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September 29, 2017

Senator Steve Vick, Co-chair
Representative Gary E. Collins, Co-chair
Administrative Hearing Officer Committee
Idaho State Legislature
700 W Jefferson Street
Boise, ID 83702

Re: Proposed changes to the Idaho Administrative Procedure Act

Dear Members of the Administrative Hearing Officer Interim Committee,

Thank you for the opportunity to offer comment on proposed changes to the Idaho Administrative Procedure Act ("APA"). I welcome the opportunity to participate in discussions affecting this important act as it will have a significant impact on the operations of our agencies. The draft revisions currently posted on the committee's webpage represent a substantial change to the APA. This letter provides an overview of some of our overarching concerns relating to the proposed changes.

First, it appears the draft legislation was based in part on the Model State Administrative Procedures Act ("Model Act") as adopted by the National Conference of Commissioners on Uniform State Laws. However, the draft departs from the Model Act in significant ways. For example, the Model Act specifically recognizes the ability of an agency head and agency staff to serve as a presiding officer. The draft legislation circulated by the committee does just the opposite. It eliminates the ability of the agency head and agency staff to conduct a hearing and replaces it with a requirement that the agency hire an attorney to conduct the hearing. This provision is of particular concern to us. Agency heads and staff possess technical skills and knowledge often not possessed by attorneys. Having individuals with specialized technical skills serve as presiding officers leads to more efficient hearings and better administrative decisions for those we serve. Moreover, hiring only attorneys to conduct hearings will have a significant negative impact on agency budgets.

Second, the draft legislation appears to have been drafted with formal adjudicatory agencies in mind. The draft legislation modifies the APA in ways that overlooks the needs of other agencies or state bodies. For example, the draft legislation removes the opportunity for a hearing officer to issue a recommended order. A recommended order is an order that becomes final only after the agency has taken action on the order. Some state boards, such as the Idaho Water Resource Board, cannot act within the short timeframes of the APA and so rely upon the recommended order provisions of the APA so the board will have the ability to review and approve the decision. Removal of the recommended order process will essentially preclude board review of hearings of presiding officer decisions.

The draft legislation also removes some of the finality protections afforded to citizens who receive permits or licenses issued by State agencies. Currently, permits or licenses issued as preliminary orders become final and effective if no challenge is raised within the statutory time period. For example, the Idaho Department of Water Resources currently issues water right licenses as preliminary orders which become final and effective if no challenge is brought within 21 days. With the proposed changes,

only if a license is challenged through a contested case will the water right holder have the finality protections afforded under the current version of the APA.

The draft legislation also introduces a new standard of review into the APA whereby, after a citizen has completed the entire administrative hearing process before the agency, a judge can decide to "conduct a trial de novo" and restart the entire process before the district court. A new court trial would likely remove an agency completely from the administrative process. A new court trial will also frustrate the goal of efficient determination of contested matters through administrative proceedings, could add to the burden of Idaho's already-busy court system, and could significantly increase the costs for the parties involved in administrative actions before an agency.

Finally, the draft legislation introduces new definitions and concepts. The reason for some of the changes is unclear and I would like to learn more about the rationale behind some of the changes. I also believe that documentation (such as the documents supporting the drafting of the current version of the APA) would be invaluable to help inform the public as to the Legislature's intent behind these changes.

Attached to this letter is a document that contains a more focused discussion on particular sections of the draft legislation. I welcome the opportunity to work with legislators and stakeholders on any proposed changes affecting the APA.

Respectfully,

Gary Spackman, Director
Idaho Department of Water Resources

Comments submitted to the Administrative Hearing Officer Interim Legislative Committee
September 29, 2017

These comments are based upon a review of the draft legislation currently posted on the committee's webpage (identified as KAG 003).

1. Section 1. – Definition of Contested Case.

The existing definition of "contested case" is "a proceeding that results in the issuance of an order." "Order" is defined as "an agency action of particular applicability that determines the legal rights, duties, privileges, immunities, or other legal interest of one (1) or more specific persons."

The contested case provisions written into the current APA establish a default mechanism for issuing "orders" when an agency's organic statues do not expressly define a specific procedure.[1] By replacing the original language with the amended definition of "contested case" in the draft legislation, there is no longer a defined process for the issuance of "orders" by state agencies. Many agencies will not have clear procedures for issuing licenses, permits, and other types of "orders."

If the goal of this amendment is to create an agency appeal process, other provisions of the APA must be changed to determine how to issue licenses, permits and other types of "orders" that have traditionally been issued applying the existing APA process.

