

**Representative Keith Grover** proposes the following substitute bill:

**ADMINISTRATIVE LAW JUDGE AMENDMENTS**

2015 GENERAL SESSION

STATE OF UTAH

**Chief Sponsor: Margaret Dayton**

House Sponsor: Keith Grover

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**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:**

This bill provides a coordination clause to reconcile conflicts between this bill and other legislation.

**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

**Utah Code Sections Affected by Coordination Clause:**

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



26 Coordination Clause, Laws of Utah 2012, Chapter 360

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

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

30 **19-1-301.5. Permit review adjudicative proceedings.**

31 (1) As used in this section:

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

33 (i) the executive director takes as part of a permit review adjudicative proceeding; and

34 (ii) is subject to judicial review, in accordance with Subsection ~~[(14)]~~ (15).

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

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

37 (ii) a motion for judgment on the pleadings under Utah Rules of Civil Procedure, Rule

38 12(c); or

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

40 (c) "Party" means:

41 (i) the director who issued the permit order being challenged in the permit review

42 adjudicative proceeding;

43 (ii) the permittee;

44 (iii) the person who applied for the permit, if the permit was denied; or

45 (iv) a person granted intervention by the administrative law judge.

46 (d) "Permit" means any of the following issued under this title:

47 (i) a permit;

48 (ii) a plan;

49 (iii) a license;

50 (iv) an approval order; or

51 (v) another administrative authorization made by a director.

52 (e) (i) "Permit order" means an order issued by a director that:

53 (A) approves a permit;

54 (B) renews a permit;

55 (C) denies a permit;

56 (D) modifies or amends a permit; or

57 (E) revokes and reissues a permit.  
58 (ii) "Permit order" does not include an order terminating a permit.  
59 (f) "Permit review adjudicative proceeding" means a proceeding to resolve a challenge  
60 to a permit order.  
61 (2) This section governs permit review adjudicative proceedings.  
62 (3) Except as expressly provided in this section, the provisions of Title 63G, Chapter 4,  
63 Administrative Procedures Act, do not apply to a permit review adjudicative proceeding.  
64 (4) If a public comment period was provided during the permit application process, a  
65 person who challenges a permit order, including the permit applicant, may only raise an issue  
66 or argument during the permit review adjudicative proceeding that:  
67 (a) the person raised during the public comment period; and  
68 (b) was supported with [sufficient] information or documentation [to enable] that is  
69 cited with reasonable specificity and sufficiently enables the director to fully consider the  
70 substance and significance of the issue.  
71 (5) ~~[The]~~ (a) Upon request by a party, the executive director shall ~~[appoint]~~ issue a  
72 notice of appointment appointing an administrative law judge, in accordance with Subsections  
73 19-1-301(5) and (6), to conduct a permit review adjudicative proceeding.  
74 (b) The executive director shall issue a notice of appointment within 30 days after the  
75 day on which a party files a request.  
76 (c) A notice of appointment shall include:  
77 (i) the agency's file number or other reference number assigned to the permit review  
78 adjudicative proceeding;  
79 (ii) the name of the permit review adjudicative proceeding; and  
80 (iii) the administrative law judge's name, title, mailing address, email address, and  
81 telephone number.  
82 (6) (a) Only the following may file a ~~[request for agency action seeking]~~ petition for  
83 review of a permit order:  
84 (i) a party; or  
85 (ii) a person who is seeking to intervene under Subsection (7).  
86 (b) A person who files a ~~[request for agency action seeking]~~ petition for review of a  
87 permit order shall file the ~~[request: (i)]~~ petition for review within 30 days after the day on

88 which the permit order is issued~~;~~ and].

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

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

93 (d) A petition for review shall:

94 (i) be served in accordance with department rule;

95 (ii) include the name and address of each person to whom a copy of the petition for  
96 review is sent;

97 (iii) if known, include the agency's file number or other reference number assigned to  
98 the permit review adjudicative proceeding;

99 (iv) state the date on which the petition for review is served;

100 (v) include a statement of the petitioner's position, including:

101 (A) the legal authority under which the petition for review is requested;

102 (B) the legal authority under which the agency has jurisdiction to review the petition  
103 for review;

104 (C) each of the petitioner's arguments in support of the petitioner's requested relief;

105 (D) an explanation of how each argument described in Subsection (6)(d)(v)(C) was  
106 preserved;

107 (E) a detailed description of any permit condition to which the petitioner is objecting;

108 (F) any modification or addition to the permit that the petitioner is requesting;

109 (G) a demonstration that the agency's permit decision is based on a finding of fact or  
110 conclusion of law that is clearly erroneous;

111 (H) if the agency director addressed a finding of fact or conclusion of law described in  
112 Subsection (6)(d)(v)(G) in a response to public comment, a citation to the comment and  
113 response that relates to the finding of fact or conclusion of law and an explanation of why the  
114 director's response was clearly erroneous or otherwise warrants review; and

115 (I) a claim for relief.

