

1                   **DEPARTMENT OF ENVIRONMENTAL QUALITY BOARDS**

2                                   **ADJUDICATIVE PROCEEDINGS**

3   2012 GENERAL SESSION

4   STATE OF UTAH

5                                   **Chief Sponsor: Margaret Dayton**

6                                   House Sponsor: Bill Wright

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7

8   **LONG TITLE**

9   **Committee Note:**

10           The Natural Resources, Agriculture, and Environment Interim Committee  
11 recommended this bill.

12   **General Description:**

13           This bill modifies requirements and procedures for adjudicative proceedings where a  
14 party challenges an agency order, other than a termination order, relating to a permit,  
15 plan, license, approval order, or other administrative authorization made by an  
16 executive secretary under Title 19, Environmental Quality Code.

17   **Highlighted Provisions:**

18           This bill:

- 19           ▶ defines terms;
- 20           ▶ distinguishes between adjudicative proceedings not related to permit orders and  
21 permit review adjudicative proceedings;
- 22           ▶ modifies requirements and procedures for adjudicative proceedings where a party  
23 challenges an agency order, other than a termination order, relating to a permit,  
24 plan, license, approval order, or other administrative authorization made by an  
25 executive secretary under Title 19, Environmental Quality Code;
- 26           ▶ provides that only properly preserved issues may be reviewed during a permit  
27 review adjudicative proceeding;



- 28           ▶ describes the requirements for intervention in a permit review adjudicative
- 29 proceeding;
- 30           ▶ establishes that permit review adjudicative proceedings will be based on the
- 31 administrative record and any permitted supplementation;
- 32           ▶ provides that stays may not be issued during a permit review adjudicative
- 33 proceeding, unless certain conditions are met;
- 34           ▶ provides for judicial review of a permit review adjudicative proceeding; and
- 35           ▶ makes technical changes.

36 **Money Appropriated in this Bill:**

37           None

38 **Other Special Clauses:**

39           None

40 **Utah Code Sections Affected:**

41 AMENDS:

- 42           **19-1-301**, as last amended by Laws of Utah 2009, Chapter 377
- 43           **19-2-108**, as last amended by Laws of Utah 2009, Chapter 377
- 44           **19-2-112**, as last amended by Laws of Utah 2009, Chapter 377
- 45           **63G-4-102**, as last amended by Laws of Utah 2011, Chapter 367
- 46           **78A-4-103**, as last amended by Laws of Utah 2009, Chapter 344

47 ENACTS:

- 48           **19-1-301.5**, Utah Code Annotated 1953



50 *Be it enacted by the Legislature of the state of Utah:*

51           Section 1. Section **19-1-301** is amended to read:

52           **19-1-301. Adjudicative proceedings.**

53           (1) As used in this section, "dispositive action" [is] means a final agency action that:

54           (a) a board takes following an adjudicative proceeding on a request for agency action;

55 and

56           (b) is subject to judicial review under Section 63G-4-403.

57           (2) This section governs adjudicative proceedings that are not permit review

58 adjudicative proceedings as defined in Section 19-1-301.5.

59           ~~[(2)]~~ (3) (a) The department and its boards shall comply with the procedures and  
60 requirements of Title 63G, Chapter 4, Administrative Procedures Act.

61           (b) The procedures for an adjudicative proceeding conducted by an administrative law  
62 judge are governed by:

63           (i) Title 63G, Chapter 4, Administrative Procedures Act;

64           (ii) this title;

65           ~~[(ii)]~~ (iii) rules adopted by a board ~~[as authorized by]~~ under:

66           (A) Subsection 63G-4-102(6); ~~[and]~~ or

67           (B) this title; and

68           ~~[(iii)]~~ (iv) the Utah Rules of Civil Procedure, in the absence of a procedure established  
69 under Subsection ~~[(2)]~~ (3)(b)(i), (ii), or ~~[(ii)]~~ (iii).

70           ~~[(3)]~~ (4) An administrative law judge shall hear a party's request for agency action  
71 made to a board created in Section 19-1-106.

72           ~~[(4)]~~ (5) The executive director shall appoint an administrative law judge who:

73           (a) is a member in good standing of the Utah State Bar;

74           (b) has a minimum of:

75           (i) 10 years of experience practicing law; and

76           (ii) five years of experience practicing in the field of:

77           (A) environmental compliance;

78           (B) natural resources;

79           (C) regulation by an administrative agency; or

80           (D) a field related to a field listed in Subsections ~~[(4)]~~ (5)(b)(ii)(A) through (C); and

81           (c) has a working knowledge of the federal laws and regulations and state statutes and  
82 rules applicable to a request for agency action.

