

ADMINISTRATIVE LAW JUDGE AMENDMENTS

2015 GENERAL SESSION

STATE OF UTAH

Chief Sponsor: Margaret Dayton

House Sponsor: Keith Grover

LONG TITLE

General Description:

This bill modifies provisions relating to permit review adjudicative proceedings.

Highlighted Provisions:

This bill:

- ▶ addresses the procedures governing an administrative review of an order relating to a permit issued by a director within the Department of Environmental Quality; and
- ▶ makes technical and conforming changes.

Money Appropriated in this Bill:

None

Other Special Clauses:

None

Utah Code Sections Affected:

AMENDS:

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

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

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

19-1-301.5. Permit review adjudicative proceedings.

(1) As used in this section:



- 28 (a) "Dispositive action" means a final agency action that:
- 29 (i) the executive director takes as part of a permit review adjudicative proceeding; and
- 30 (ii) is subject to judicial review, in accordance with Subsection [~~(14)~~] (15).
- 31 (b) "Dispositive motion" means a motion that is equivalent to:
- 32 (i) a motion to dismiss under Utah Rules of Civil Procedure, Rule 12(b)(6);
- 33 (ii) a motion for judgment on the pleadings under Utah Rules of Civil Procedure, Rule
- 34 12(c); or
- 35 (iii) a motion for summary judgment under Utah Rules of Civil Procedure, Rule 56.
- 36 (c) "Party" means:
- 37 (i) the director who issued the permit order being challenged in the permit review
- 38 adjudicative proceeding;
- 39 (ii) the permittee;
- 40 (iii) the person who applied for the permit, if the permit was denied; or
- 41 (iv) a person granted intervention by the administrative law judge.
- 42 (d) "Permit" means any of the following issued under this title:
- 43 (i) a permit;
- 44 (ii) a plan;
- 45 (iii) a license;
- 46 (iv) an approval order; or
- 47 (v) another administrative authorization made by a director.
- 48 (e) (i) "Permit order" means an order issued by a director that:
- 49 (A) approves a permit;
- 50 (B) renews a permit;
- 51 (C) denies a permit;
- 52 (D) modifies or amends a permit; or
- 53 (E) revokes and reissues a permit.
- 54 (ii) "Permit order" does not include an order terminating a permit.
- 55 (f) "Permit review adjudicative proceeding" means a proceeding to resolve a challenge
- 56 to a permit order.
- 57 (2) This section governs permit review adjudicative proceedings.
- 58 (3) Except as expressly provided in this section, the provisions of Title 63G, Chapter 4,

59 Administrative Procedures Act, do not apply to a permit review adjudicative proceeding.

60 (4) If a public comment period was provided during the permit application process, a
61 person who challenges a permit order, including the permit applicant, may only raise an issue
62 or argument during the permit review adjudicative proceeding that:

63 (a) the person raised during the public comment period; and

64 (b) was supported with ~~[sufficient]~~ information or documentation ~~[to enable]~~ that is
65 cited with reasonable specificity and sufficiently enables the director to fully consider the
66 substance and significance of the issue.

67 (5) ~~[The]~~ (a) Upon request by a party, the executive director shall ~~[appoint]~~ issue a
68 notice of appointment appointing an administrative law judge, in accordance with Subsections
69 19-1-301(5) and (6), to conduct a permit review adjudicative proceeding.

70 (b) The executive director shall issue a notice of appointment within 30 days after the
71 day on which a party files a request.

72 (c) A notice of appointment shall include:

73 (i) the agency's file number or other reference number assigned to the permit review
74 adjudicative proceeding;

75 (ii) the name of the permit review adjudicative proceeding; and

76 (iii) the administrative law judge's name, title, mailing address, email address, and
77 telephone number.

78 (6) (a) Only the following may file a ~~[request for agency action seeking]~~ petition for
79 review of a permit order:

80 (i) a party; or

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

82 (b) A person who files a ~~[request for agency action seeking]~~ petition for review of a
83 permit order shall file the ~~[request: (i)]~~ petition for review within 30 days after the day on
84 which the permit order is issued~~[-and]~~.

85 ~~[(ii) in accordance with Subsections 63G-4-201(3)(a) through (c).]~~

86 (c) The department may, in accordance with Title 63G, Chapter 3, Utah Administrative
87 Rulemaking Act, make rules allowing the extension of the filing deadline described in
88 Subsection (6)(b).

