

**FINANCIAL ASSURANCE DETERMINATION REVIEW**

**PROCESS**

2015 GENERAL SESSION

STATE OF UTAH

**Chief Sponsor: J. Stuart Adams**

House Sponsor: Mike K. McKell

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**LONG TITLE**

**General Description:**

This bill modifies the Environmental Quality Code by amending provisions for certain special adjudicative proceedings related to financial assurance and by enacting certain rulemaking requirements related to waste disposal.

**Highlighted Provisions:**

This bill:

- ▶ defines terms;
- ▶ provides for arbitration or a special adjudicative proceeding for a challenge of a financial assurance determination made by the director of the Division of Radiation Control or the director of the Division of Solid and Hazardous Waste;
- ▶ requires the Radiation Control Board to include certain provisions in rules for financial assurance requirements for radioactive waste land disposal facilities; and
- ▶ makes technical changes.

**Money Appropriated in this Bill:**

None

**Other Special Clauses:**

None

**Utah Code Sections Affected:**

AMENDS:



28 **19-1-201**, as last amended by Laws of Utah 2012, Chapter 360 and last amended by  
29 Coordination Clause, Laws of Utah 2012, Chapter 360

30 **19-1-301**, as last amended by Laws of Utah 2012, Chapters 333, 360 and last amended  
31 by Coordination Clause, Laws of Utah 2012, Chapter 360

32 **19-1-301.5**, as enacted by Laws of Utah 2012, Chapter 333 and last amended by  
33 Coordination Clause, Laws of Utah 2012, Chapter 360

34 **19-2-108**, as last amended by Laws of Utah 2012, Chapters 333 and 360

35 **19-3-104**, as last amended by Laws of Utah 2012, Chapter 360

36 **63G-4-102**, as last amended by Laws of Utah 2012, Chapter 333

37 **78A-4-103**, as last amended by Laws of Utah 2012, Chapter 333

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

40 Section 1. Section **19-1-201** is amended to read:

41 **19-1-201. Powers and duties of department -- Rulemaking authority.**

42 (1) The department shall:

43 (a) enter into cooperative agreements with the Department of Health to delineate  
44 specific responsibilities to assure that assessment and management of risk to human health  
45 from the environment are properly administered;

46 (b) consult with the Department of Health and enter into cooperative agreements, as  
47 needed, to ensure efficient use of resources and effective response to potential health and safety  
48 threats from the environment, and to prevent gaps in protection from potential risks from the  
49 environment to specific individuals or population groups;

50 (c) coordinate implementation of environmental programs to maximize efficient use of  
51 resources by developing, with local health departments, a Comprehensive Environmental  
52 Service Delivery Plan that:

53 (i) recognizes that the department and local health departments are the foundation for  
54 providing environmental health programs in the state;

55 (ii) delineates the responsibilities of the department and each local health department  
56 for the efficient delivery of environmental programs using federal, state, and local authorities,  
57 responsibilities, and resources;

58 (iii) provides for the delegation of authority and pass through of funding to local health

59 departments for environmental programs, to the extent allowed by applicable law, identified in  
60 the plan, and requested by the local health department; and

61 (iv) is reviewed and updated annually; and

62 (d) make rules, in accordance with Title 63G, Chapter 3, Utah Administrative  
63 Rulemaking Act, as follows:

64 (i) for a board created in Section 19-1-106, rules regarding:

65 (A) board meeting attendance; and

66 (B) conflicts of interest procedures; and

67 (ii) procedural rules that govern:

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

69 (B) a [~~permit review~~] special adjudicative proceeding, consistent with Section  
70 19-1-301.5.

71 (2) The department may:

72 (a) investigate matters affecting the environment;

73 (b) investigate and control matters affecting the public health when caused by  
74 environmental hazards;

75 (c) prepare, publish, and disseminate information to inform the public concerning  
76 issues involving environmental quality;

77 (d) establish and operate programs, as authorized by this title, necessary for protection  
78 of the environment and public health from environmental hazards;

79 (e) use local health departments in the delivery of environmental health programs to  
80 the extent provided by law;

81 (f) enter into contracts with local health departments or others to meet responsibilities  
82 established under this title;

83 (g) acquire real and personal property by purchase, gift, devise, and other lawful  
84 means;

85 (h) prepare and submit to the governor a proposed budget to be included in the budget  
86 submitted by the governor to the Legislature;

87 (i) (i) establish a schedule of fees that may be assessed for actions and services of the  
88 department according to the procedures and requirements of Section 63J-1-504; and