83           ~~[(5)]~~ (6) In appointing an administrative law judge who meets the qualifications ~~[listed]~~  
84 described in Subsection ~~[(4)]~~ (5), the executive director may:

85           (a) compile a list of persons who may be engaged as an administrative law judge pro  
86 tempore by mutual consent of the parties to an adjudicative proceeding;

87           (b) appoint an assistant attorney general as an administrative law judge pro tempore; or

88           (c) (i) appoint an administrative law judge as an employee of the department; and

89           (ii) assign the administrative law judge responsibilities in addition to conducting an

90 adjudicative proceeding.

91 [~~(6)~~] (7) (a) An administrative law judge shall:

92 (i) conduct an adjudicative proceeding;

93 (ii) take any action that is not a dispositive action; and

94 (iii) submit to the board a proposed dispositive action, including:

95 (A) written findings of fact;

96 (B) written conclusions of law; and

97 (C) a recommended order.

98 (b) A board may:

99 (i) approve, approve with modifications, or disapprove a proposed dispositive action

100 submitted to the board under Subsection [~~(6)~~] (7)(a); or

101 (ii) return the proposed dispositive action to the administrative law judge for further

102 action as directed.

103 [~~(7)~~] (8) To conduct an adjudicative proceeding, an administrative law judge may:

104 (a) compel:

105 (i) the attendance of a witness; and

106 (ii) the production of a document or other evidence;

107 (b) administer an oath;

108 (c) take testimony; and

109 (d) receive evidence as necessary.

110 [~~(8)~~] (9) A party may appear before an administrative law judge in person, through an  
111 agent or employee, or as provided by a board rule.

112 [~~(9)~~] (10) (a) An administrative law judge or board member may not communicate with  
113 a party to an adjudicative proceeding regarding the merits of the adjudicative proceeding unless  
114 notice and an opportunity to be heard are afforded to all parties.

115 (b) An administrative law judge or board member who receives an ex parte  
116 communication shall place the communication into the public record of the proceedings and  
117 afford all parties an opportunity to comment on the information.

118 [~~(10)~~] (11) Nothing in this section limits a party's right to an adjudicative proceeding  
119 under Title 63G, Chapter 4, Administrative Procedures Act.

120 (12) A board created in Section 19-1-106 may, in accordance with Title 63G, Chapter

121 3, Utah Administrative Rulemaking Act, make procedural rules governing an adjudicative  
122 proceeding that are consistent with this section and Title 63G, Chapter 4, Administrative  
123 Procedures Act.

124 Section 2. Section **19-1-301.5** is enacted to read:

125 **19-1-301.5. Permit review adjudicative proceedings.**

126 (1) As used in this section:

127 (a) "Board" means:

128 (i) the Air Quality Board, if the permit order being challenged was issued by the  
129 executive secretary of the Air Quality Board;

130 (ii) the Radiation Control Board, if the permit order being challenged was issued by the  
131 executive secretary of the Radiation Control Board;

132 (iii) the Drinking Water Board, if the permit order being challenged was issued by the  
133 executive secretary of the Drinking Water Board;

134 (iv) the executive director, if the permit order being challenged was issued by the  
135 executive secretary of the Water Quality Board in relation to a Utah Pollution Discharge  
136 Elimination System permit for which the state has assumed primacy under the Federal Water  
137 Pollution Prevention and Control Act 33 U.S.C. Sec. 1251 et seq.;

138 (v) the Water Quality Board, if the permit order being challenged was issued by the  
139 executive secretary of the Water Quality Board in relation to a permit other than a permit  
140 described in Subsection (1)(a)(iv); or

141 (vi) the Solid and Hazardous Waste Control Board, if the permit order being  
142 challenged was issued by the executive secretary of the Solid and Hazardous Waste Control  
143 Board.

144 (b) "Dispositive action" means a final agency action that:

145 (i) the board takes as part of a permit review adjudicative proceeding; and

146 (ii) is subject to judicial review, in accordance with Subsection (14).

147 (c) "Dispositive motion" means a motion that is equivalent to:

148 (i) a motion to dismiss under Utah Rules of Civil Procedure, Rule 12(b)(6);

149 (ii) a motion for judgment on the pleadings under Utah Rules of Civil Procedure, Rule  
150 12(c); or

151 (iii) a motion for summary judgment under Utah Rules of Civil Procedure, Rule 56.