2. Section 1. – Definition of Contested Case.

The new definition of "contested case" in the draft legislation includes any "agency action in which an opportunity for an evidentiary hearing is required… ." The term "agency action" is defined in Idaho Code § 67-5201(3) to include:

(a) The whole or part of a rule or order;
(b) The failure to issue a rule or order; or
(c) An agency's performance of or failure to perform, any duty placed on it by law.

Rulemaking proceedings often involve hearings where testimony and evidence is taken. The scope of the proposed "contested case" procedure could be interpreted to apply to rulemaking, which is separately governed by Idaho Code § 67-5220 through 5231 and should not be subject to contested case provisions.

3. Section 1. – Definition of Contested Case.

The draft legislation defines contested case as "an agency action in which an opportunity for an evidentiary hearing is required by the federal constitution, a federal statute or the constitution or a statute of this state." This definition shifts a paradigm of Idaho's APA. Currently, the contested case provisions apply based on the nature of the order issued, rather than by whether a "right of hearing" is provided for by any statute.

[1] M. Gilmore, D. Goble, *The Idaho Administrative Procedure Act: A Primer for the Practitioner*, 30 Idaho L. Rev. 273, 277 (1993/4).

See Gilmore & Goble, at 313. If the purpose of this legislation is to shift this paradigm, more analysis is required to determine whether and how other provisions of the APA would need to be amended.

Also, the term "evidentiary hearing required" is ambiguous. For example, Idaho Code § 42-1701A states that there is an "opportunity" for a hearing before the Director of IDWR. It is unclear whether the Director is "required" to hold an evidentiary hearing.

Likewise, the recipient of a notice of violation is entitled to a "compliance conference under Idaho Code § 42-1701B where "the recipient of a notice of violation" can explain the circumstances of the alleged violation. Does this constitute an "evidentiary hearing" that is subject to this process?

Similarly, the question of when an "evidentiary hearing" is required by either the state or federal constitution is ambiguous. There is no express mention of "evidentiary hearing" and the words "evidence" and "evidentiary" do not appear in either the United States or Idaho Constitutions. The due process clause of the Fifth Amendment has been interpreted to require various levels of procedural due process, but whether such proceedings are "evidentiary" in nature is undefined.

Other terms in the definition are also ambiguous. For example, the draft version replaces the words "a proceeding" with "an adjudication" but does not define the term adjudication. The term adjudication should be defined. The draft then includes the words "a proceeding" later in this section. If the words "a proceeding" were deleted in the first instance, the same replacement term should be written later in the draft to avoid creating ambiguity.

4. Section 1: Definition of Presiding Officer

"Presiding Officer" is defined as "an individual, appointed by the agency head or his designee, who presides over the evidentiary hearing in a contested case." This section should be modified to recognize that state boards may appoint presiding officers. Also, the individual appointed presides over more than just the evidentiary hearing. For example, an appointed presiding officer may preside over the pre-hearing conference. The plain language in the definition suggests a limit to the authorities of the presiding officer which is likely not intentional.

5. Section 3 (67-5241(1)(a))

Idaho Code § 67-5241(1)(a) is inconsistent with the definition of contested case. To the extent an "opportunity for an evidentiary hearing is required" it would be inconsistent to allow "an agency or presiding officer" to "decline to initiate a contested case." Also, the current 67-5241(b) is proposed to be deleted. The ability to receive evidence in written form is a helpful tool to expedite hearings and ensure a full and complete record.

6. Section 7 (67-5242(1))

Concurrent Resolution No. 122, which authorized appointment of this interim legislative committee, stated that the purpose of the committee is to "continue with a study of potential approaches to mitigating the risk of bias in contested case proceedings." The resolution also stated that the "committee previously recommended that proposed legislation address adoption of provisions of the National Conference of Commissioners on Uniform State Laws' Model State Administrative Procedure Act." Recommended legislation was introduced last legislative session as Senate Bill 1155. An amended version of the language of Senate Bill 1155 was posted on the committee's website and is the version reviewed for these comments

The draft legislation is a substantial change in the structure of the entire portion of the Idaho APA governing administrative contested case hearings. The draft Idaho legislation adopts, almost verbatim, many provisions of the model act adopted by the National Conference of Commissioners (hereafter referred to as "the Model Act") that have, at best, an indirect relationship to the issue of hearing officer bias. In two subject areas that directly relate to possible hearing officer bias, however, the Idaho draft legislation contradicts the Model Act. The first subject area relates to Presiding Officers.

Section 602 of the Model Act recognizes that a presiding officer may be (1) an administrative law judge; (2) an individual agency head; (3) a member of a multi-member body of individuals that is the agency head; or, possibly (4) an individual designated by the agency head.