89 (ii) in accordance with Section 63J-1-504, all fees shall be reasonable, fair, and reflect

90 the cost of services provided;

91 (j) prescribe by rule reasonable requirements not inconsistent with law relating to  
92 environmental quality for local health departments;

93 (k) perform the administrative functions of the boards established by Section 19-1-106,  
94 including the acceptance and administration of grants from the federal government and from  
95 other sources, public or private, to carry out the board's functions;

96 (l) upon the request of any board or a division director, provide professional, technical,  
97 and clerical staff and field and laboratory services, the extent of which are limited by the funds  
98 available to the department for the staff and services; and

99 (m) establish a supplementary fee, not subject to Section 63J-1-504, to provide service  
100 that the person paying the fee agrees by contract to be charged for the service in order to  
101 efficiently utilize department resources, protect department permitting processes, address  
102 extraordinary or unanticipated stress on permitting processes, or make use of specialized  
103 expertise.

104 (3) In providing service under Subsection (2)(m), the department may not provide  
105 service in a manner that impairs any other person's service from the department.

106 Section 2. Section 19-1-301 is amended to read:

107 **19-1-301. Adjudicative proceedings.**

108 (1) As used in this section, "dispositive action" means a final agency action that:

109 (a) the executive director takes following an adjudicative proceeding on a request for  
110 agency action; and

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

112 (2) This section governs adjudicative proceedings that are not ~~[permit review]~~ special  
113 adjudicative proceedings as defined in Section 19-1-301.5.

114 (3) (a) The department and its boards shall comply with the procedures and  
115 requirements of Title 63G, Chapter 4, Administrative Procedures Act.

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

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

119 (ii) this title;

120 (iii) rules adopted by the department under:

- 121 (A) Subsection 63G-4-102(6); or
- 122 (B) this title; and
- 123 (iv) the Utah Rules of Civil Procedure, in the absence of a procedure established under
- 124 Subsection (3)(b)(i), (ii), or (iii).
- 125 (4) Except as provided in Section 19-2-113, an administrative law judge shall hear a
- 126 party's request for agency action.
- 127 (5) The executive director shall appoint an administrative law judge who:
- 128 (a) is a member in good standing of the Utah State Bar;
- 129 (b) has a minimum of:
- 130 (i) 10 years of experience practicing law; and
- 131 (ii) five years of experience practicing in the field of:
- 132 (A) environmental compliance;
- 133 (B) natural resources;
- 134 (C) regulation by an administrative agency; or
- 135 (D) a field related to a field listed in Subsections (5)(b)(ii)(A) through (C); and
- 136 (c) has a working knowledge of the federal laws and regulations and state statutes and
- 137 rules applicable to a request for agency action.
- 138 (6) In appointing an administrative law judge who meets the qualifications described in
- 139 Subsection (5), the executive director may:
- 140 (a) compile a list of persons who may be engaged as an administrative law judge pro
- 141 tempore by mutual consent of the parties to an adjudicative proceeding;
- 142 (b) appoint an assistant attorney general as an administrative law judge pro tempore; or
- 143 (c) (i) appoint an administrative law judge as an employee of the department; and
- 144 (ii) assign the administrative law judge responsibilities in addition to conducting an
- 145 adjudicative proceeding.
- 146 (7) (a) An administrative law judge:
- 147 (i) shall conduct an adjudicative proceeding;
- 148 (ii) may take any action that is not a dispositive action; and
- 149 (iii) shall submit to the executive director a proposed dispositive action, including:
- 150 (A) written findings of fact;
- 151 (B) written conclusions of law; and

- 152 (C) a recommended order.
- 153 (b) The executive director may:
  - 154 (i) approve, approve with modifications, or disapprove a proposed dispositive action
  - 155 submitted to the executive director under Subsection (7)(a); or
  - 156 (ii) return the proposed dispositive action to the administrative law judge for further
  - 157 action as directed.
- 158 (c) In making a decision regarding a dispositive action, the executive director may seek
- 159 the advice of, and consult with:
  - 160 (i) the assistant attorney general assigned to the department; or
  - 161 (ii) a special master who:
    - 162 (A) is appointed by the executive director; and
    - 163 (B) is an expert in the subject matter of the proposed dispositive action.
- 164 (d) The executive director shall base a final dispositive action on the record of the
- 165 proceeding before the administrative law judge.
- 166 (8) To conduct an adjudicative proceeding, an administrative law judge may:
  - 167 (a) compel:
    - 168 (i) the attendance of a witness; and
    - 169 (ii) the production of a document or other evidence;
  - 170 (b) administer an oath;
  - 171 (c) take testimony; and
  - 172 (d) receive evidence as necessary.
- 173 (9) A party may appear before an administrative law judge in person, through an agent
- 174 or employee, or as provided by department rule.
- 175 (10) (a) An administrative law judge or the executive director may not participate in an
- 176 ex parte communication with a party to an adjudicative proceeding regarding the merits of the
- 177 adjudicative proceeding unless notice and an opportunity to be heard are afforded to all parties.
- 178 (b) If an administrative law judge or the executive director receives an ex parte
- 179 communication, the person who receives the ex parte communication shall place the
- 180 communication into the public record of the proceedings and afford all parties an opportunity
- 181 to comment on the information.
- 182 (11) Nothing in this section limits a party's right to an adjudicative proceeding under