- 152 (d) "Party" means:
- 153 (i) the executive secretary who issued the permit order being challenged in the permit
- 154 review adjudicative proceeding;
- 155 (ii) the permittee;
- 156 (iii) the person who applied for the permit, if the permit was denied; or
- 157 (iv) a person granted intervention by the administrative law judge.
- 158 (e) "Permit" means any of the following issued under this title:
- 159 (i) a permit;
- 160 (ii) a plan;
- 161 (iii) a license;
- 162 (iv) an approval order; or
- 163 (v) another administrative authorization made by an executive secretary.
- 164 (f) (i) "Permit order" means an order issued by an executive secretary that:
- 165 (A) approves a permit;
- 166 (B) renews a permit;
- 167 (C) denies a permit;
- 168 (D) modifies or amends a permit; or
- 169 (E) revokes and reissues a permit.
- 170 (ii) "Permit order" does not include an order terminating a permit.
- 171 (g) "Permit review adjudicative proceeding" means a proceeding to resolve a challenge
- 172 to a permit order.
- 173 (2) This section governs permit review adjudicative proceedings.
- 174 (3) Except as expressly provided in this section, the provisions of Title 63G, Chapter 4,
- 175 Administrative Procedures Act, do not apply to a permit review adjudicative proceeding.
- 176 (4) If a public comment period was provided during the permit application process, a
- 177 person who challenges a permit order, including the permit applicant, may only raise an issue
- 178 or argument during the permit review adjudicative proceeding that:
- 179 (a) the person raised during the public comment period; and
- 180 (b) was supported with sufficient information or documentation to enable the executive
- 181 secretary to fully consider the substance and significance of the issue.
- 182 (5) The executive director shall appoint an administrative law judge, in accordance

183 with Subsections 19-1-301(5) and (6), to conduct a permit review adjudicative proceeding.

184 (6) (a) Only the following may file a request for agency action seeking review of a  
185 permit order:

186 (i) a party; or

187 (ii) a person who is seeking to intervene under Subsection (7).

188 (b) A person who files a request for agency action seeking review of a permit order  
189 shall file the request:

190 (i) within 30 days after the day on which the permit order is issued; and

191 (ii) in accordance with Subsections 63G-4-201(3)(a) through (c).

192 (c) A person may not raise an issue or argument in a request for agency action unless  
193 the issue or argument:

194 (i) was preserved in accordance with Subsection (4); or

195 (ii) was not reasonably ascertainable before or during the public comment period.

196 (d) A board created in Section 19-1-106 may, in accordance with Title 63G, Chapter 3,  
197 Utah Administrative Rulemaking Act, make rules allowing the extension of the filing deadline  
198 described in Subsection (6)(b)(i).

199 (7) (a) A person who is not a party may not participate in a permit review adjudicative  
200 proceeding unless the person is granted the right to intervene under this Subsection (7).

201 (b) A person who seeks to intervene in a permit review adjudicative proceeding under  
202 this section shall, within 30 days after the day on which the permit order being challenged was  
203 issued, file:

204 (i) a petition to intervene that:

205 (A) meets the requirements of Subsection 63G-4-207(1); and

206 (B) demonstrates that the person is entitled to intervention under Subsection (7)(c)(ii);

207 and

208 (ii) a timely request for agency action.

209 (c) An administrative law judge shall grant a petition to intervene in a permit review  
210 adjudicative proceeding, if:

211 (i) the petition to intervene is timely filed; and

212 (ii) the petitioner:

213 (A) demonstrates that the petitioner's legal interests may be substantially affected by

214 the permit review adjudicative proceeding;

215 (B) demonstrates that the interests of justice and the orderly and prompt conduct of the  
216 permit review adjudicative proceeding will not be materially impaired by allowing the  
217 intervention; and

218 (C) in the petitioner's request for agency action, raises issues or arguments that are  
219 preserved in accordance with Subsection (4).

220 (d) An administrative law judge:

221 (i) shall issue an order granting or denying a petition to intervene in accordance with  
222 Subsection 63G-4-207(3)(a); and

223 (ii) may impose conditions on intervenors as described in Subsection 63G-4-207(3)(b)  
224 and (c).

225 (e) A board created in Section 19-1-106 may, in accordance with Title 63G, Chapter 3,  
226 Utah Administrative Rulemaking Act, make rules allowing the extension of the filing deadline  
227 described in Subsection (7)(b).

228 (8) (a) An administrative law judge shall conduct a permit review adjudicative  
229 proceeding based only on the administrative record and not as a trial de novo.

230 (b) To the extent relative to the issues and arguments raised in the request for agency  
231 action, the administrative record shall consist of the following items, if they exist:

232 (i) the permit application, draft permit, and final permit;

233 (ii) each statement of basis, fact sheet, engineering review, or other substantive  
234 explanation designated by the executive secretary as part of the basis for the decision relating to  
235 the permit order;

236 (iii) the notice and record of each public comment period;

237 (iv) the notice and record of each public hearing, including oral comments made during  
238 the public hearing;

239 (v) written comments submitted during the public comment period;

240 (vi) responses to comments that are designated by the executive secretary as part of the  
241 basis for the decision relating to the permit order;

242 (vii) any information that is:

243 (A) requested by and submitted to the executive secretary; and

244 (B) designated by the executive secretary as part of the basis for the decision relating to



245 the permit order;

246 (viii) any additional information specified by rule;

247 (ix) any additional documents agreed to by the parties; and

248 (x) information supplementing the record under Subsection (8)(c).