116 ~~[(c)]~~ (e) A person may not raise an issue or argument in a [request for agency action]  
117 petition for review unless the issue or argument:

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

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

120 [~~(d) The department may, in accordance with Title 63G, Chapter 3, Utah~~  
121 ~~Administrative Rulemaking Act, make rules allowing the extension of the filing deadline~~  
122 ~~described in Subsection (6)(b)(i).]~~

123 (f) To demonstrate that an issue or argument was preserved in accordance with  
124 Subsection (4), a petitioner shall include the following in the petitioner's petition for review:

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

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

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

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

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

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

137 (i) a petition to intervene that:

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

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

140 and

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

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

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

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

148 (ii) the petitioner:

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

150 the permit review adjudicative proceeding;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

184 (b) (i) A reply brief may not raise an issue that was not raised in the response brief; and  
185 (ii) a surreply brief may not raise an issue that was not raised in the reply brief.

186 ~~[(8)]~~ (9) (a) An administrative law judge shall conduct a permit review adjudicative  
187 proceeding based only on the administrative record and not as a trial de novo.

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

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

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

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

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

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

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

201 (vii) any information that is:

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

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

205 (viii) any additional information specified by rule;

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

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

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

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

211 (iii) The administrative law judge may grant a motion to supplement the record

212 described in Subsection ~~[(8)]~~ (9)(b) with technical or factual information if the moving party  
213 proves that:

- 214 (A) good cause exists for supplementing the record;
- 215 (B) supplementing the record is in the interest of justice; and
- 216 (C) supplementing the record is necessary for resolution of the issues.

217 ~~[(iv) The administrative law judge may supplement the record with technical or factual~~  
218 ~~information on the administrative law judge's own motion if the administrative law judge~~  
219 ~~determines that adequate grounds exist to supplement the record under Subsections (8)~~  
220 ~~(c)(iii)(A) through (C).]~~

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

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

225 ~~[(9)]~~ (10) (a) ~~[The]~~ Except as otherwise provided by this section, the administrative  
226 law judge shall review and respond to a [request for agency action] petition for review in  
227 accordance with Subsections 63G-4-201(3)(d) and (e), following the relevant procedures for  
228 formal adjudicative proceedings.

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

231 (c) If an administrative law judge enters an order of default against a party, the  
232 administrative law judge shall enter the order of default in accordance with Section  
233 63G-4-209~~[, following the relevant procedures for formal adjudicative proceedings].~~

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

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

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

242 (e) In conducting a permit review adjudicative proceeding, the administrative law



243 judge may take judicial notice of matters not in the administrative record, in accordance with  
244 Utah Rules of Evidence, Rule 201.

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

247 ~~[(10)]~~ (11) (a) A person who files a ~~[request for agency action]~~ petition for review has  
248 the burden of demonstrating that an issue or argument raised in the ~~[request for agency action]~~  
249 petition for review has been preserved in accordance with Subsection (4).

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

253 ~~[(11)]~~ (12) In response to a dispositive motion, within 45 days after the day on which  
254 oral argument takes place, or, if there is no oral argument, within 45 days after the day on  
255 which the reply brief on the dispositive motion is due, the administrative law judge ~~[may]~~ shall:

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

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

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

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

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

264 ~~[(12)]~~ (13) For each issue or argument that is not dismissed or otherwise resolved  
265 under Subsection ~~[(10)]~~ (11)(b) or ~~[(11)]~~ (12), the administrative law judge shall:

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

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

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

272 (i) written findings of fact;

273 (ii) written conclusions of law; and

274 (iii) a recommended order.

275 ~~[(13)]~~ (14) (a) When the administrative law judge submits a proposed dispositive  
276 action to the executive director, the executive director may:

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

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

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

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

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

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

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

296 ~~[(14)]~~ (15) (a) A party may seek judicial review in the Utah Court of Appeals of a  
297 dispositive action in a permit review adjudicative proceeding, in accordance with Sections  
298 [63G-4-401](#), [63G-4-403](#), and [63G-4-405](#).

