

Effective 5/8/2018

19-1-301.5 Permit review adjudicative proceedings.

- (1) As used in this section:
 - (a) "Dispositive action" means a final agency action that:
 - (i) the executive director takes as part of a special adjudicative proceeding; and
 - (ii) is subject to judicial review, in accordance with Subsection (16).
 - (b) "Dispositive motion" means a motion that is equivalent to:
 - (i) a motion to dismiss under Utah Rules of Civil Procedure, Rule 12(b)(6);
 - (ii) a motion for judgment on the pleadings under Utah Rules of Civil Procedure, Rule 12(c); or
 - (iii) a motion for summary judgment under Utah Rules of Civil Procedure, Rule 56.
 - (c) "Financial assurance determination" means a decision on whether a facility, site, plan, party, broker, owner, operator, generator, or permittee has met financial assurance or financial responsibility requirements as determined by the director of the Division of Waste Management and Radiation Control.
 - (d) "Party" means:
 - (i) the director who issued the permit order or financial assurance determination that is being challenged in the special adjudicative proceeding under this section;
 - (ii) the permittee;
 - (iii) the person who applied for the permit, if the permit was denied;
 - (iv) the person who is subject to a financial assurance determination; or
 - (v) a person granted intervention by the administrative law judge.
 - (e) "Permit" means any of the following issued under this title:
 - (i) a permit;
 - (ii) a plan;
 - (iii) a license;
 - (iv) an approval order; or
 - (v) another administrative authorization made by a director.
 - (f)
 - (i) "Permit order" means an order issued by a director that:
 - (A) approves a permit;
 - (B) renews a permit;
 - (C) denies a permit;
 - (D) modifies or amends a permit; or
 - (E) revokes and reissues a permit.
 - (ii) "Permit order" does not include an order terminating a permit.
 - (g) "Special adjudicative proceeding" means a proceeding under this section to resolve a challenge to a:
 - (i) permit order; or
 - (ii) financial assurance determination.
- (2) This section governs special adjudicative proceedings.
- (3) Except as expressly provided in this section, the provisions of Title 63G, Chapter 4, Administrative Procedures Act, do not apply to a special adjudicative proceeding under this section.
- (4) If a public comment period was provided during the permit application process or the financial assurance determination process, a person who challenges an order or determination may only raise an issue or argument during the special adjudicative proceeding that:
 - (a) the person raised during the public comment period; and

- (b) was supported with information or documentation that is cited with reasonable specificity and sufficiently enables the director to fully consider the substance and significance of the issue.
- (5)
- (a) Upon request by a party, the executive director shall issue a notice of appointment appointing an administrative law judge, in accordance with Subsections 19-1-301(5) and (6), to conduct a special adjudicative proceeding under this section.
 - (b) The executive director shall issue a notice of appointment within 30 days after the day on which a party files a request.
 - (c) A notice of appointment shall include:
 - (i) the agency's file number or other reference number assigned to the special adjudicative proceeding;
 - (ii) the name of the special adjudicative proceeding; and
 - (iii) the administrative law judge's name, title, mailing address, email address, and telephone number.
- (6)
- (a) Only the following may file a petition for review of a permit order or financial assurance determination:
 - (i) a party; or
 - (ii) a person who is seeking to intervene under Subsection (7).
 - (b) A person who files a petition for review of a permit order or a financial assurance determination shall file the petition for review within 30 days after the day on which the permit order or the financial assurance determination is issued.
 - (c) The department may, in accordance with Title 63G, Chapter 3, Utah Administrative Rulemaking Act, make rules allowing the extension of the filing deadline described in Subsection (6)(b).
 - (d) A petition for review shall:
 - (i) be served in accordance with department rule;
 - (ii) include the name and address of each person to whom a copy of the petition for review is sent;
 - (iii) if known, include the agency's file number or other reference number assigned to the special adjudicative proceeding;
 - (iv) state the date on which the petition for review is served;
 - (v) include a statement of the petitioner's position, including, as applicable:
 - (A) the legal authority under which the petition for review is requested;
 - (B) the legal authority under which the agency has jurisdiction to review the petition for review;
 - (C) each of the petitioner's arguments in support of the petitioner's requested relief;
 - (D) an explanation of how each argument described in Subsection (6)(d)(v)(C) was preserved;
 - (E) a detailed description of any permit condition to which the petitioner is objecting;
 - (F) any modification or addition to a permit that the petitioner is requesting;
 - (G) a demonstration that the agency's permit decision is based on a finding of fact or conclusion of law that is clearly erroneous;
 - (H) if the agency director addressed a finding of fact or conclusion of law described in Subsection (6)(d)(v)(G) in a response to public comment, a citation to the comment and response that relates to the finding of fact or conclusion of law and an explanation of why the director's response was clearly erroneous or otherwise warrants review; and
 - (I) a claim for relief.