249 (c) (i) There is a rebuttable presumption against supplementing the record.

250 (ii) A party may move to supplement the record described in Subsection (8)(b) with  
251 technical or factual information.

252 (iii) The administrative law judge may grant a motion to supplement the record  
253 described in Subsection (8)(b) with technical or factual information if the moving party proves  
254 that:

255 (A) good cause exists for supplementing the record;

256 (B) supplementing the record is in the interest of justice; and

257 (C) supplementing the record is necessary for resolution of the issues.

258 (iv) The administrative law judge may supplement the record with technical or factual  
259 information on the administrative law judge's own motion if the administrative law judge  
260 determines that adequate grounds exist to supplement the record under Subsections  
261 (8)(c)(iii)(A) through (C).

262 (v) In supplementing the record with testimonial evidence, the administrative law judge  
263 may administer an oath or take testimony as necessary.

264 (vi) A board created in Section 19-1-106 may, in accordance with Title 63G, Chapter  
265 3, Utah Administrative Rulemaking Act, make rules permitting further supplementation of the  
266 record.

267 (9) (a) The administrative law judge shall review and respond to a request for agency  
268 action in accordance with Subsections 63G-4-201(3)(d) and (e), following the relevant  
269 procedures for formal adjudicative proceedings.

270 (b) The administrative law judge shall require the parties to file responsive pleadings in  
271 accordance with Section 63G-4-204.

272 (c) If an administrative law judge enters an order of default against a party, the  
273 administrative law judge shall enter the order of default in accordance with Section 63G-4-209,  
274 following the relevant procedures for formal adjudicative proceedings.

275 (d) The administrative law judge, in conducting a permit review adjudicative

276 proceeding:

277 (i) may not participate in an ex parte communication with a party to the permit review  
278 adjudicative proceeding regarding the merits of the permit review adjudicative proceeding  
279 unless notice and an opportunity to be heard are afforded to all parties; and

280 (ii) shall, upon receiving an ex parte communication, place the communication in the  
281 public record of the proceeding and afford all parties an opportunity to comment on the  
282 information.

283 (e) In conducting a permit review adjudicative proceeding, the administrative law  
284 judge may take judicial notice of matters not in the administrative record, in accordance with  
285 Utah Rules of Evidence, Rule 201.

286 (f) An administrative law judge may take any action in a permit review adjudicative  
287 proceeding that is not a dispositive action.

288 (10) (a) A person who files a request for agency action has the burden of demonstrating  
289 that an issue or argument raised in the request for agency action has been preserved in  
290 accordance with Subsection (4).

291 (b) The administrative law judge shall dismiss, with prejudice, any issue or argument  
292 raised in a request for agency action that has not been preserved in accordance with Subsection  
293 (4).

294 (11) In response to a dispositive motion, the administrative law judge may submit a  
295 proposed dispositive action to the board recommending full or partial resolution of the permit  
296 review adjudicative proceeding, that includes:

- 297 (a) written findings of fact;
- 298 (b) written conclusions of law; and
- 299 (c) a recommended order.

300 (12) For each issue or argument that is not dismissed or otherwise resolved under  
301 Subsection (10)(b) or (11), the administrative law judge shall:

- 302 (a) provide the parties an opportunity for briefing and oral argument;
- 303 (b) conduct a review of the executive secretary's determination, based on the record  
304 described in Subsections (8)(b), (8)(c), and (9)(e); and
- 305 (c) submit to the board a proposed dispositive action, that includes:
  - 306 (i) written findings of fact;

307 (ii) written conclusions of law; and

308 (iii) a recommended order.

309 (13) (a) When the administrative law judge submits a proposed dispositive action to  
310 the board, the board may:

311 (i) adopt, adopt with modifications, or reject the proposed dispositive action; or

312 (ii) return the proposed dispositive action to the administrative law judge for further  
313 action as directed.

314 (b) On review of a proposed dispositive action, the board shall uphold all factual,  
315 technical, and scientific agency determinations that are supported by substantial evidence taken  
316 from the record as a whole.

317 (c) (i) The board may not participate in an ex parte communication with a party to the  
318 permit review adjudicative proceeding regarding the merits of the permit review adjudicative  
319 proceeding unless notice and an opportunity to be heard are afforded to all parties.