In stark contrast, the new Idaho Code § 67-5242 states that a presiding officer must be an attorney admitted to practice law in the state of Idaho for three years, and then, in conflict with the Model Act, states that the presiding officer cannot be the agency head, cannot be a member of the multimember body of individuals that is the agency head, and cannot be a member of the agency governing board. This language is in direct conflict with the Model Act.

The National Conference of Commissioners is comprised of attorney representatives from the 50 states of the Union. These attorneys, who presumably are well versed in the need for due process and fairness, did not feel compelled to exclude agency heads and members of decision making boards from being presiding officers in the Model Act. One of the express efficiency advantages of administrative process is that the presiding officer, often the agency head, can rely on the technical expertise of agency staff. The Model Act recognizes these advantages and efficiencies by allowing technical agency staff to assist the decision maker.

The draft Idaho legislation also eliminates all Model Act references to and allowances for agency staff participation in the contested case. As a result, the assigned presiding officer may not have any expertise in the contested case subject matter and will not have expert assistance to address technical issues. This may result in incorrect or simplistic determinations by the presiding officer that will degrade the quality of agency decisions.

Proposed Section 67-5242(a)'s elimination of the ability of the agency head or a board to conduct an evidentiary hearing is also inconsistent with numerous organic statutes. For example, Idaho Code § 42-1701A, which allows persons aggrieved by an action of the Director of the Idaho Department of Water Resources to petition the Director for a hearing, which is held before the Director. This provision is of particular concern with regard to agency heads that oversee highly scientific based subject matter such as IDWR. Many agency heads possess technical skills not possessed by hearing officers.

Moreover, this section may deprive the technical staff of agencies from conducting hearings intended to gather input, testimony and evidence concerning the issuance of permits or licenses. Many agency staff possess technical skills not possessed by hearing officers. If an applicant is concerned about employee involvement, the current administrative process already allows for the disqualification of an agency employee for any reason. See Idaho Code § 67-5252.

7. Section 7 (67-5242(2))

This section states that a person "who is subject to the authority, direction or discretion of an individual who has served as investigator, prosecutor or advocate at any stage in a contested case may not serve as the presiding officer." If an agency head appoints a presiding officer, isn't that individual subject to the authority of the agency head? Couldn't the agency head remove the presiding officer for cause? Based upon this plain language, can a situation arise where the agency head couldn't appoint a presiding officer? Is that intended?

8. Sec Section 7 (67-5242(3))

Section 67-5242(3) states that a presiding officer is subject to disqualification based on ex parte communications. This expands the current grounds for disqualification. Many citizens represent themselves before state agencies and are often unaware of the ex parte communication rules and inadvertently violate them. The current process employs an easy and fair remedy for such action. Here, an inadvertent communication may be alleged by another party to try to justify disqualification of a presiding officer late in an administrative process. The current approach to ex parte communications strikes a better balance in addressing this issue.

9. Section 8 (67-5243(2))

This section introduces a new term: a contested case petition. Requests for hearing come in many different formats. This should be defined to remove ambiguity.

10. Section 8 (67-5243(8))

Section 67-5243(8) states that "if allowed by administrative rule, a party may be advised or represented by another individual." This provision may allow for the unauthorized practice of law. The Idaho Supreme Court has held that appearing on behalf of an individual in an adjudicative process constitutes the practice of law and should only be done by an attorney. *Kyle v. Beco Corp.* 109 Idaho 267, 271 (1985) (The general rule

in Idaho is that "representation of another person before a public agency or service commission constitutes the unauthorized practice of law, where the proceedings before those tribunals are held for purposes of adjudicating legal rights or duties of a party.")

11. Section 8 (67-5244(2))

Section 67-5244(2) states that "The presiding officer shall exclude the evidence if objection is made at the time the evidence is offered." This section appears to mandate that the presiding officer must exclude the evidence if an objection is made regardless of the merits of the objection.

12. Section 8 (67-5244(4))

Section 67-5244(4) states that "Documentary evidence may be received in the form of a copy if the original is not readily available or by incorporation by reference." The term incorporation by reference is normally reserved for inclusion in law of other statutory or regulatory provisions. It is not a term used for the recognition of "evidence." Evidence is "judicially noticed" as stated in the new provision of § 67-5244(7). Thus, it is unclear what is meant by "incorporation by reference" in this section.