183 Title 63G, Chapter 4, Administrative Procedures Act.

184 Section 3. Section **19-1-301.5** is amended to read:

185 **19-1-301.5. Permit review and financial assurance determination special**  
 186 **adjudicative proceedings.**

187 (1) As used in this section:

188 (a) "Dispositive action" means a final agency action that:

189 (i) the executive director takes as part of a [~~permit review~~] special adjudicative  
 190 proceeding; and

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

192 (b) "Dispositive motion" means a motion that is equivalent to:

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

194 (ii) a motion for judgment on the pleadings under Utah Rules of Civil Procedure, Rule  
 195 12(c); or

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

197 (c) "Financial assurance determination" means a decision on whether a facility, site,  
 198 plan, party, broker, owner, operator, generator, or permittee has met financial assurance or  
 199 financial responsibility requirements as determined by the director of the:

200 (i) Division of Radiation Control under Subsection 19-3-104(12); or

201 (ii) Division of Solid and Hazardous Waste under Subsection 19-6-108(9)(c).

202 [~~(c)~~] (d) "Party" means:

203 (i) the director who issued the permit order or financial assurance determination that is  
 204 being challenged in the [~~permit review~~] special adjudicative proceeding under this section;

205 (ii) the permittee;

206 (iii) the person who applied for the permit, if the permit was denied; [~~or~~]

207 (iv) the person who is subject to a financial assurance determination; or

208 [~~(iv)~~] (v) a person granted intervention by the administrative law judge.

209 [~~(d)~~] (e) "Permit" means any of the following issued under this title:

210 (i) a permit;

211 (ii) a plan;

212 (iii) a license;

213 (iv) an approval order; or

214 (v) another administrative authorization made by a director.  
215 ~~[(e)]~~ (f) (i) "Permit order" means an order issued by a director that:  
216 (A) approves a permit;  
217 (B) renews a permit;  
218 (C) denies a permit;  
219 (D) modifies or amends a permit; or  
220 (E) revokes and reissues a permit.  
221 (ii) "Permit order" does not include an order terminating a permit.  
222 ~~[(f) "Permit review adjudicative proceeding" means a proceeding to resolve a challenge~~  
223 ~~to a permit order.]~~  
224 (g) "Special adjudicative proceeding" means a proceeding under this section to resolve  
225 a challenge to a:  
226 (i) permit order; or  
227 (ii) financial assurance determination.  
228 (2) This section governs ~~[permit review]~~ special adjudicative proceedings.  
229 (3) Except as expressly provided in this section, the provisions of Title 63G, Chapter 4,  
230 Administrative Procedures Act, do not apply to a ~~[permit review]~~ special adjudicative  
231 proceeding under this section.  
232 (4) If a public comment period was provided during the permit application process or  
233 the financial assurance determination process, a person who challenges ~~[a permit order,~~  
234 ~~including the permit applicant,]~~ an order, application, or determination may only raise an issue  
235 or argument during the ~~[permit review]~~ special adjudicative proceeding that:  
236 (a) the person raised during the public comment period; and  
237 (b) was supported with sufficient information or documentation to enable the director  
238 to fully consider the substance and significance of the issue.  
239 (5) The executive director shall appoint an administrative law judge, in accordance  
240 with Subsections 19-1-301(5) and (6), to conduct a ~~[permit review]~~ special adjudicative  
241 proceeding under this section.  
242 (6) (a) Only the following may file a request for agency action seeking review of a  
243 permit order or a financial assurance determination:  
244 (i) a party; or



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

246 (b) A person who files a request for agency action seeking review of a permit order or a  
247 financial assurance determination shall file the request:

248 (i) within 30 days after the day on which the permit order or the financial assurance  
249 determination is issued; and

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

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

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

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

255 (d) The department may, in accordance with Title 63G, Chapter 3, Utah Administrative  
256 Rulemaking Act, make rules allowing the extension of the filing deadline described in  
257 Subsection (6)(b)(i).