320 (ii) Upon receiving an ex parte communication, the board shall place the  
321 communication in the public record of the proceeding and afford all parties an opportunity to  
322 comment on the information.

323 (d) In reviewing a proposed dispositive action during a permit review adjudicative  
324 proceeding, the board may take judicial notice of matters not in the record, in accordance with  
325 Utah Rules of Evidence, Rule 201.

326 (e) The board may use its technical expertise in making a determination.

327 (14) (a) A party may seek judicial review in the Utah Court of Appeals of a dispositive  
328 action in a permit review adjudicative proceeding, in accordance with Sections 63G-4-401,  
329 63G-4-403, and 63G-4-405.

330 (b) An appellate court shall limit its review of a dispositive action of a permit review  
331 adjudicative proceeding to:

332 (i) the record described in Subsections (8)(b), (8)(c), (9)(e), and (13)(d); and

333 (ii) the record made by the administrative law judge and the board during the permit  
334 review adjudicative proceeding.

335 (c) During judicial review of a dispositive action, the appellate court shall:

336 (i) review all agency determinations in accordance with Subsection 63G-4-403(4),  
337 recognizing that the agency has been granted substantial discretion to interpret its governing

338 statutes and rules; and

339 (ii) uphold all factual, technical, and scientific agency determinations that are  
340 supported by substantial evidence viewed in light of the record as a whole.

341 (15) (a) The filing of a request for agency action does not stay a permit or delay the  
342 effective date of a permit.

343 (b) A permit may not be stayed or delayed unless a stay is granted under this  
344 Subsection (15).

345 (c) The administrative law judge shall:

346 (i) consider a party's motion to stay a permit during a permit review adjudicative  
347 proceeding; and

348 (ii) submit a proposed determination on the stay to the board.

349 (d) The administrative law judge may not recommend to the board a stay of a permit,  
350 or a portion of a permit, unless:

351 (i) all parties agree to the stay; or

352 (ii) the party seeking the stay demonstrates that:

353 (A) the party seeking the stay will suffer irreparable harm unless the stay is issued;

354 (B) the threatened injury to the party seeking the stay outweighs whatever damage the  
355 proposed stay is likely to cause the party restrained or enjoined;

356 (C) the stay, if issued, would not be adverse to the public interest; and

357 (D) there is a substantial likelihood that the party seeking the stay will prevail on the  
358 merits of the underlying claim, or the case presents serious issues on the merits, which should  
359 be the subject of further adjudication.

360 (e) A party may appeal a board's decision regarding a stay of a permit to the Utah Court  
361 of Appeals, in accordance with Section 78A-4-103.

362 (16) A board created in Section 19-1-106 may, in accordance with Title 63G, Chapter  
363 3, Utah Administrative Rulemaking Act, make procedural rules governing a permit review  
364 adjudicative proceeding that are consistent with this section.

365 Section 3. Section **19-2-108** is amended to read:

366 **19-2-108. Notice of construction or modification of installations required --**

367 **Authority of executive secretary to prohibit construction -- Hearings -- Limitations on**

368 **authority of board -- Inspections authorized.**

369 (1) The board shall require that notice be given to the executive secretary by any person  
370 planning to construct a new installation which will or might reasonably be expected to be a  
371 source or indirect source of air pollution or to make modifications to an existing installation  
372 which will or might reasonably be expected to increase the amount of or change the character  
373 or effect of air contaminants discharged, so that the installation may be expected to be a source  
374 or indirect source of air pollution, or by any person planning to install an air cleaning device or  
375 other equipment intended to control emission of air contaminants.

376 (2) (a) (i) The executive secretary may require, as a condition precedent to the  
377 construction, modification, installation, or establishment of the air contaminant source or  
378 indirect source, the submission of plans, specifications, and other information as he finds  
379 necessary to determine whether the proposed construction, modification, installation, or  
380 establishment will be in accord with applicable rules in force under this chapter.

381 (ii) Plan approval for an indirect source may be delegated by the executive secretary to  
382 a local authority when requested and upon assurance that the local authority has and will  
383 maintain sufficient expertise to insure that the planned installation will meet the requirements  
384 established by law.

385 (b) If within 90 days after the receipt of plans, specifications, or other information  
386 required under this subsection, the executive secretary determines that the proposed  
387 construction, installation, or establishment or any part of it will not be in accord with the  
388 requirements of this chapter or applicable rules or that further time, not exceeding three  
389 extensions of 30 days each, is required by the board to adequately review the plans,  
390 specifications, or other information, he shall issue an order prohibiting the construction,  
391 installation, or establishment of the air contaminant source or sources in whole or in part.