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

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

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

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

306 (i) review all agency determinations in accordance with Subsection 63G-4-403(4),  
307 recognizing that the agency has been granted substantial discretion to interpret its governing  
308 statutes and rules; and

309 (ii) uphold all factual, technical, and scientific agency determinations that are  
310 ~~[supported by substantial evidence viewed in light of the record as a whole]~~ not clearly  
311 erroneous based upon the petitioner's marshaling of the evidence.

312 ~~[(15)]~~ (16) (a) The filing of a ~~[request for agency action]~~ petition for review does not  
313 stay a permit or delay the effective date of a permit.

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

316 (c) The administrative law judge shall:

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

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

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

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

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

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

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

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

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

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

334 (17) (a) Subject to Subsection (17)(c), the administrative law judge shall issue a written  
335 response to a non-dispositive motion within 45 days after the day on which the reply brief on

336 the non-dispositive motion is due or, if the administrative law judge grants oral argument on  
337 the non-dispositive motion, within 45 days after the day on which oral argument takes place.

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

342 (i) the amount of additional time that the administrative law judge requires; and

343 (ii) the reason the administrative law judge needs the additional time.

344 (c) If the administrative law judge grants oral argument on a non-dispositive motion,  
345 the administrative law judge shall hold the oral argument within 30 days after the day on which  
346 the reply brief on the non-dispositive motion is due.

347 **Section 2. Coordinating S.B. 282 with S.B. 173 -- Superseding, technical, and**  
348 **substantive amendments.**

349 If this S.B. 282 and S.B. 173, Financial Assurance Determination Review Process, both  
350 pass and become law, it is the intent of the Legislature that the Office of Legislative Research  
351 and General Counsel, in preparing the Utah Code database for publication, modify Section  
352 [19-1-301.5](#) to read as follows:

353 **"19-1-301.5. Permit review and financial assurance determination special**  
354 **adjudicative proceedings.**

355 (1) As used in this section:

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

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

359 (ii) is subject to judicial review, in accordance with Subsection [~~(14)~~] (15).

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

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

362 (ii) a motion for judgment on the pleadings under Utah Rules of Civil Procedure, Rule  
363 12(c); or

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

365 (c) "Financial assurance determination" means a decision on whether a facility, site,  
366 plan, party, broker, owner, operator, generator, or permittee has met financial assurance or

367 financial responsibility requirements as determined by the director of the:

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

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

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

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

373 (ii) the permittee;

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

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

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

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

378 (i) a permit;

379 (ii) a plan;

380 (iii) a license;

381 (iv) an approval order; or

382 (v) another administrative authorization made by a director.

383 ~~[(e)]~~ (f) (i) "Permit order" means an order issued by a director that:

384 (A) approves a permit;

385 (B) renews a permit;

386 (C) denies a permit;

387 (D) modifies or amends a permit; or

388 (E) revokes and reissues a permit.

389 (ii) "Permit order" does not include an order terminating a permit.

390 ~~[(f) "Permit review adjudicative proceeding" means a proceeding to resolve a challenge~~  
391 ~~to a permit order.]~~

392 (g) "Special adjudicative proceeding" means a proceeding under this section to resolve  
393 a challenge to a:

394 (i) permit order; or

395 (ii) financial assurance determination.

396 (2) This section governs permit ~~[review adjudicative]~~ special proceedings.

397 (3) Except as expressly provided in this section, the provisions of Title 63G, Chapter 4,

398 Administrative Procedures Act, do not apply to a [~~permit review~~] special adjudicative  
399 proceeding under this section.

400 (4) If a public comment period was provided during the permit application process or  
401 the financial assurance determination process, a person who challenges [~~a permit order,~~  
402 ~~including the permit applicant,~~] an order, application, or determination may only raise an issue  
403 or argument during the [~~permit review~~] special adjudicative proceeding that:

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

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

408 (5) [~~The~~] (a) Upon request by a party, the executive director shall [~~appoint~~] issue a  
409 notice of appointment appointing an administrative law judge, in accordance with Subsections  
410 19-1-301(5) and (6), to conduct a [~~permit review~~] special adjudicative proceeding under this  
411 section.