258 (7) (a) A person who is not a party may not participate in a [~~permit review~~] special  
259 adjudicative proceeding under this section unless the person is granted the right to intervene  
260 under this Subsection (7).

261 (b) A person who seeks to intervene in a [~~permit review~~] special adjudicative  
262 proceeding under this section shall, within 30 days after the day on which the permit order or  
263 the financial assurance determination being challenged was issued, file:

264 (i) a petition to intervene that:

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

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

267 and

268 (ii) a timely request for agency action.

269 (c) An administrative law judge shall grant a petition to intervene in a [~~permit review~~]  
270 special adjudicative proceeding, if:

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

272 (ii) the petitioner:

273 (A) demonstrates that the petitioner's legal interests may be substantially affected by  
274 the [~~permit review~~] special adjudicative proceeding;

275 (B) demonstrates that the interests of justice and the orderly and prompt conduct of the

276 [~~permit review~~] special adjudicative proceeding will not be materially impaired by allowing the  
277 intervention; and

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

280 (d) An administrative law judge:

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

283 (ii) may impose conditions on intervenors as described in Subsections 63G-4-207(3)(b)  
284 and (c).

285 (e) The department may, in accordance with Title 63G, Chapter 3, Utah Administrative  
286 Rulemaking Act, make rules allowing the extension of the filing deadline described in  
287 Subsection (7)(b).

288 (8) (a) An administrative law judge shall conduct a [~~permit review~~] special  
289 adjudicative proceeding based only on the administrative record and not as a trial de novo.

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

292 (i) (A) for a permit review, the permit application, draft permit, and final permit; or  
293 (B) for a financial assurance determination review, the proposed financial assurance  
294 determination from the owner or operator of the facility, the draft financial assurance  
295 determination, and the final financial assurance determination;

296 (ii) each statement of basis, fact sheet, engineering review, or other substantive  
297 explanation designated by the director as part of the basis for the decision relating to the permit  
298 order or the financial assurance determination;

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

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

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

303 (vi) responses to comments that are designated by the director as part of the basis for  
304 the decision relating to the permit order or the financial assurance determination;

305 (vii) any information that is:

306 (A) requested by and submitted to the director; and

307 (B) designated by the director as part of the basis for the decision relating to the permit  
308 order or the financial assurance determination;

309 (viii) any additional information specified by rule;

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

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

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

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

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

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

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

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

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

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

327 (vi) The department may, in accordance with Title 63G, Chapter 3, Utah  
328 Administrative Rulemaking Act, make rules permitting further supplementation of the record.

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

332 (b) The administrative law judge shall require the parties to file responsive pleadings in  
333 accordance with Section [63G-4-204](#).

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

337 (d) The administrative law judge, in conducting a [~~permit review~~] special adjudicative

338 proceeding:

339 (i) may not participate in an ex parte communication with a party to the [~~permit~~  
340 ~~review~~] special adjudicative proceeding regarding the merits of the [~~permit review~~] special  
341 adjudicative proceeding unless notice and an opportunity to be heard are afforded to all parties;  
342 and

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

346 (e) In conducting a [~~permit review~~] special adjudicative proceeding, the administrative  
347 law judge may take judicial notice of matters not in the administrative record, in accordance  
348 with Utah Rules of Evidence, Rule 201.

349 (f) An administrative law judge may take any action in a [~~permit review~~] special  
350 adjudicative proceeding that is not a dispositive action.

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

354 (b) The administrative law judge shall dismiss, with prejudice, any issue or argument  
355 raised in a request for agency action that has not been preserved in accordance with Subsection  
356 (4).

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

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

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

- 365 (a) provide the parties an opportunity for briefing and oral argument;  
366 (b) conduct a review of the director's order or determination, based on the record  
367 described in Subsections (8)(b), (8)(c), and (9)(e); and  
368 (c) submit to the executive director a proposed dispositive action, that includes:

369 (i) written findings of fact;

370 (ii) written conclusions of law; and

371 (iii) a recommended order.

372 (13) (a) When the administrative law judge submits a proposed dispositive action to  
373 the executive director, the executive director may:

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

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

377 (b) On review of a proposed dispositive action, the executive director shall uphold all  
378 factual, technical, and scientific agency determinations that are supported by substantial  
379 evidence taken from the record as a whole.