392 (3) In addition to any other remedies, any person aggrieved by the issuance of an order  
393 either granting or denying a request for the construction of a new installation, and prior to  
394 invoking any such other remedies shall, upon request, in accordance with the rules of the board,  
395 be entitled to a ~~[hearing]~~ permit review adjudicative proceeding conducted by an administrative  
396 law judge as provided by Section ~~[19-1-301]~~ 19-1-301.5. Following the ~~[hearing]~~ permit  
397 review adjudicative proceeding and the receipt by the board of the proposed dispositive action  
398 from the administrative law judge, the board may affirm, modify, or withdraw the permit.

399 (4) Any features, machines, and devices constituting parts of or called for by plans,

400 specifications, or other information submitted under Subsection (1) shall be maintained in good  
401 working order.

402 (5) This section does not authorize the board to require the use of machinery, devices,  
403 or equipment from a particular supplier or produced by a particular manufacturer if the required  
404 performance standards may be met by machinery, devices, or equipment otherwise available.

405 (6) (a) Any authorized officer, employee, or representative of the board may enter and  
406 inspect any property, premise, or place on or at which an air contaminant source is located or is  
407 being constructed, modified, installed, or established at any reasonable time for the purpose of  
408 ascertaining the state of compliance with this chapter and the rules adopted under it.

409 (b) (i) A person may not refuse entry or access to any authorized representative of the  
410 board who requests entry for purposes of inspection and who presents appropriate credentials.

411 (ii) A person may not obstruct, hamper, or interfere with any inspection.

412 (c) If requested, the owner or operator of the premises shall receive a report setting  
413 forth all facts found which relate to compliance status.

414 Section 4. Section **19-2-112** is amended to read:

415 **19-2-112. Generalized condition of air pollution creating emergency -- Sources**  
416 **causing imminent danger to health -- Powers of executive director -- Declaration of**  
417 **emergency.**

418 (1) (a) Title 63G, Chapter 4, Administrative Procedures Act, and any other provision of  
419 law to the contrary notwithstanding, if the executive director finds that a generalized condition  
420 of air pollution exists and that it creates an emergency requiring immediate action to protect  
421 human health or safety, the executive director, with the concurrence of the governor, shall  
422 order persons causing or contributing to the air pollution to reduce or discontinue immediately  
423 the emission of air contaminants.

424 (b) The order shall fix a place and time, not later than 24 hours after its issuance, for a  
425 hearing to be held before the governor.

426 (c) Not more than 24 hours after the commencement of this hearing, and without  
427 adjournment of it, the governor shall affirm, modify, or set aside the order of the executive  
428 director.

429 (2) (a) In the absence of a generalized condition of air pollution referred to in  
430 Subsection (1), but if the executive director finds that emissions from the operation of one or

431 more air contaminant sources is causing imminent danger to human health or safety, the  
432 executive director may commence adjudicative proceedings under Section 63G-4-502.

433 (b) Notwithstanding Section 19-1-301 or 19-1-301.5, the executive director may  
434 conduct the emergency adjudicative proceeding in place of an administrative law judge.

435 (3) Nothing in this section limits any power that the governor or any other officer has  
436 to declare an emergency and act on the basis of that declaration.

437 Section 5. Section **63G-4-102** is amended to read:

438 **63G-4-102. Scope and applicability of chapter.**

439 (1) Except as set forth in Subsection (2), and except as otherwise provided by a statute  
440 superseding provisions of this chapter by explicit reference to this chapter, the provisions of  
441 this chapter apply to every agency of the state and govern:

442 (a) state agency action that determines the legal rights, duties, privileges, immunities,  
443 or other legal interests of an identifiable person, including agency action to grant, deny, revoke,  
444 suspend, modify, annul, withdraw, or amend an authority, right, or license; and

445 (b) judicial review of the action.

446 (2) This chapter does not govern:

447 (a) the procedure for making agency rules, or judicial review of the procedure or rules;

448 (b) the issuance of a notice of a deficiency in the payment of a tax, the decision to  
449 waive a penalty or interest on taxes, the imposition of and penalty or interest on taxes, or the  
450 issuance of a tax assessment, except that this chapter governs an agency action commenced by  
451 a taxpayer or by another person authorized by law to contest the validity or correctness of the  
452 action;

453 (c) state agency action relating to extradition, to the granting of a pardon or parole, a  
454 commutation or termination of a sentence, or to the rescission, termination, or revocation of  
455 parole or probation, to the discipline of, resolution of a grievance of, supervision of,  
456 confinement of, or the treatment of an inmate or resident of a correctional facility, the Utah  
457 State Hospital, the Utah State Developmental Center, or a person in the custody or jurisdiction  
458 of the Division of Substance Abuse and Mental Health, or a person on probation or parole, or  
459 judicial review of the action;