- (e) A person may not raise an issue or argument in a petition for review unless the issue or argument:
 - (i) was preserved in accordance with Subsection (4); or
 - (ii) was not reasonably ascertainable before or during the public comment period.
- (f) To demonstrate that an issue or argument was preserved in accordance with Subsection (4), a petitioner shall include the following in the petitioner's petition for review:
 - (i) a citation to where the petitioner raised the issue or argument during the public comment period; and
 - (ii) for each document upon which the petitioner relies in support of an issue or argument, a description that:
 - (A) states why the document is part of the administrative record; and
 - (B) demonstrates that the petitioner cited the document with reasonable specificity in accordance with Subsection (4)(b).
- (7)
 - (a) A person who is not a party may not participate in a special adjudicative proceeding under this section unless the person is granted the right to intervene under this Subsection (7).
 - (b) A person who seeks to intervene in a special adjudicative proceeding under this section shall, within 30 days after the day on which the permit order or the financial assurance determination being challenged was issued, file:
 - (i) a petition to intervene that:
 - (A) meets the requirements of Subsection 63G-4-207(1); and
 - (B) demonstrates that the person is entitled to intervention under Subsection (7)(d)(ii); and
 - (ii) a timely petition for review.
 - (c) In a special adjudicative proceeding to review a permit order, the permittee is a party to the special adjudicative proceeding regardless of who files the petition for review and does not need to file a petition to intervene under Subsection (7)(b).
 - (d) An administrative law judge shall grant a petition to intervene in a special adjudicative proceeding, if:
 - (i) the petition to intervene is timely filed; and
 - (ii) the petitioner:
 - (A) demonstrates that the petitioner's legal interests may be substantially affected by the special adjudicative proceeding;
 - (B) demonstrates that the interests of justice and the orderly and prompt conduct of the special adjudicative proceeding will not be materially impaired by allowing the intervention; and
 - (C) in the petitioner's petition for review, raises issues or arguments that are preserved in accordance with Subsection (4).
 - (e) An administrative law judge:
 - (i) shall issue an order granting or denying a petition to intervene in accordance with Subsection 63G-4-207(3)(a); and
 - (ii) may impose conditions on intervenors as described in Subsections 63G-4-207(3)(b) and (c).
 - (f) The department may, in accordance with Title 63G, Chapter 3, Utah Administrative Rulemaking Act, make rules allowing the extension of the filing deadline described in Subsection (7)(b).
- (8)
 - (a) Unless the parties otherwise agree, or the administrative law judge otherwise orders, a special adjudicative proceeding shall be conducted as follows:

- (i) the director shall file and serve the administrative record within 40 days after the day on which the executive director issues a notice of appointment, unless otherwise ordered by the administrative law judge;
 - (ii) any dispositive motion shall be filed and served within 15 days after the day on which the administrative record is filed and served;
 - (iii) the petitioner shall file and serve an opening brief of no more than 30 pages:
 - (A) within 30 days after the day on which the director files and serves the administrative record; or
 - (B) if a party files and serves a dispositive motion, within 30 days after the day on which the administrative law judge issues a decision on the dispositive motion, including a decision to defer the motion;
 - (iv) each responding party shall file and serve a response brief of no more than 30 pages within 15 days after the day on which the petitioner files and serves the opening brief;
 - (v) the petitioner may file and serve a reply brief of not more than 15 pages within 15 days after the day on which the response brief is filed and served; and
 - (vi) if the petitioner files and serves a reply brief, each responding party may file and serve a surreply brief of no more than 15 pages within five business days after the day on which the petitioner files and serves the reply brief.
- (b)
- (i) A reply brief may not raise an issue that was not raised in the response brief.
 - (ii) A surreply brief may not raise an issue that was not raised in the reply brief.
- (9)
- (a) An administrative law judge shall conduct a special adjudicative proceeding based only on the administrative record and not as a trial de novo.
 - (b) To the extent relative to the issues and arguments raised in the petition for review, the administrative record consists of the following items, if they exist:
 - (i)
 - (A) for review of a permit order, the permit application, draft permit, and final permit; or
 - (B) for review of a financial assurance determination, the proposed financial assurance determination from the owner or operator of the facility, the draft financial assurance determination, and the final financial assurance determination;
 - (ii) each statement of basis, fact sheet, engineering review, or other substantive explanation designated by the director as part of the basis for the decision relating to the permit order or the financial assurance determination;
 - (iii) the notice and record of each public comment period;
 - (iv) the notice and record of each public hearing, including oral comments made during the public hearing;
 - (v) written comments submitted during the public comment period;
 - (vi) responses to comments that are designated by the director as part of the basis for the decision relating to the permit order or the financial assurance determination;
 - (vii) any information that is:
 - (A) requested by and submitted to the director; and
 - (B) designated by the director as part of the basis for the decision relating to the permit order or the financial assurance determination;
 - (viii) any additional information specified by rule;
 - (ix) any additional documents agreed to by the parties; and
 - (x) information supplementing the record under Subsection (9)(c).
- (c)