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

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

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

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

392 (14) (a) A party may seek judicial review in the Utah Court of Appeals of a dispositive  
393 action in a [~~permit review~~] special adjudicative proceeding, in accordance with Sections  
394 [63G-4-401](#), [63G-4-403](#), and [63G-4-405](#).

395 (b) An appellate court shall limit its review of a dispositive action of a [~~permit review~~]  
396 special adjudicative proceeding under this section to:

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

398 (ii) the record made by the administrative law judge and the executive director during  
399 the [~~permit review~~] special adjudicative proceeding.

- 400 (c) During judicial review of a dispositive action, the appellate court shall:
- 401 (i) review all agency determinations in accordance with Subsection 63G-4-403(4),
- 402 recognizing that the agency has been granted substantial discretion to interpret its governing
- 403 statutes and rules; and
- 404 (ii) uphold all factual, technical, and scientific agency determinations that are
- 405 supported by substantial evidence viewed in light of the record as a whole.
- 406 (15) (a) The filing of a request for agency action does not:
- 407 (i) stay a permit order or a financial assurance determination; or
- 408 (ii) delay the effective date of a permit order or a financial assurance determination.
- 409 (b) A permit order or a financial assurance determination may not be stayed or delayed
- 410 unless a stay is granted under this Subsection (15).
- 411 (c) The administrative law judge shall:
- 412 (i) consider a party's motion to stay a permit order or a financial assurance
- 413 determination during a [~~permit review~~] special adjudicative proceeding; and
- 414 (ii) submit a proposed determination on the stay to the executive director.
- 415 (d) The administrative law judge may not recommend to the executive director a stay
- 416 of a permit order or a financial assurance determination, or a portion of a permit order or a
- 417 portion of a financial assurance determination, unless:
- 418 (i) all parties agree to the stay; or
- 419 (ii) the party seeking the stay demonstrates that:
- 420 (A) the party seeking the stay will suffer irreparable harm unless the stay is issued;
- 421 (B) the threatened injury to the party seeking the stay outweighs whatever damage the
- 422 proposed stay is likely to cause the party restrained or enjoined;
- 423 (C) the stay, if issued, would not be adverse to the public interest; and
- 424 (D) there is a substantial likelihood that the party seeking the stay will prevail on the
- 425 merits of the underlying claim, or the case presents serious issues on the merits, which should
- 426 be the subject of further adjudication.
- 427 (e) A party may appeal the executive director's decision regarding a stay of a permit
- 428 order or a financial assurance determination to the Utah Court of Appeals, in accordance with
- 429 Section 78A-4-103.
- 430 Section 4. Section 19-2-108 is amended to read:

431           **19-2-108. Notice of construction or modification of installations required --**  
432 **Authority of director to prohibit construction -- Hearings -- Limitations on authority of**  
433 **director -- Inspections authorized.**

434           (1) Notice shall be given to the director by any person planning to construct a new  
435 installation which will or might reasonably be expected to be a source or indirect source of air  
436 pollution or to make modifications to an existing installation which will or might reasonably be  
437 expected to increase the amount of or change the character or effect of air contaminants  
438 discharged, so that the installation may be expected to be a source or indirect source of air  
439 pollution, or by any person planning to install an air cleaning device or other equipment  
440 intended to control emission of air contaminants.

441           (2) (a) (i) The director may require, as a condition precedent to the construction,  
442 modification, installation, or establishment of the air contaminant source or indirect source, the  
443 submission of plans, specifications, and other information as he finds necessary to determine  
444 whether the proposed construction, modification, installation, or establishment will be in  
445 accord with applicable rules in force under this chapter.

446           (ii) Plan approval for an indirect source may be delegated by the director to a local  
447 authority when requested and upon assurance that the local authority has and will maintain  
448 sufficient expertise to insure that the planned installation will meet the requirements  
449 established by law.

450           (b) If within 90 days after the receipt of plans, specifications, or other information  
451 required under this subsection, the director determines that the proposed construction,  
452 installation, or establishment or any part of it will not be in accord with the requirements of this  
453 chapter or applicable rules or that further time, not exceeding three extensions of 30 days each,  
454 is required by the director to adequately review the plans, specifications, or other information,  
455 he shall issue an order prohibiting the construction, installation, or establishment of the air  
456 contaminant source or sources in whole or in part.