460 (d) state agency action to evaluate, discipline, employ, transfer, reassign, or promote a  
461 student or teacher in a school or educational institution, or judicial review of the action;

462 (e) an application for employment and internal personnel action within an agency  
463 concerning its own employees, or judicial review of the action;

464 (f) the issuance of a citation or assessment under Title 34A, Chapter 6, Utah  
465 Occupational Safety and Health Act, and Title 58, Occupations and Professions, except that  
466 this chapter governs an agency action commenced by the employer, licensee, or other person  
467 authorized by law to contest the validity or correctness of the citation or assessment;

468 (g) state agency action relating to management of state funds, the management and  
469 disposal of school and institutional trust land assets, and contracts for the purchase or sale of  
470 products, real property, supplies, goods, or services by or for the state, or by or for an agency of  
471 the state, except as provided in those contracts, or judicial review of the action;

472 (h) state agency action under Title 7, Chapter 1, [~~Article~~] Part 3, Powers and Duties of  
473 Commissioner of Financial Institutions, Title 7, Chapter 2, Possession of Depository Institution  
474 by Commissioner, Title 7, Chapter 19, Acquisition of Failing Depository Institutions or  
475 Holding Companies, and Title 63G, Chapter 7, Governmental Immunity Act of Utah, or  
476 judicial review of the action;

477 (i) the initial determination of a person's eligibility for unemployment benefits, the  
478 initial determination of a person's eligibility for benefits under Title 34A, Chapter 2, Workers'  
479 Compensation Act, and Title 34A, Chapter 3, Utah Occupational Disease Act, or the initial  
480 determination of a person's unemployment tax liability;

481 (j) state agency action relating to the distribution or award of a monetary grant to or  
482 between governmental units, or for research, development, or the arts, or judicial review of the  
483 action;

484 (k) the issuance of a notice of violation or order under Title 26, Chapter 8a, Utah  
485 Emergency Medical Services System Act, Title 19, Chapter 2, Air Conservation Act, Title 19,  
486 Chapter 3, Radiation Control Act, Title 19, Chapter 4, Safe Drinking Water Act, Title 19,  
487 Chapter 5, Water Quality Act, Title 19, Chapter 6, Part 1, Solid and Hazardous Waste Act,  
488 Title 19, Chapter 6, Part 4, Underground Storage Tank Act, or Title 19, Chapter 6, Part 7, Used  
489 Oil Management Act, or Title 19, Chapter 6, Part 10, Mercury Switch Removal Act, except  
490 that this chapter governs an agency action commenced by a person authorized by law to contest  
491 the validity or correctness of the notice or order;

492 (l) state agency action, to the extent required by federal statute or regulation, to be



493 conducted according to federal procedures;

494 (m) the initial determination of a person's eligibility for government or public  
495 assistance benefits;

496 (n) state agency action relating to wildlife licenses, permits, tags, and certificates of  
497 registration;

498 (o) a license for use of state recreational facilities;

499 (p) state agency action under Title 63G, Chapter 2, Government Records Access and  
500 Management Act, except as provided in Section 63G-2-603;

501 (q) state agency action relating to the collection of water commissioner fees and  
502 delinquency penalties, or judicial review of the action;

503 (r) state agency action relating to the installation, maintenance, and repair of headgates,  
504 caps, valves, or other water controlling works and weirs, flumes, meters, or other water  
505 measuring devices, or judicial review of the action;

506 (s) the issuance and enforcement of an initial order under Section 73-2-25;

507 (t) (i) a hearing conducted by the Division of Securities under Section 61-1-11.1; and

508 (ii) an action taken by the Division of Securities pursuant to a hearing conducted under  
509 Section 61-1-11.1, including a determination regarding the fairness of an issuance or exchange  
510 of securities described in Subsection 61-1-11.1(1); and

511 (u) state agency action relating to water well driller licenses, water well drilling  
512 permits, water well driller registration, or water well drilling construction standards, or judicial  
513 review of the action.

514 (3) This chapter does not affect a legal remedy otherwise available to:

515 (a) compel an agency to take action; or

516 (b) challenge an agency's rule.

517 (4) This chapter does not preclude an agency, prior to the beginning of an adjudicative  
518 proceeding, or the presiding officer during an adjudicative proceeding from:

519 (a) requesting or ordering a conference with parties and interested persons to:

520 (i) encourage settlement;

521 (ii) clarify the issues;

522 (iii) simplify the evidence;

523 (iv) facilitate discovery; or

524 (v) expedite the proceeding; or  
525 (b) granting a timely motion to dismiss or for summary judgment if the requirements of  
526 Rule 12(b) or Rule 56 of the Utah Rules of Civil Procedure are met by the moving party,  
527 except to the extent that the requirements of those rules are modified by this chapter.