89 (d) A petition for review shall:

- 90 (i) be served in accordance with department rule;
- 91 (ii) include the name and address of each person to whom a copy of the petition for
 92 review is sent;
- 93 (iii) if known, include the agency's file number or other reference number assigned to
 94 the permit review adjudicative proceeding;
- 95 (iv) state the date on which the petition for review is served;
- 96 (v) include a statement of the petitioner's position, including:
- 97 (A) the legal authority under which the petition for review is requested;
- 98 (B) the legal authority under which the agency has jurisdiction to review the petition
 99 for review;
- 100 (C) each of the petitioner's arguments in support of the petitioner's requested relief;
- 101 (D) an explanation of how each argument described in Subsection (6)(d)(v)(C) was
 102 preserved;
- 103 (E) a detailed description of any permit condition to which the petitioner is objecting;
- 104 (F) any modification or addition to the permit that the petitioner is requesting;
- 105 (G) a demonstration that the agency's permit decision is based on a finding of fact or
 106 conclusion of law that is clearly erroneous;
- 107 (H) if the agency director addressed a finding of fact or conclusion of law described in
 108 Subsection (6)(d)(v)(G) in a response to public comment, a citation to the comment and
 109 response that relates to the finding of fact or conclusion of law and an explanation of why the
 110 director's response was clearly erroneous or otherwise warrants review; and
- 111 (I) a claim for relief.
- 112 ~~[(e)]~~ (e) A person may not raise an issue or argument in a ~~[request for agency action]~~
 113 petition for review unless the issue or argument:
- 114 (i) was preserved in accordance with Subsection (4); or
- 115 (ii) was not reasonably ascertainable before or during the public comment period.
- 116 ~~[(d) The department may, in accordance with Title 63G, Chapter 3, Utah~~
 117 ~~Administrative Rulemaking Act, make rules allowing the extension of the filing deadline~~
 118 ~~described in Subsection (6)(b)(i).]~~
- 119 (f) To demonstrate that an issue or argument was preserved in accordance with
 120 Subsection (4), a petitioner shall include the following in the petitioner's petition for review:

121 (i) a citation to where the petitioner raised the issue or argument during the public
122 comment period; and

123 (ii) for each document upon which the petitioner relies in support of an issue or
124 argument, a description that:

125 (A) states why the document is part of the administrative record; and

126 (B) demonstrates that the petitioner cited the document with reasonable specificity in
127 accordance with Subsection (4)(b).

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

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

133 (i) a petition to intervene that:

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

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

137 (ii) a timely [~~request for agency action~~] petition for review.

138 (c) The permittee is a party to a permit review adjudicative proceeding regardless of
139 who files the petition for review and does not need to file a petition to intervene under
140 Subsection (7)(b).

141 [~~(e)~~] (d) An administrative law judge shall grant a petition to intervene in a permit
142 review adjudicative proceeding, if:

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

144 (ii) the petitioner:

145 (A) demonstrates that the petitioner's legal interests may be substantially affected by
146 the permit review adjudicative proceeding;

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

150 (C) in the petitioner's [~~request for agency action~~] petition for review, raises issues or
151 arguments that are preserved in accordance with Subsection (4).

152 ~~[(d)]~~ (e) An administrative law judge:

153 (i) shall issue an order granting or denying a petition to intervene in accordance with
154 Subsection [63G-4-207\(3\)\(a\)](#); and

155 (ii) may impose conditions on intervenors as described in Subsections [63G-4-207\(3\)\(b\)](#)
156 and (c).

157 ~~[(e)]~~ (f) The department may, in accordance with Title 63G, Chapter 3, Utah
158 Administrative Rulemaking Act, make rules allowing the extension of the filing deadline
159 described in Subsection (7)(b).

