allowed to use petitions for declaratory rulings to end run prior decisions whose appeal periods have run. The case law (mostly out-of-state) often framed this question as whether declaratory rulings are solely forward-looking or whether they may also seek to re-examine prior decisions. The predominant view (and this is backed up by the legislative history of the federal act) is that the mechanism is designed to allow people to say, for example: “Hey agency, I’m thinking of doing X. If I do X, will I get in trouble?” Or, for example: “How will you apply your Department policy—never before contained in a final order—to my situation?” Those are forward looking. This is in contrast to seeking a declaratory ruling that a license condition (which I neglected to appeal from a final order) is unlawful.

This is the reason we previously proposed the following language of Rule 301.b:

Declaratory rulings should be forward-looking in their applicability, and should not be employed to alter or circumvent prior agency orders on applications or petitions.

414. EX PARTE COMMUNICATIONS

Although we are generally comfortable with the approach taken in Strawman 2 on ex parte communications, we think some further clarity would be helpful. Most notably, we think it is important to let people know when the ex parte rules come into play.

We appreciate the Department’s concern that this subject is governed by case law with constitutional underpinnings (due process). In our view, however, the direction provided by Idaho courts is pretty clear: Ex parte communication rules apply to quasi-judicial proceedings. *Idaho Historic Preservation Council, Inc. v. City Council of Boise* (“*Historic Preservation*”), 134 Idaho 651, 8 P.3d 646 (2000).

Strawman 2 provides that formal proceedings are quasi-judicial, while informal proceedings are only “administrative evaluations and processes.” Rules 100.01 and 100.02. We think that is a reasonable distinction to draw. Accordingly, we think the Department would be on firm ground by saying that ex parte communication limitations kick in when the proceeding shifts to the formal stage. Likewise, the ex parte communication rules should be lifted if all protests are resolved and the proceeding moves back into an informal proceeding mode with the applicant being the only remaining party.

Garrick Baxter noted during the last Zoom meeting, that there is risk of communications with agency officials prior to the formal stage of a proceeding. Specifically, it could lead to the disqualification of the presiding officer under Rule 411 and Idaho Code § 67-5252. That point is well taken. It is a risk that both parties and agency officials should take into account before they engage in substantive discussions. Perhaps the ex parte communication rule should cross-

broad declaratory judgment statutes. To the extent the District Court asks whether administrative remedies were exhausted, the Department’s refusal to take up the merits of the original petition would be strong evidence that no adequate remedies exist.

reference that provision. But the risk of occasional disqualification is not a sufficient reason for an across-the-board ban on all ex parte communication rules outside the formal proceeding stage. The ability to communicate informally with agency staff is too valuable to needlessly throw away. Those informal conversations are critical to the agency's efficient functioning—both for applicants and for the Department.

In our prior comments, we added “other interested person” (i.e., non-party) to the general prohibition against ex parte communications. The Department took that out. Maybe this is a technical quibble, but by taking that out, doesn't that make it permissible for the presiding officer to speak freely with any non-party on substantive matters so long as he or she later puts a summary in the record? In our view, substantive communications with non-parties should be deemed improper, but subject to cure by putting a summary in the record.

As we read the rule, the prohibition on ex parte communications applies only to the presiding officer. Does this mean that, even during the formal proceeding stage of the case, it is permissible to have substantive ex parte communications with counsel for IDWR and other IDWR staff—even the agency head? Does the rule need to be expanded to include at least the agency head? Further clarity on this would be helpful.

515. FACTS DISCLOSED NOT PART OF THE RECORD (offers of settlement)

In our prior comments we made two suggestions, one of which IDWR accepted. We think the other suggestion may have been misunderstood. The second suggestion has to do with offers of settlement.

In our view the evidentiary rule regarding offers of settlement is intended to protect the party making the offer (and thereby to encourage such offers). But the party who makes a settlement offer should not be prohibited from offering the settlement offer into the record if he or she chooses. Its content might be found irrelevant, in which case the Presiding Officer may ignore it. But it should not be excluded per se merely because it is a settlement offer.

For example, a party may wish the Department (or a reviewing court) to know that it tried to resolve the issues. This could be relevant, if nothing else, for attorney fee recovery purposes. Parties should be encouraged to wear the white hat by trying to resolve cases. If they do so, they should not be precluded from making a record of it.

720.02.a. RECOMMENDED ORDERS (Exhaustion)

730.02.a. PRELIMINARY ORDERS (Exhaustion)

730.02.g. PRELIMINARY ORDERS (Exhaustion)

740.02.a. FINAL ORDERS (Exhaustion)

790. PERSONS WHO MAY FILE A PETITION FOR JUDICIAL REVIEW (Exhaustion)

We agree with provision in Rule 730.02.a of Strawman 2 which expressly states that filing exceptions is not required to exhaust administrative remedies. (By the way, identical provisions should be added to Rules 720.02.a and 740.02.a.)

