

**Testimony**  
**Senate Bill 2296 – Department of Water Resources**  
**House Government and Veterans Affairs Committee**  
**Representative Austen Schauer, Chairman**  
**March 16, 2023**

Chairman Schauer, and members of the House Government and Veterans Affairs Committee – I am John Paczkowski, State Engineer at the Department of Water Resources (Department). I am submitting testimony to oppose Senate Bill 2296, which proposes that administrative law judges may not defer to an agency’s interpretation of its own statutes and regulations and that ambiguities be resolved against increased agency authority.

The Department uses the Office of Administrative Hearings (OAH) for appeals of Department decisions pursuant to section 61-03-22 and drainage appeals from water resource boards under chapter 61-32. In other matters, the Department is generally exempt from using OAH.

Under section 61-03-22, the Department has typically granted hearing requests and proceeded through the administrative hearing process since it is easier, less expensive, and less intimidating for the appellant to be able to “tell their side of the story.” It also gives the Department another chance to reconsider its decision prior to going to district court. However, the Department does have the option to deny a hearing request, and force the appellant to proceed directly to district court. If SB 2296 passes as it is currently written, the Department would be less likely to grant administrative hearings and would instead proceed straight to district court. District court, under its own authority through judicial precedent, is required to grant the Department deference, particularly in technical matters.

Regarding drainage appeals under chapter 61-32, a little background is necessary. Under this chapter, a person may file a drainage complaint about unauthorized drainage with the local water resource board (board). The board is required to do an investigation and make a determination. The board’s decision may be appealed to

the Department. The Department then conducts its own investigation and makes a determination about the board's decision. A person aggrieved by the Department's decision can then appeal, and that appeal is required to go through OAH.

In drainage complaints, the Department steps into the shoes of whichever individual it has determined to be "in the right". Besides defending proper hydrology and water management decisions, the Department has no vested interest in the outcome of these drainage complaints. Removing deference to agency interpretation in cases such as this punishes the individual that the Department has determined to be "in the right" based on technical expertise.

For example, if Landowner A constructs an allegedly unauthorized drain and starts draining water onto Landowner B's property, Landowner B may file a drainage complaint with the local water resource board. The board will make its decision. In this example, Landowner A wins and the board finds he hasn't been illegally draining. Landowner B is still unhappy, so he appeals to the Department. The Department may determine Landowner A didn't do anything wrong – perhaps he is just the victim of a harassing neighbor, which is not an uncommon situation with these sorts of complaints. Landowner B is still unhappy, so he appeals the Department's decision to OAH. If this bill were to pass, suddenly the balance has shifted in favor of Landowner B, as the administrative law judge is no longer able to defer to the Department's expertise or interpretation of its statutes and regulations involving technical issues like hydrology, watershed calculations, or even if a drain has been constructed. Despite having done nothing wrong, and that opinion being supported by investigations from both the local board and the Department, Landowner A would now be punished simply because the Department determined he was in the right.

Further, the bill would essentially put the administrative law judge in charge of making technical determinations about issues like hydrology and watershed acreage

calculations because he would no longer be allowed to defer to the Department's technical expertise.

Thank you for the opportunity to comment and I'm happy to answer any questions.