457           (3) In addition to any other remedies but prior to invoking any such other remedies, any  
458 person aggrieved by the issuance of an order either granting or denying a request for the  
459 construction of a new installation, [~~and prior to invoking any such other remedies~~] shall, upon  
460 request, in accordance with the rules of the department, be entitled to a [~~permit review~~] special  
461 adjudicative proceeding conducted by an administrative law judge as provided by Section

462 19-1-301.5.

463 (4) Any features, machines, and devices constituting parts of or called for by plans,  
464 specifications, or other information submitted under Subsection (1) shall be maintained in good  
465 working order.

466 (5) This section does not authorize the director to require the use of machinery,  
467 devices, or equipment from a particular supplier or produced by a particular manufacturer if the  
468 required performance standards may be met by machinery, devices, or equipment otherwise  
469 available.

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

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

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

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

480 Section 5. Section 19-3-104 is amended to read:

481 **19-3-104. Registration and licensing of radiation sources by department --**  
482 **Assessment of fees -- Rulemaking authority and procedure -- Siting criteria -- Indirect**  
483 **and direct costs.**

484 (1) As used in this section:

485 (a) "Decommissioning" includes financial assurance.

486 (b) "Source material" and "byproduct material" have the same definitions as in the  
487 Atomic Energy Act of 1954, 42 U.S.C.[A] Sec. 2014, [~~Atomic Energy Act of 1954,~~] as  
488 amended.

489 (2) The division may require the registration or licensing of radiation sources that  
490 constitute a significant health hazard.

491 (3) All sources of ionizing radiation, including ionizing radiation producing machines,  
492 shall be registered or licensed by the department.



493 (4) [~~The~~] In accordance with Title 63G, Chapter 3, Utah Administrative Rulemaking  
494 Act, the board may make rules:

495 (a) necessary for controlling exposure to sources of radiation that constitute a  
496 significant health hazard;

497 (b) to meet the requirements of federal law relating to radiation control to ensure the  
498 radiation control program under this part is qualified to maintain primacy from the federal  
499 government;

500 (c) to establish:

501 (i) board accreditation requirements and procedures for mammography facilities; and

502 (ii) certification procedure and qualifications for persons who survey mammography  
503 equipment and oversee quality assurance practices at mammography facilities; and

504 (d) as necessary regarding the possession, use, transfer, or delivery of source and  
505 byproduct material and the disposal of byproduct material to establish requirements for:

506 (i) the licensing, operation, decontamination, and decommissioning, including financial  
507 assurances; and

508 (ii) the reclamation of sites, structures, and equipment used in conjunction with the  
509 activities described in this Subsection (4).

510 (5) (a) On and after January 1, 2003, a fee is imposed for the regulation of source and  
511 byproduct material and the disposal of byproduct material at uranium mills or commercial  
512 waste facilities, as provided in this Subsection (5).

513 (b) On and after January 1, 2003<sub>2</sub> through March 30, 2003:

514 (i) \$6,667 per month for uranium mills or commercial sites disposing of or  
515 reprocessing byproduct material; and

516 (ii) \$4,167 per month for those uranium mills the director has determined are on  
517 standby status.

518 (c) On and after March 31, 2003<sub>2</sub> through June 30, 2003<sub>2</sub> the same fees as in  
519 Subsection (5)(b) apply, but only if the federal Nuclear Regulatory Commission grants to Utah  
520 an amendment for agreement state status for uranium recovery regulation on or before March  
521 30, 2003.

522 (d) If the Nuclear Regulatory Commission does not grant the amendment for state  
523 agreement status on or before March 30, 2003, fees under Subsection (5)(e) do not apply and

524 are not required to be paid until on and after the later date of:

525 (i) October 1, 2003; or

526 (ii) the date the Nuclear Regulatory Commission grants to Utah an amendment for  
527 agreement state status for uranium recovery regulation.

528 (e) For the payment periods beginning on and after July 1, 2003, the department shall  
529 establish the fees required under Subsection (5)(a) under Section [63J-1-504](#), subject to the  
530 restrictions under Subsection (5)(d).

531 (f) The division shall deposit fees it receives under this Subsection (5) into the  
532 Environmental Quality Restricted Account created in Section [19-1-108](#).

533 (6) (a) The division shall assess fees for registration, licensing, and inspection of  
534 radiation sources under this section.

535 (b) The division shall comply with the requirements of Section [63J-1-504](#) in assessing  
536 fees for licensure and registration.

537 (7) The division shall coordinate its activities with the Department of Health rules  
538 made under Section [26-21a-203](#).