We would go further and provide that filing a petition for reconsideration or request for hearing under Section 42-1701A(3), Idaho Code, also are optional and not required to exhaust administrative remedies. By the way, with respect to petitions for reconsideration, that appears to be the effect (intended or not) of the Strawman 2 language in Rule 730.02.g (which says that “all administrative remedies shall be deemed exhausted” when the preliminary order becomes final).

We have reviewed Judge Wildman’s decision of 12/14/2015 (*A&B v. IDWR*—the *Cook* case). Thank you for providing that. As you and others explained in our last Zoom meeting, that decision held that filing exceptions is not required. But it did not speak to reconsideration or requests for hearings under Section 42-1701A(3), Idaho Code.³

Even if the reconsideration/request for hearing/exhaustion issue has not been addressed in the case law, we think the statute is quite clear that reconsideration and requests for hearing are not required. Here’s why:

First, we acknowledge that exhaustion is jurisdictional. I.R.C.P. 84(n). But that, of course, does not answer the question of what one must do in order to exhaust.

Then we turn to the language of exhaustion in the IAPA: “A person is not entitled to judicial review of an agency action until that person has exhausted all administrative remedies required in this chapter.” Idaho Code § 67-5271(1) (emphasis added). That does not answer the question either. It merely poses the question: What administrative remedies are required under the IAPA?

The IAPA expressly authorizes petitions for reconsideration. Idaho Code §§ 67-5243(3), 67-5245(3), 67-4246(4) &(5), 67-5248(1)(b), 67-5249(g), and 67-5273(2). However, none of these state or even imply that a petition for reconsideration is required. And requests for hearings under Idaho Code § 42-1701A(3) are not included in or referenced in the IAPA. Because they are not required by the IAPA, agencies are free to make them optional. Indeed, agencies are arguably required to make them optional.

The optional nature of a petition for reconsideration is also evident in the IAPA’s provision setting the deadline for judicial review:

A petition for judicial review of a final order or a preliminary order that has become final when it was not reviewed by the agency head . . . must be filed within twenty-eight (28) days of the service date of the final order [or] the date when the preliminary order became final . . . , or, if reconsideration is sought, within twenty-eight (28) days after the service date of the decision thereon. . . .

³ By the way, do you know whether a petition for reconsideration or request for hearing was filed in that case? If none was filed, Judge Wildman would have known that (because such a petition or request is required to be included in the record). And given that the Court was focused on exhaustion and the Judge knew that it is a jurisdictional issue, isn’t that an indication he did not view reconsideration or a request for hearing as required?

Idaho Code § 67-5373(2) (emphasis added). The fact that the deadline depends on whether or not a petition for reconsideration has been filed must mean that a petition for judicial review is optional. Otherwise, the only deadline would be the one for after disposal of the petition for reconsideration.

Accordingly, we believe the Department can and should resolve this issue by stating that neither exceptions, nor reconsideration, nor requests for hearing are required. We think the cleanest way would be to including the following in Rule 790:

Pursuant to Section 67-5270, Idaho Code, any party aggrieved by a final order of an agency in a contested case may file a petition for judicial review with the district court. Pursuant to Section 67-5271, Idaho Code, a party is not entitled to judicial review of an agency action in district court until that person has exhausted all administrative remedies available with the agency, but a preliminary, procedural, or intermediate agency action or ruling is immediately reviewable in district court if review of the final agency action would not provide an adequate remedy. The filing of exceptions, petitions for reconsideration, and requests for hearing under Idaho Code § 42-1701A(3) are optional and are not required in order to exhaust administrative remedies.

Alternatively, or in addition, similar language could be included in each of the following: Rules 720.02.a, 730.02.a, and 740.02.a.

740.01. FINAL ORDERS (definition)

The definition of Final Orders could be clarified. It is easy enough for lawyers steeped in this nomenclature to figure out. But for lay people and lawyers unfamiliar with this practice area, the following might be easier to understand:

Definition. Final orders are preliminary orders that have become final ~~under Rule 730 pursuant to Section 67-5245, Idaho Code,~~ orders issued by the agency head that were initially issued as recommended or preliminary orders, ~~or~~ orders initially issued by the agency head when acting as the Presiding Officer ~~pursuant to Section 67-5246, Idaho Code,~~ or emergency orders, including cease and desist or show cause orders, issued by the agency head pursuant to Section 67-5247, Idaho Code.