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

414 (c) A notice of appointment shall include:

415 (i) the agency's file number or other reference number assigned to the special  
416 adjudicative proceeding;

417 (ii) the name of the special adjudicative proceeding; and

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

420 (6) (a) Only the following may file a [~~request for agency action seeking~~] petition for  
421 review of a permit order or financial assurance determination:

422 (i) a party; or

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

424 (b) A person who files a [~~request for agency action seeking~~] petition for review of a  
425 permit order or a financial assurance determination shall file the [~~request: (i)~~] petition for  
426 review within 30 days after the day on which the permit order or the financial assurance  
427 determination is issued[~~; and~~].

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

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

432 (d) A petition for review shall:

433 (i) be served in accordance with department rule;

434 (ii) include the name and address of each person to whom a copy of the petition for  
435 review is sent;

436 (iii) if known, include the agency's file number or other reference number assigned to  
437 the special adjudicative proceeding;

438 (iv) state the date on which the petition for review is served;

439 (v) include a statement of the petitioner's position, including, as applicable:

440 (A) the legal authority under which the petition for review is requested;

441 (B) the legal authority under which the agency has jurisdiction to review the petition  
442 for review;

443 (C) each of the petitioner's arguments in support of the petitioner's requested relief;

444 (D) an explanation of how each argument described in Subsection (6)(d)(v)(C) was  
445 preserved;

446 (E) a detailed description of any permit condition to which the petitioner is objecting;

447 (F) any modification or addition to a permit that the petitioner is requesting;

448 (G) a demonstration that the agency's permit decision is based on a finding of fact or  
449 conclusion of law that is clearly erroneous;

450 (H) if the agency director addressed a finding of fact or conclusion of law described in  
451 Subsection (6)(d)(v)(G) in a response to public comment, a citation to the comment and  
452 response that relates to the finding of fact or conclusion of law and an explanation of why the  
453 director's response was clearly erroneous or otherwise warrants review; and

454 (I) a claim for relief.

455 ~~[(e)]~~ (e) A person may not raise an issue or argument in a [request for agency action]  
456 petition for review unless the issue or argument:

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

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

459 ~~[(d) The department may, in accordance with Title 63G, Chapter 3, Utah~~

460 ~~Administrative Rulemaking Act, make rules allowing the extension of the filing deadline~~  
461 ~~described in Subsection (6)(b)(i).]~~

462 (f) To demonstrate that an issue or argument was preserved in accordance with  
463 Subsection (4), a petitioner shall include the following in the petitioner's petition for review:

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

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

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

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

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

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

477 (i) a petition to intervene that:

478 (A) meets the requirements of Subsection [63G-4-207\(1\)](#); and

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

480 and

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

482 (c) In a special adjudicative proceeding to review a permit order, the permittee is a  
483 party to the special adjudicative proceeding regardless of who files the petition for review and  
484 does not need to file a petition to intervene under Subsection (7)(b).

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

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

488 (ii) the petitioner:

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



491 (B) demonstrates that the interests of justice and the orderly and prompt conduct of the  
492 ~~[permit review]~~ special adjudicative proceeding will not be materially impaired by allowing the  
493 intervention; and

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

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

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

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

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

504 (8) (a) Unless the parties otherwise agree, the schedule for a special adjudicative  
505 proceeding is as follows:

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

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

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

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

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

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

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

521 (vi) if the petitioner files and serves a reply brief, each party may file and serve a

522 surreply brief of no more than five pages within five business days after the day on which the  
523 petitioner files and serves the reply brief.

524 (b) (i) A reply brief may not raise an issue that was not raised in the response brief.

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

526 ~~[(8)]~~ (9) (a) An administrative law judge shall conduct a ~~[permit review]~~ special  
527 adjudicative proceeding based only on the administrative record and not as a trial de novo.

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

531 (i) (A) for review of a permit order, the permit application, draft permit, and final  
532 permit; or

533 (B) for review of a financial assurance determination, the proposed financial assurance  
534 determination from the owner or operator of the facility, the draft financial assurance  
535 determination, and the final financial assurance determination;

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

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

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

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

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

545 (vii) any information that is:

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

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

549 (viii) any additional information specified by rule;

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

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

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

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

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

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

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

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

561 ~~[(iv) The administrative law judge may supplement the record with technical or factual  
562 information on the administrative law judge's own motion if the administrative law judge  
563 determines that adequate grounds exist to supplement the record under Subsections  
564 (8)(c)(iii)(A) through (C).]~~

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

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

569 ~~[(9)]~~ (10) (a) ~~[The]~~ Except as otherwise provided by this section, the administrative  
570 law judge shall review and respond to a [request for agency action] petition for review in  
571 accordance with Subsections 63G-4-201(3)(d) and (e), following the relevant procedures for  
572 formal adjudicative proceedings.