13. Section 10 (67-5245(2)(e) & (3)(h))

Sections 67-5245(2)(e) and (3)(h) require the agency to notify "all parties." However, the term "parties" is not defined, and the agency may not know who should be considered a "party," especially in cases where the contested case is filed by a person other than the agency. Moreover, there are often many interested persons who should receive notice of the filing of a contested case. For example, in a permitting process, many people can comment upon the permit. If someone appeals a permit condition, people submitting comments may wish to know about the permit condition so that they can follow the case and possibly intervene; yet, under this legislation they would not be considered "parties" in a traditional sense.

Also, depending on how "parties" is defined, the seven day time frame for notifying "parties" may be difficult to achieve. For example, if a water user objects to how the Director is administering water rights in a water district and seeks a change to administration, such action could impact thousands of water users. If potentially impacted water users are considered "parties," the agency would have difficulty notifying all potentially impacted water users within seven days.

14. Section 10 (67-5245(3))

Section 67-5245(3) discusses contested cases initiated by an agency and states that the agency "shall give notice to the party against which the action is brought." A contested case may be initiated by an agency but the case may not be "against" a party.

15. Section 11 (67-5246(2)(i))

This section should be clarified to ensure that state agencies are not required to prepare written transcripts of proceedings.

16. Section 12 (67-5247(2))

Section 67-5247(2) is limited to concerns for "peril to the public health or safety." It is recommended that this be expanded to allow for an emergency adjudication in situations posing an imminent threat to the "environment."

17. Section 13 (67-5248(1))

Section 67-5248(1) introduces the new term "final decision maker." This term should be defined. This section also states that a contested case is pending "from issuance of the agency's pleading or from an application for an agency decision." It is unclear what an "application for an agency decision" means. This blurs the line in cases where, for instance, a person has applied for a permit or license. The process for issuing a license should not necessarily require oversight by a presiding officer.

18. Section 13 (67-5248(3))

First, section 67-5248(3) is a single long sentence and difficult to understand. The sentence should be broken up to aid in clarity. Second, section 67-5248(3) states that a presiding officer "may communicate about a pending contested case with an individual authorized by law to provide legal advice to the presiding officer ... ." It is unclear whether such statutory authorization exists. Third, Section 67-5248(3) references "staff of the presiding officer." Is it expected that presiding officers will have staff? Finally, the Model APA recognizes that there are particular circumstances in which it is appropriate for staff to communicate with a presiding officer. For example, the Model APA states that a presiding officer may communicate with staff to receive "an explanation" of "technical or scientific terms" in the agency hearing record. Preserving the ability of a presiding officer to seek such information would result in improved decisions without undermining the contested case process.

19. Section 13 (67-5248(6))

67-5248(6) states that a presiding officer or final decision maker may be disqualified. It is unclear who determines disqualification under this section. This section also references "dismissal of the application." This is the first instance of any reference to "the application."

20. Section 14 (67-5249)

Section 67-5249 provides for intervention but sets forth a standard that is different than Idaho Rule of Civil Procedure 24 and IDWR's rules at IDAPA 37.01.01.350. The language is confusing to the extent it uses phrases like "statutory right of intervention" or "permissive statutory right to intervene." Subsection one and two reference "notice to all parties." It is unclear who is required to notify all parties.

21. Section 15 (67-5250)

The phrase "general relevance and reasonable scope of the evidence sought for use at the hearing," is ambiguous. Furthermore, if a presiding officer is the only person that can hear a contested case, will there ever be a circumstance when there is "any other officer" that would need authority to issue a subpoena?

22. Section 16 (67-5251)

Section 67-5251(2) seemingly limits discovery to identification of witnesses and inspection of documents. It appears this section would prevent a party from taking the deposition of a witness without approval from the presiding officer. Is this a correct interpretation? Also, as discussed above, there may be circumstances where there are multiple parties. References to "the other party" in subsection (2)(b) may create confusion in such circumstances.

23. Section 18 (67-5253)

This section does not allow a presiding officer to issue a recommended order. A recommended order is an order that becomes final only after the agency head has acted on the order. Some state boards, such as the Idaho Water Resource Board, cannot act within the short timeframes of the APA and rely upon the recommended order provisions of the APA to ensure they have the ability to review and approve decisions. Removal of the recommended order process will essentially preclude Board review of hearings of presiding officer decisions.

Moreover, subsection (6) creates an unclear standard for a presiding officer to apply when considering the admissibility of hearsay. Furthermore, subsection (8) states that the order is effective 30 days after service unless reconsideration is sought under section 67-5256 or a stay is granted under section 67-5257. What happens if the order is reviewed by agency under 67-5254? Is it sensible for an order to become effective pending review by the agency?