528 (5) (a) A declaratory proceeding authorized by Section 63G-4-503 is not governed by  
529 this chapter, except as explicitly provided in that section.

530 (b) Judicial review of a declaratory proceeding authorized by Section 63G-4-503 is  
531 governed by this chapter.

532 (6) This chapter does not preclude an agency from enacting a rule affecting or  
533 governing an adjudicative proceeding or from following the rule, if the rule is enacted  
534 according to the procedures outlined in Title 63G, Chapter 3, Utah Administrative Rulemaking  
535 Act, and if the rule conforms to the requirements of this chapter.

536 (7) (a) If the attorney general issues a written determination that a provision of this  
537 chapter would result in the denial of funds or services to an agency of the state from the federal  
538 government, the applicability of the provision to that agency shall be suspended to the extent  
539 necessary to prevent the denial.

540 (b) The attorney general shall report the suspension to the Legislature at its next  
541 session.

542 (8) Nothing in this chapter may be interpreted to provide an independent basis for  
543 jurisdiction to review final agency action.

544 (9) Nothing in this chapter may be interpreted to restrict a presiding officer, for good  
545 cause shown, from lengthening or shortening a time period prescribed in this chapter, except  
546 the time period established for judicial review.

547 (10) Notwithstanding any other provision of this section, this chapter does not apply to  
548 a permit review adjudicative proceeding, as defined in Section 19-1-301.5, except to the extent  
549 expressly provided in Section 19-1-301.5.

550 Section 6. Section **78A-4-103** is amended to read:

551 **78A-4-103. Court of Appeals jurisdiction.**

552 (1) The Court of Appeals has jurisdiction to issue all extraordinary writs and to issue  
553 all writs and process necessary:

554 (a) to carry into effect its judgments, orders, and decrees; or

555 (b) in aid of its jurisdiction.

556 (2) The Court of Appeals has appellate jurisdiction, including jurisdiction of  
557 interlocutory appeals, over:

558 [~~(a) the final orders and decrees~~]

559 (a) (i) a final order or decree resulting from:

560 (A) a formal adjudicative [proceedings of state agencies or appeals] proceeding of a  
561 state agency; or

562 (B) a permit review adjudicative proceeding, as defined in Section 19-1-301.5; or

563 (ii) an appeal from the district court review of an informal adjudicative [~~proceedings of~~  
564 ~~the agencies, except~~] proceeding of an agency other than the following:

565 (A) the Public Service Commission[;];

566 (B) the State Tax Commission[;];

567 (C) the School and Institutional Trust Lands Board of Trustees[;];

568 (D) the Division of Forestry, Fire, and State Lands [actions], for an action reviewed by  
569 the executive director of the Department of Natural Resources[;];

570 (E) the Board of Oil, Gas, and Mining[; and]; or

571 (F) the state engineer;

572 (b) appeals from the district court review of:

573 (i) adjudicative proceedings of agencies of political subdivisions of the state or other  
574 local agencies; and

575 (ii) a challenge to agency action under Section 63G-3-602;

576 (c) appeals from the juvenile courts;

577 (d) interlocutory appeals from any court of record in criminal cases, except those  
578 involving a charge of a first degree or capital felony;

579 (e) appeals from a court of record in criminal cases, except those involving a  
580 conviction or charge of a first degree felony or capital felony;

581 (f) appeals from orders on petitions for extraordinary writs sought by persons who are  
582 incarcerated or serving any other criminal sentence, except petitions constituting a challenge to  
583 a conviction of or the sentence for a first degree or capital felony;

584 (g) appeals from the orders on petitions for extraordinary writs challenging the  
585 decisions of the Board of Pardons and Parole except in cases involving a first degree or capital

586 felony;

587 (h) appeals from district court involving domestic relations cases, including, but not  
588 limited to, divorce, annulment, property division, child custody, support, parent-time,  
589 visitation, adoption, and paternity;

590 (i) appeals from the Utah Military Court; and

591 (j) cases transferred to the Court of Appeals from the Supreme Court.

592 (3) The Court of Appeals upon its own motion only and by the vote of four judges of  
593 the court may certify to the Supreme Court for original appellate review and determination any  
594 matter over which the Court of Appeals has original appellate jurisdiction.

595 (4) The Court of Appeals shall comply with the requirements of Title 63G, Chapter 4,  
596 Administrative Procedures Act, in its review of agency adjudicative proceedings.

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**Legislative Review Note**  
**as of 11-17-11 11:49 AM**

**Office of Legislative Research and General Counsel**