

1st Sub. S.B. 21

DEPARTMENT OF ENVIRONMENTAL QUALITY BOARDS REVISIONS

HOUSE FLOOR AMENDMENTS

AMENDMENT 4

FEBRUARY 15, 2012 10:12 AM

Representative **Bill Wright** proposes the following amendments:

1. *Page 2, Lines 36 through 37:*

36 Other Special Clauses:

37 This bill provides an effective date. =

This bill coordinates with S.B. 11, Department of Environmental Quality Boards Adjudicative Proceedings, by providing substantive and technical amendments.

2. *Page 188, Lines 5802 through 5803:*

5802 (2) The amendments to Sections 19-5-102 (Effective 07/01/12) and 19-5-104

5803 (Effective 07/01/12) take effect on July 1, 2012. =

Section 115. Coordinating S.B. 21 with S.B. 11 -- Substantive and technical amendments.

If this S.B. 21 and S.B. 11, Department of Environmental Quality Boards Adjudicative Proceedings, both pass and become law, the Legislature intends that the Office of Legislative Research and General Counsel shall prepare the Utah Code database for publication as follows:

(1) amend Subsection 19-1-201(1)(d)(ii) to read as follows:

"(ii) procedural rules that govern:

(A) an adjudicative proceeding, consistent with Section 19-1-301; and

(B) a permit review adjudicative proceeding, consistent with Section 19-1-301.5.";

(2) delete Subsection 19-1-301(12); and

(3) amend Section 19-1-301.5 to read as follows:

"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 permit review adjudicative proceeding; and

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

(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) "Party" means:

(i) the director who issued the permit order being challenged in the permit review adjudicative proceeding;

- (ii) the permittee;
- (iii) the person who applied for the permit, if the permit was denied; or
- (iv) a person granted intervention by the administrative law judge.
- (d) "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.
- (e) (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.
- (f) "Permit review adjudicative proceeding" means a proceeding to resolve a challenge to a permit order.
- (2) This section governs permit review 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 permit review adjudicative proceeding.
- (4) If a public comment period was provided during the permit application process, a person who challenges a permit order, including the permit applicant, may only raise an issue or argument during the permit review adjudicative proceeding that:
- (a) the person raised during the public comment period; and
- (b) was supported with sufficient information or documentation to enable the director to fully consider the substance and significance of the issue.
- (5) The executive director shall appoint an administrative law judge, in accordance with Subsections 19-1-301(5) and (6), to conduct a permit review adjudicative proceeding.
- (6) (a) Only the following may file a request for agency action seeking review of a permit order:
- (i) a party; or
- (ii) a person who is seeking to intervene under Subsection (7).
- (b) A person who files a request for agency action seeking review of a permit order shall file the request:
- (i) within 30 days after the day on which the permit order is issued; and
- (ii) in accordance with Subsections 63G-4-201(3)(a) through (c).
- (c) A person may not raise an issue or argument in a request for agency action 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.
- (d) 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)(i).

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

(b) A person who seeks to intervene in a permit review adjudicative proceeding under this section shall, within 30 days after the day on which the permit order 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)(c)(ii); and

(ii) a timely request for agency action.

(c) An administrative law judge shall grant a petition to intervene in a permit review 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 permit review adjudicative proceeding;

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

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

(d) 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 Subsection 63G-4-207(3)(b) and (c).

(e) 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) An administrative law judge shall conduct a permit review 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 request for agency action, the administrative record shall consist of the following items, if they exist:

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

(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;

(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;

(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;
- (viii) any additional information specified by rule;
- (ix) any additional documents agreed to by the parties; and
- (x) information supplementing the record under Subsection (8)(c).
- (c) (i) There is a rebuttable presumption against supplementing the record.
- (ii) A party may move to supplement the record described in Subsection (8)(b) with technical or factual information.
- (iii) The administrative law judge may grant a motion to supplement the record described in Subsection (8)(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 administrative law judge may supplement the record with technical or factual information on the administrative law judge's own motion if the administrative law judge determines that adequate grounds exist to supplement the record under Subsections (8)(c)(iii)(A) through (C).
- (v) In supplementing the record with testimonial evidence, the administrative law judge may administer an oath or take testimony as necessary.
- (vi) The department may, in accordance with Title 63G, Chapter 3, Utah Administrative Rulemaking Act, make rules permitting further supplementation of the record.
- (9) (a) The administrative law judge shall review and respond to a request for agency action 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 pleadings in accordance with Section 63G-4-204.
- (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, following the relevant procedures for formal adjudicative proceedings.
- (d) The administrative law judge, in conducting a permit review adjudicative proceeding:
- (i) may not participate in an ex parte communication with a party to the permit review adjudicative proceeding regarding the merits of the permit review 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 permit review 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 permit review adjudicative proceeding that is not a dispositive action.
- (10) (a) A person who files a request for agency action has the burden of demonstrating that an issue or argument raised in the request for agency action has been preserved in accordance with Subsection (4).

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

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

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

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

- (a) provide the parties an opportunity for briefing and oral argument;
- (b) conduct a review of the director's determination, based on the record described in Subsections (8)(b), (8)(c), and (9)(e); and
- (c) 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.

(13) (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 supported by substantial evidence taken from the record as a whole.

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

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

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

(e) The executive director may use the executive director's technical expertise in making a determination.

(14) (a) A party may seek judicial review in the Utah Court of Appeals of a dispositive action in a permit review 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 permit review adjudicative proceeding to:

- (i) the record described in Subsections (8)(b), (8)(c), (9)(e), and (13)(d); and
- (ii) the record made by the administrative law judge and the executive director during the permit review

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 supported by substantial evidence viewed in light of the record as a whole.

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

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

(c) The administrative law judge shall:

- (i) consider a party's motion to stay a permit during a permit review adjudicative proceeding; and
- (ii) 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, or a portion of a permit, 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 to the Utah Court of Appeals, in accordance with Section 78A-4-103."

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