160 (8) (a) Unless the parties otherwise agree, the schedule for a permit review adjudicative
161 proceeding is as follows:

162 (i) the director shall file and serve the administrative record within 40 days after the
163 day on which the executive director issues a notice of appointment, unless otherwise ordered
164 by the administrative law judge;

165 (ii) any dispositive motion shall be filed and served within 15 days after the day on
166 which the administrative record is filed and served;

167 (iii) the petitioner shall file and serve an opening brief of no more than 30 pages:

168 (A) within 30 days after the day on which the director files and serves the
169 administrative record; or

170 (B) if a party files and serves a dispositive motion, within 30 days after the day on
171 which the administrative law judge issues a decision on the dispositive motion, including a
172 decision to defer the motion;

173 (iv) each party shall file and serve a response brief of no more than 15 pages within 15
174 days after the day on which the petitioner files and serves the opening brief;

175 (v) the petitioner may file and serve a reply brief of not more than 15 pages within 15
176 days after the day on which the response brief is filed and served; and

177 (vi) if the petitioner files and serves a reply brief, each party may file and serve a
178 surreply brief of no more than five pages within five business days after the day on which the
179 petitioner files and serves the reply brief.

180 (b) (i) A reply brief may not raise an issue that was not raised in the response brief; and

181 (ii) a surreply brief may not raise an issue that was not raised in the reply brief.

182 ~~[(8)]~~ (9) (a) An administrative law judge shall conduct a permit review adjudicative

183 proceeding based only on the administrative record and not as a trial de novo.

184 (b) To the extent relative to the issues and arguments raised in the [~~request for agency~~
185 ~~action~~] petition for review, the administrative record [~~shall consist~~] consists of the following
186 items, if they exist:

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

188 (ii) each statement of basis, fact sheet, engineering review, or other substantive
189 explanation designated by the director as part of the basis for the decision relating to the permit
190 order;

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

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

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

195 (vi) responses to comments that are designated by the director as part of the basis for
196 the decision relating to the permit order;

197 (vii) any information that is:

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

199 (B) designated by the director as part of the basis for the decision relating to the permit
200 order;

201 (viii) any additional information specified by rule;

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

203 (x) information supplementing the record under Subsection [~~(8)~~] (9)(c).

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

205 (ii) A party may move to supplement the record described in Subsection [~~(8)~~] (9)(b)
206 with technical or factual information.

207 (iii) The administrative law judge may grant a motion to supplement the record
208 described in Subsection [~~(8)~~] (9)(b) with technical or factual information if the moving party
209 proves that:

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

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

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

213 [~~(iv) The administrative law judge may supplement the record with technical or factual~~]

214 information on the administrative law judge's own motion if the administrative law judge
215 determines that adequate grounds exist to supplement the record under Subsections (8)
216 (c)(iii)(A) through (C).]

217 [~~(v)~~] In supplementing the record with testimonial evidence, the administrative law
218 judge may administer an oath or take testimony as necessary.]

219 [~~(vi)~~] (iv) The department may, in accordance with Title 63G, Chapter 3, Utah
220 Administrative Rulemaking Act, make rules permitting further supplementation of the record.

221 [~~(9)~~] (10) (a) [~~The~~] Except as otherwise provided by this section, the administrative
222 law judge shall review and respond to a [~~request for agency action~~] petition for review in
223 accordance with Subsections 63G-4-201(3)(d) and (e), following the relevant procedures for
224 formal adjudicative proceedings.

225 (b) The administrative law judge shall require the parties to file responsive [~~pleadings~~]
226 briefs in accordance with [~~Section 63G-4-204~~] Subsection (8).

227 (c) If an administrative law judge enters an order of default against a party, the
228 administrative law judge shall enter the order of default in accordance with Section
229 63G-4-209[~~, following the relevant procedures for formal adjudicative proceedings~~].

230 (d) The administrative law judge, in conducting a permit review adjudicative
231 proceeding:

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

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

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

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

243 [~~(10)~~] (11) (a) A person who files a [~~request for agency action~~] petition for review has
244 the burden of demonstrating that an issue or argument raised in the [~~request for agency action~~]

245 petition for review has been preserved in accordance with Subsection (4).

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

249 [~~(H)~~] (12) In response to a dispositive motion, within 45 days after the day on which
250 oral argument takes place, or, if there is no oral argument, within 45 days after the day on
251 which the reply brief on the dispositive motion is due, the administrative law judge [~~may~~] shall:

252 (a) submit a proposed dispositive action to the executive director recommending full or
253 partial resolution of the permit review adjudicative proceeding, that includes:

254 [~~(a)~~] (i) written findings of fact;

255 [~~(b)~~] (ii) written conclusions of law; and

256 [~~(c)~~] (iii) a recommended order[~~;~~]; or

257 (b) if the administrative law judge determines that a full or partial resolution of the
258 permit review adjudicative proceeding is not appropriate, issue an order that explains the basis
259 for the administrative law judge's determination.