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

575 (c) If an administrative law judge enters an order of default against a party, the  
576 administrative law judge shall enter the order of default in accordance with Section  
577 63G-4-209~~[, following the relevant procedures for formal adjudicative proceedings].~~

578 (d) The administrative law judge, in conducting a [permit review] special adjudicative  
579 proceeding:

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

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

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

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

592 ~~[(10)]~~ (11) (a) A person who files a ~~[request for agency action]~~ petition for review has  
593 the burden of demonstrating that an issue or argument raised in the ~~[request for agency action]~~  
594 petition for review has been preserved in accordance with Subsection (4).

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

598 ~~[(11)]~~ (12) In response to a dispositive motion, within 45 days after the day on which  
599 oral argument takes place, or, if there is no oral argument, within 45 days after the day on  
600 which the reply brief on the dispositive motion is due, the administrative law judge ~~[may]~~ shall:

601 (a) submit a proposed dispositive action to the executive director recommending full or  
602 partial resolution of the ~~[permit review]~~ special adjudicative proceeding, that includes:

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

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

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

606 (b) if the administrative law judge determines that a full or partial resolution of the  
607 special adjudicative proceeding is not appropriate, issue an order that explains the basis for the  
608 administrative law judge's determination.

609 ~~[(12)]~~ (13) For each issue or argument that is not dismissed or otherwise resolved  
610 under Subsection ~~[(10)]~~ (11)(b) or ~~[(11)]~~ (12), the administrative law judge shall:

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

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

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

- 617 (i) written findings of fact;  
618 (ii) written conclusions of law; and  
619 (iii) a recommended order.

620 ~~[(13)]~~ (14) (a) When the administrative law judge submits a proposed dispositive  
621 action to the executive director, the executive director may:

- 622 (i) adopt, adopt with modifications, or reject the proposed dispositive action; or  
623 (ii) return the proposed dispositive action to the administrative law judge for further  
624 action as directed.

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

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

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

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

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

641 ~~[(14)]~~ (15) (a) A party may seek judicial review in the Utah Court of Appeals of a  
642 dispositive action in a ~~[permit review]~~ special adjudicative proceeding, in accordance with  
643 Sections [63G-4-401](#), [63G-4-403](#), and [63G-4-405](#).

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

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

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

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

651 (i) review all agency determinations in accordance with Subsection 63G-4-403(4),  
652 recognizing that the agency has been granted substantial discretion to interpret its governing  
653 statutes and rules; and

654 (ii) uphold all factual, technical, and scientific agency determinations that are  
655 ~~[supported by substantial evidence viewed in light of the record as a whole]~~ not clearly  
656 erroneous based upon the petitioner's marshaling of the evidence.

657 ~~[(15)]~~ (16) (a) The filing of a ~~[request for agency action]~~ petition for review does not:

658 (i) stay a permit order or a financial assurance determination; or

659 (ii) delay the effective date of a permit order or a portion of a financial assurance  
660 determination.

661 (b) A permit order or a financial assurance determination may not be stayed or delayed  
662 unless a stay is granted under this Subsection ~~[(15)]~~ (16).

663 (c) The administrative law judge shall:

664 (i) consider a party's motion to stay a permit order or a financial assurance  
665 determination during a ~~[permit review]~~ special adjudicative proceeding; and

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

668 (d) The administrative law judge may not recommend to the executive director a stay  
669 of a permit order or a financial assurance determination, or a portion of a permit order or a  
670 portion of a financial assurance determination, unless:

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

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

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

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

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

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

680 (e) A party may appeal the executive director's decision regarding a stay of a permit  
681 order or a financial assurance determination to the Utah Court of Appeals, in accordance with  
682 Section [78A-4-103](#).

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

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

691 (i) the amount of additional time that the administrative law judge requires; and

692 (ii) the reason the administrative law judge needs the additional time.

693 (c) If the administrative law judge grants oral argument on a non-dispositive motion,  
694 the administrative law judge shall hold the oral argument within 30 days after the day on which  
695 the reply brief on the non-dispositive motion is due."