- (i) There is a rebuttable presumption against supplementing the record.
 - (ii) A party may move to supplement the record described in Subsection (9)(b) with technical or factual information.
 - (iii) The administrative law judge may grant a motion to supplement the record described in Subsection (9)(b) with technical or factual information if the moving party proves that:
 - (A) good cause exists for supplementing the record;
 - (B) supplementing the record is in the interest of justice; and
 - (C) supplementing the record is necessary for resolution of the issues.
 - (iv) The department may, in accordance with Title 63G, Chapter 3, Utah Administrative Rulemaking Act, make rules permitting further supplementation of the record.
- (10)
- (a) Except as otherwise provided by this section, the administrative law judge shall review and respond to a petition for review in accordance with Subsections 63G-4-201(3)(d) and (e), following the relevant procedures for formal adjudicative proceedings.
 - (b) The administrative law judge shall require the parties to file responsive briefs in accordance with Subsection (8).
 - (c) If an administrative law judge enters an order of default against a party, the administrative law judge shall enter the order of default in accordance with Section 63G-4-209.
 - (d) The administrative law judge, in conducting a special adjudicative proceeding:
 - (i) may not participate in an ex parte communication with a party to the special adjudicative proceeding regarding the merits of the special adjudicative proceeding unless notice and an opportunity to be heard are afforded to all parties; and
 - (ii) shall, upon receiving an ex parte communication, place the communication in the public record of the proceeding and afford all parties an opportunity to comment on the information.
 - (e) In conducting a special adjudicative proceeding, the administrative law judge may take judicial notice of matters not in the administrative record, in accordance with Utah Rules of Evidence, Rule 201.
 - (f) An administrative law judge may take any action in a special adjudicative proceeding that is not a dispositive action.
- (11)
- (a) A person who files a petition for review has the burden of demonstrating that an issue or argument raised in the petition for review has been preserved in accordance with Subsection (4).
 - (b) The administrative law judge shall dismiss, with prejudice, any issue or argument raised in a petition for review that has not been preserved in accordance with Subsection (4).
- (12) In response to a dispositive motion, within 45 days after the day on which oral argument takes place, or, if there is no oral argument, within 45 days after the day on which the reply brief on the dispositive motion is due, the administrative law judge shall:
- (a) submit a proposed dispositive action to the executive director recommending full or partial resolution of the special adjudicative proceeding, that includes:
 - (i) written findings of fact;
 - (ii) written conclusions of law; and
 - (iii) a recommended order; or
 - (b) if the administrative law judge determines that a full or partial resolution of the special adjudicative proceeding is not appropriate, issue an order that explains the basis for the administrative law judge's determination.