260 [~~(I)~~] (13) For each issue or argument that is not dismissed or otherwise resolved
261 under Subsection [~~(H)~~] (11)(b) or [~~(H)~~] (12), the administrative law judge shall:

262 (a) provide the parties an opportunity for briefing and oral argument in accordance with
263 this section;

264 (b) conduct a review of the director's determination, based on the record described in
265 Subsections [~~(8)~~] (9)(b), [~~(8)~~] (9)(c), and [~~(9)~~] (10)(e); and

266 (c) within 60 days after the day on which the reply brief on the dispositive motion is
267 due, submit to the executive director a proposed dispositive action, that includes:

268 (i) written findings of fact;

269 (ii) written conclusions of law; and

270 (iii) a recommended order.

271 [~~(J)~~] (14) (a) When the administrative law judge submits a proposed dispositive
272 action to the executive director, the executive director may:

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

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

276 (b) On review of a proposed dispositive action, the executive director shall uphold all
277 factual, technical, and scientific agency determinations that are ~~[supported by substantial~~
278 ~~evidence taken from the record as a whole]~~ not clearly erroneous based on the petitioner's
279 marshaling of the evidence.

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

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

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

290 ~~[(e)]~~ (d) The executive director may use the executive director's technical expertise in
291 making a determination.

292 ~~[(14)]~~ (15) (a) A party may seek judicial review in the Utah Court of Appeals of a
293 dispositive action in a permit review adjudicative proceeding, in accordance with Sections
294 [63G-4-401](#), [63G-4-403](#), and [63G-4-405](#).

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

297 (i) the record described in Subsections ~~[(8)]~~ (9)(b), ~~[(8)]~~ (9)(c), ~~[(9)]~~ (10)(e), and
298 ~~[(13)(d)]~~ (14)(c); and

299 (ii) the record made by the administrative law judge and the executive director during
300 the permit review adjudicative proceeding.

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

302 (i) review all agency determinations in accordance with Subsection [63G-4-403](#)(4),
303 recognizing that the agency has been granted substantial discretion to interpret its governing
304 statutes and rules; and

305 (ii) uphold all factual, technical, and scientific agency determinations that are
306 ~~[supported by substantial evidence viewed in light of the record as a whole]~~ not clearly

307 erroneous based upon the petitioner's marshaling of the evidence.

308 [~~(15)~~] (16) (a) The filing of a [~~request for agency action~~] petition for review does not
309 stay a permit or delay the effective date of a permit.

310 (b) A permit may not be stayed or delayed unless a stay is granted under this
311 Subsection [~~(15)~~] (16).

312 (c) The administrative law judge shall:

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

315 (ii) within 45 days after the day on which the reply brief on the motion to stay is due,
316 submit a proposed determination on the stay to the executive director.

317 (d) The administrative law judge may not recommend to the executive director a stay
318 of a permit, or a portion of a permit, unless:

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

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

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

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

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

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

328 (e) A party may appeal the executive director's decision regarding a stay of a permit to
329 the Utah Court of Appeals, in accordance with Section [78A-4-103](#).

330 (17) (a) Subject to Subsection (17)(c), the administrative law judge shall issue a written
331 response to a non-dispositive motion within 45 days after the day on which the reply brief on
332 the non-dispositive motion is due or, if the administrative law judge grants oral argument on
333 the non-dispositive motion, within 45 days after the day on which oral argument takes place.

334 (b) If the administrative law judge determines that the administrative law judge needs
335 more time to issue a response to a non-dispositive motion, the administrative law judge may
336 issue a response after the deadline described in Subsection (17)(a) if, before the deadline
337 expires, the administrative law judge gives notice to the parties that includes:

- 338 (i) the amount of additional time that the administrative law judge requires; and
339 (ii) the reason the administrative law judge needs the additional time.
340 (c) If the administrative law judge grants oral argument on a non-dispositive motion,
341 the administrative law judge shall hold the oral argument within 30 days after the day on which
342 the reply brief on the non-dispositive motion is due.
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Legislative Review Note
as of 2-27-15 10:32 AM

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