539 (8) (a) Except as provided in Subsection (9), and in accordance with Title 63G,  
540 Chapter 3, Utah Administrative Rulemaking Act, the board may not adopt rules, for the  
541 purpose of the state assuming responsibilities from the United States Nuclear Regulatory  
542 Commission with respect to regulation of sources of ionizing radiation, that are more stringent  
543 than the corresponding federal regulations which address the same circumstances.

544 (b) In adopting those rules, the board may incorporate corresponding federal  
545 regulations by reference.

546 (9) (a) The board may adopt rules more stringent than corresponding federal  
547 regulations for the purpose described in Subsection (8) only if it makes a written finding after  
548 public comment and hearing and based on evidence in the record that corresponding federal  
549 regulations are not adequate to protect public health and the environment of the state.

550 (b) Those findings shall be accompanied by an opinion referring to and evaluating the  
551 public health and environmental information and studies contained in the record which form  
552 the basis for the board's conclusion.

553 (10) (a) [~~The~~] In accordance with Title 63G, Chapter 3, Utah Administrative  
554 Rulemaking Act, the board shall by rule:

555 (i) authorize independent qualified experts to conduct inspections required under this  
556 chapter of x-ray facilities registered with the division; and

557 (ii) establish qualifications and certification procedures necessary for independent  
558 experts to conduct these inspections.

559 (b) Independent experts under this Subsection (10) are not considered employees or  
560 representatives of the division or the state when conducting the inspections.

561 (11) (a) ~~[The]~~ In accordance with Title 63G, Chapter 3, Utah Administrative  
562 Rulemaking Act, the board may by rule establish criteria for siting commercial low-level  
563 radioactive waste treatment or disposal facilities, subject to the prohibition imposed by Section  
564 19-3-103.7.

565 (b) Subject to Subsection 19-3-105(10), any facility under Subsection (11)(a) for which  
566 a radioactive material license is required by this section shall comply with those criteria.

567 (c) Subject to Subsection 19-3-105(10), a facility may not receive a radioactive  
568 material license until siting criteria have been established by the board. The criteria also apply  
569 to facilities that have applied for but not received a radioactive material license.

570 (12) ~~[The board shall by rule establish]~~ In accordance with Title 63G, Chapter 3, Utah  
571 Administrative Rulemaking Act, the board shall make rules that establish financial assurance  
572 requirements for closure and postclosure care of radioactive waste land disposal facilities~~;~~  
573 ~~taking into account existing financial assurance requirements].~~

574 (13) The rules described in Subsection (12) shall include the following provisions:

575 (a) the financial assurance shall be based on an annual calculation and shall include the  
576 costs of closure and postclosure care of radioactive waste land disposal facilities in all areas  
577 subject to the licensed or permitted portions of the facility;

578 (b) financial assurance for closing the areas within the disposal embankments shall be  
579 limited to the cost of closing areas where waste has been disposed; and

580 (c) at the option of the licensee or permittee, the financial assurance requirements shall  
581 be based on:

582 (i) an annual calculation using the current edition of RS Means Facilities Construction  
583 Cost Data or using a process, including an indirect cost multiplier, previously agreed to  
584 between the licensee or permittee and the director; or

585 (ii) (A) for an initial financial assurance determination and for each financial assurance

586 determination every five years thereafter, a competitive site-specific bid for closure and  
587 postclosure care of the facility at least once every five years; and

588 (B) for each year between a financial assurance determination as described in  
589 Subsection (13)(c)(ii)(A), an annual inflation adjustment to the financial assurance  
590 determination using the Gross Domestic Product Implicit Price Deflator of the Bureau of  
591 Economic Analysis, United States Department of Commerce, calculated by dividing the latest  
592 annual deflator by the deflator for the previous year.

593 (14) Subject to the financial assurance requirements described in Subsections (12) and  
594 (13), if the director and the licensee or permittee do not agree on a final financial assurance  
595 determination made by the director, the licensee or permittee may appeal the determination in:

596 (a) an arbitration proceeding governed by Title 78B, Chapter 11, Utah Uniform  
597 Arbitration Act, with the costs of the arbitration to be split equally between the licensee or  
598 permittee and the division, if both the licensee or permittee and the director agree in writing to  
599 arbitration; or

600 (b) a special adjudicative proceeding under Section [19-1-301.5](#).

601 Section 6. Section **63G-4-102** is amended to read:

602 **63G-4-102. Scope and applicability of chapter.**

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

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

609 (b) judicial review of the action.