- (13) For each issue or argument that is not dismissed or otherwise resolved under Subsection (11) (b) or (12), the administrative law judge shall:
- (a) provide the parties an opportunity for briefing and oral argument in accordance with this section;
 - (b) conduct a review of the director's order or determination, based on the record described in Subsections (9)(b), (9)(c), and (10)(e); and
 - (c) within 60 days after the day on which the reply brief on the dispositive motion is due, submit to the executive director a proposed dispositive action, that includes:
 - (i) written findings of fact;
 - (ii) written conclusions of law; and
 - (iii) a recommended order.
- (14)
- (a) When the administrative law judge submits a proposed dispositive action to the executive director, the executive director may:
 - (i) adopt, adopt with modifications, or reject the proposed dispositive action; or
 - (ii) return the proposed dispositive action to the administrative law judge for further action as directed.
 - (b) On review of a proposed dispositive action, the executive director shall uphold all factual, technical, and scientific agency determinations that are not clearly erroneous based on the petitioner's marshaling of the evidence.
 - (c) In reviewing a proposed dispositive action during a special adjudicative proceeding, the executive director may take judicial notice of matters not in the record, in accordance with Utah Rules of Evidence, Rule 201.
 - (d) The executive director may use the executive director's technical expertise in making a determination.
- (15)
- (a) Except as provided in Subsection (15)(b), the executive director may not participate in an ex parte communication with a party to a special adjudicative proceeding regarding the merits of the special adjudicative proceeding, unless notice and opportunity to be heard are afforded to all parties involved in the proceeding.
 - (b) The executive director may discuss ongoing operational matters that require the involvement of a division director without violating Subsection (15)(a).
 - (c) Upon receiving an ex parte communication from a party to a proceeding, the executive director shall place the communication in the public record of the proceeding and afford all parties to the proceeding with an opportunity to comment on the communication.
- (16)
- (a) A party may seek judicial review in the Utah Court of Appeals of a dispositive action in a special adjudicative proceeding, in accordance with Sections 63G-4-401, 63G-4-403, and 63G-4-405.
 - (b) An appellate court shall limit its review of a dispositive action of a special adjudicative proceeding under this section to:
 - (i) the record described in Subsections (9)(b), (9)(c), (10)(e), and (14)(c); and
 - (ii) the record made by the administrative law judge and the executive director during the special adjudicative proceeding.
 - (c) During judicial review of a dispositive action, the appellate court shall:
 - (i) review all agency determinations in accordance with Subsection 63G-4-403(4), recognizing that the agency has been granted substantial discretion to interpret its governing statutes and rules; and

- (ii) uphold all factual, technical, and scientific agency determinations that are not clearly erroneous based upon the petitioner's marshaling of the evidence.

(17)

- (a) The filing of a petition for review does not:
 - (i) stay a permit order or a financial assurance determination; or
 - (ii) delay the effective date of a permit order or a portion of a financial assurance determination.
- (b) A permit order or a financial assurance determination may not be stayed or delayed unless a stay is granted under this Subsection (17).
- (c) The administrative law judge shall:
 - (i) consider a party's motion to stay a permit order or a financial assurance determination during a special adjudicative proceeding; and
 - (ii) within 45 days after the day on which the reply brief on the motion to stay is due, submit a proposed determination on the stay to the executive director.
- (d) The administrative law judge may not recommend to the executive director a stay of a permit order or a financial assurance determination, or a portion of a permit order or a portion of a financial assurance determination, unless:
 - (i) all parties agree to the stay; or
 - (ii) the party seeking the stay demonstrates that:
 - (A) the party seeking the stay will suffer irreparable harm unless the stay is issued;
 - (B) the threatened injury to the party seeking the stay outweighs whatever damage the proposed stay is likely to cause the party restrained or enjoined;
 - (C) the stay, if issued, would not be adverse to the public interest; and
 - (D) there is a substantial likelihood that the party seeking the stay will prevail on the merits of the underlying claim, or the case presents serious issues on the merits, which should be the subject of further adjudication.
- (e) A party may appeal the executive director's decision regarding a stay of a permit order or a financial assurance determination to the Utah Court of Appeals, in accordance with Section 78A-4-103.

(18)

- (a) Subject to Subsection (18)(c), the administrative law judge shall issue a written response to a non-dispositive motion within 45 days after the day on which the reply brief on the non-dispositive motion is due or, if the administrative law judge grants oral argument on the non-dispositive motion, within 45 days after the day on which oral argument takes place.
- (b) If the administrative law judge determines that the administrative law judge needs more time to issue a response to a non-dispositive motion, the administrative law judge may issue a response after the deadline described in Subsection (18)(a) if, before the deadline expires, the administrative law judge gives notice to the parties that includes:
 - (i) the amount of additional time that the administrative law judge requires; and
 - (ii) the reason the administrative law judge needs the additional time.
- (c) If the administrative law judge grants oral argument on a non-dispositive motion, the administrative law judge shall hold the oral argument within 30 days after the day on which the reply brief on the non-dispositive motion is due.

Amended by Chapter 281, 2018 General Session