



# OFFICE OF ADMINISTRATIVE HEARINGS


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## MEMORANDUM

TO: Legislative Council - Natural Resources Committee

FROM: Allen C. Hoberg, Director, Office of Administrative Hearings 

RE: One-call excavation notice system bill draft - 90031.02

DATE: July 30, 2008

Although the Office of Administrative Hearings (OAH) is not directly effected by this bill draft, administrative law judges for the Public Service Commission (PSC) are effected.

OAH provides administrative law judges for the PSC.

Essentially, I agree with the comments of Illona Jeffcoat-Sacco of the Public Service Commission. I too am concerned that much of the new language in Section 4, amendments to N.D.C.C. section 49-23-06, in this bill draft, is unnecessary because there is already law and procedures within PSC statutes and rules for doing much of what is proposed.

I have some additional concerns for the work of ALJs in this bill draft. I am concerned about a probable cause standard, a criminal law standard, for an ALJ to determine whether to impose a civil penalty. That may raise due process concerns. But, if you do use this standard, imposing a civil penalty is not a traditional role for an ALJ. ALJ's often determine for other agencies whether a civil penalty should be imposed but only impose a specific amount of civil penalty based upon a recommendation from the agency, usually in accordance with a penalty matrix or some other agency system of imposing civil penalties that is fair and consistent.

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Rather, I believe a different standard should be used, such as a sufficiency of the complaint standard, which is a more appropriate standard for deciding whether to proceed with a complaint, and a civil penalty should not be imposed until after there is some proof of violation, or upon entering into a consent agreement with the agency.

The complaint process in one place uses the language "intentionally violates" the law as the standard for finding a violation in an administrative complaint. *See* Section 4, amendments to section 49-23-06 (3)(b) (lines 5 and 6, page 10). However the complaint process also uses the language of the standard found in Section 4, subdivision c of subsection 1 (line 15, page 9), "knowingly damages," so that language can also be a standard for finding a violation in an administrative complaint. *See* subdivision a of subsection 4 (lines 19-21 of page 10). It may be confusing to have two different standards in the administrative complaint process.

I am concerned about the meaning of the word satisfy as used, e.g. in subdivisions b and c of subsection 4 - what does it mean when it says "the respondent shall satisfy the complaint" (line 31, page 10 and line 5, page 11)?

If this bill is passed as drafted, it could require the use of two different ALJs - one to make the probable cause determination and impose a civil penalty, and one to conduct the hearing for the PSC if the respondent requests a hearing on the complaint.

Although one might assume that the ALJ is paid by the Commission for the ALJ's two different roles in this legislation, the bill does not specify who will pay for the ALJ's services, and it is especially not clear who will pay for the ALJ's services in the ALJ's role in determining

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probable cause and imposing a civil penalty. It would help to specify who is responsible for paying for the ALJ's services, the Commission or the Board.

Again, Section 4 of this bill could be streamlined considerably if it was interwoven with existing PSC statutes and rules. I don't believe it is necessary or wise to set up separate, somewhat different, law and procedures than what is available for other types of complaints the PSC handles.

Thank you!