24. Section 19 (67-5254)

Section 67-5254 states that a petition for review must be filed with the agency head no later than 15 days after service of the order. This section also states that if an agency head decides to review the order on its own initiative, the agency head must give notice within 15 days after service of the order. The proposed statute then says that if review is not sought within the time limit, it becomes a final order. However, under 67-5253, it does not become an "effective" order until 30 days after service. Is there a reason for the discrepancy in the dates?

Subsection (4) states that if an order is subject to both a timely petition for reconsideration and a petition for review by the agency head, "the petition for reconsideration must be disposed of first." This suggests that the petition for rehearing

must still be addressed, even if the decision on reconsideration moots the issue. This section should be modified to address this conflict.

Regarding subsection (5), it is unclear whether there is any other state law limiting the review.

Regarding subsection (6), it is unclear how an agency head can issue a final order within 120 days of remand of the matter as the agency head does not control the timeframes of any remand. This section also conflicts with subsection (5) as it prevents the agency head from reviewing finds of fact.

25. Section 20 (67-5256)

Under section 67-5256, a party shall seek reconsideration within 15 days of service of the order. Then the "decision maker" has 20 days to issue a written order on the petition. But this section goes on to say that if the "decision maker" fails to respond within 30 days, the petition is deemed denied. It is unclear why there is a 10 day discrepancy between the deadline to issue a written order and the day it is deemed denied.

26. Section 24 (67-5260)

Section 67-5260 is supposed to create a "right of judicial review" but there is something missing: subsection (1) defines "final agency action;" subsection (2) states "a person who meets the requirements of this section is entitled to judicial review;" and subsection (3) allows for judicial review of less than "final" agency actions. However, the section does not expressly provide for a "right to judicial review", nor do the "requirements of this section" specify when "judicial review is available." Furthermore, although unclear, it also may allow a person who did not participate in the contested case to seek judicial review.

Subsection (1) says that final agency action does not include "a failure to act" but, subsection (4) says a "court may compel an agency to take action that is unlawfully withheld or unreasonably delayed." This is incongruous. If there is no "right of judicial review" for an agency's failure to act, how can a Court compel the action?

27. Section 30 (67-5267)

Section 67-5267 fails to establish any meaningful "standard of review" for a court. It states that fact issues must be judged by the "substantial and competent evidence standard" and "free review of questions of law," but beyond that it provides no guidance on when a Court should "affirm, modify or reverse an agency action." The proposed statute then states that if "the court determines that the agency action was unwarranted and based upon a manifest injustice" it shall conduct a "trial de novo." These terms are undefined and essentially allow for a complete reset of the entire contested case process. If a court does not agree with the decision of the agency, can it find that the decision was "unwarranted?" Exactly what is the Court conducting a "trial de novo" about? Moreover, it is not for a Court to "modify" an agency action. For example, a Court should not be allowed to modify a term in an Air Quality permit, if it finds the term

"unwarranted." Rather, the matter should be remanded to the Agency for reissuance of the permit.

The "trial de novo" provision is also contrary to the Model Act. Section 508 of the Model Act recognizes the finality of the agency decision. The court may overturn an agency decision only if:

> (A) The agency erroneously interpreted the law;
> (B) The agency committed an error of procedure;
> (C) The agency action is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
> (D) An agency determination of fact in a contested case in not supported by substantial evidence in the record as a whole; or
> (E) To the extent that the facts are subject to a trial de novo by the reviewing court, the action was unwarranted by the facts.

Again, in stark contrast, to the Model Act, the draft Idaho legislation eliminates the above criteria, and significantly broadens the court's authorities on appeal. The changes in the draft Idaho legislation were not recommended by the Conference of Commissioners in the Model Act to protect against hearing officer bias. A new court trial frustrates the purpose of an agency hearing to promote efficiency and employ agency expertise. A new court trial will also result in duplicative, expensive, and time consuming additional litigation for all parties, including members of the public and the regulated community. It could also increase the burden on Idaho's court system.

The existing provisions of the APA (§ 67-5279) limit the power of Courts to overrule agency decisions to cases where the agency action was: (a) in violation of constitutional or statutory provisions; (b) in excess of the statutory authority of the agency; (c) made upon unlawful procedure; or (d) arbitrary, capricious or an abuse of discretion. These standards of review are well known, have been applied for many years by the Courts and limit the power of the Courts to second guess the agency's discretionary determinations.

By granting Courts authority to overturn agency decisions they feel are "unwarranted" the ability of the executive agencies to carry out their duties will be substantially undermined and the separation of powers between the executive branch and the judiciary will be eroded.