610 (2) This chapter does not govern:

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

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

617 (c) state agency action relating to extradition, to the granting of a pardon or parole, a  
618 commutation or termination of a sentence, or to the rescission, termination, or revocation of  
619 parole or probation, to the discipline of, resolution of a grievance of, supervision of,  
620 confinement of, or the treatment of an inmate or resident of a correctional facility, the Utah  
621 State Hospital, the Utah State Developmental Center, or a person in the custody or jurisdiction  
622 of the Division of Substance Abuse and Mental Health, or a person on probation or parole, or  
623 judicial review of the action;

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

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

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

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

636 (h) state agency action under Title 7, Chapter 1, Part 3, Powers and Duties of  
637 Commissioner of Financial Institutions, Title 7, Chapter 2, Possession of Depository Institution  
638 by Commissioner, Title 7, Chapter 19, Acquisition of Failing Depository Institutions or  
639 Holding Companies, and Title 63G, Chapter 7, Governmental Immunity Act of Utah, or  
640 judicial review of the action;

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

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

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

656 (l) state agency action, to the extent required by federal statute or regulation, to be  
657 conducted according to federal procedures;

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

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

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

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

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

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

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

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

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

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

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

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

680 (b) challenge an agency's rule.

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

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

684 (i) encourage settlement;

685 (ii) clarify the issues;

686 (iii) simplify the evidence;

687 (iv) facilitate discovery; or

688 (v) expedite the proceeding; or

689 (b) granting a timely motion to dismiss or for summary judgment if the requirements of

690 Rule 12(b) or Rule 56 of the Utah Rules of Civil Procedure are met by the moving party,

691 except to the extent that the requirements of those rules are modified by this chapter.

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

694 (b) Judicial review of a declaratory proceeding authorized by Section [63G-4-503](#) is  
695 governed by this chapter.

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

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

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

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

708 (9) Nothing in this chapter may be interpreted to restrict a presiding officer, for good  
709 cause shown, from lengthening or shortening a time period prescribed in this chapter, except

710 the time period established for judicial review.

711 (10) Notwithstanding any other provision of this section, this chapter does not apply to  
712 a [permit review] special adjudicative proceeding, as defined in Section 19-1-301.5, except to  
713 the extent expressly provided in Section 19-1-301.5.

714 Section 7. Section 78A-4-103 is amended to read:

715 **78A-4-103. Court of Appeals jurisdiction.**

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

- 718 (a) to carry into effect its judgments, orders, and decrees; or
- 719 (b) in aid of its jurisdiction.

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

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

723 (A) a formal adjudicative proceeding of a state agency; or

724 (B) a [permit review] special adjudicative proceeding, as [~~defined~~] described in Section  
725 19-1-301.5; or

726 (ii) an appeal from the district court review of an informal adjudicative proceeding of  
727 an agency other than the following:

728 (A) the Public Service Commission;

729 (B) the State Tax Commission;

730 (C) the School and Institutional Trust Lands Board of Trustees;

731 (D) the Division of Forestry, Fire, and State Lands, for an action reviewed by the  
732 executive director of the Department of Natural Resources;

733 (E) the Board of Oil, Gas, and Mining; or

734 (F) the state engineer;

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

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

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

739 (c) appeals from the juvenile courts;

740 (d) interlocutory appeals from any court of record in criminal cases, except those



741 involving a charge of a first degree or capital felony;  
742 (e) appeals from a court of record in criminal cases, except those involving a  
743 conviction or charge of a first degree felony or capital felony;  
744 (f) appeals from orders on petitions for extraordinary writs sought by persons who are  
745 incarcerated or serving any other criminal sentence, except petitions constituting a challenge to  
746 a conviction of or the sentence for a first degree or capital felony;  
747 (g) appeals from the orders on petitions for extraordinary writs challenging the  
748 decisions of the Board of Pardons and Parole except in cases involving a first degree or capital  
749 felony;  
750 (h) appeals from district court involving domestic relations cases, including, but not  
751 limited to, divorce, annulment, property division, child custody, support, parent-time,  
752 visitation, adoption, and paternity;  
753 (i) appeals from the Utah Military Court; and  
754 (j) cases transferred to the Court of Appeals from the Supreme Court.  
755 (3) The Court of Appeals upon its own motion only and by the vote of four judges of  
756 the court may certify to the Supreme Court for original appellate review and determination any  
757 matter over which the Court of Appeals has original appellate jurisdiction.  
758 (4) The Court of Appeals shall comply with the requirements of Title 63G, Chapter 4,  
759 Administrative Procedures Act, in its review of agency adjudicative proceedings.

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**Legislative Review Note**  
as of 2-9-15 11:05 AM

**Office of Legislative Research and General Counsel**