

ADMINISTRATIVE LAW JUDGE AMENDMENTS

2017 GENERAL SESSION

STATE OF UTAH

Chief Sponsor: Margaret Dayton

House Sponsor: Keith Grover

LONG TITLE

General Description:

This bill modifies the procedure for certain adjudicative hearings.

Highlighted Provisions:

This bill:

- ▶ states that an administrative law judge or the executive director of the Department of Environmental Quality may not participate in an ex parte communication;
- ▶ states that if an administrative law judge or the executive director of the Department of Environmental Quality receives an ex parte communication, the judge or director shall place the communication in the record so other parties may comment on the communication;
- ▶ modifies the process for a special adjudicative proceeding over a permit; and
- ▶ makes technical changes.

Money Appropriated in this Bill:

None

Other Special Clauses:

None

Utah Code Sections Affected:

AMENDS:

19-1-301, as last amended by Laws of Utah 2015, Chapter 441

19-1-301.5, as last amended by Laws of Utah 2016, Chapter 348



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

Section 1. Section **19-1-301** is amended to read:

19-1-301. Adjudicative proceedings.

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

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

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

(2) This section governs adjudicative proceedings that are not special adjudicative proceedings as defined in Section [19-1-301.5](#).

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

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

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

(ii) this title;

(iii) rules adopted by the department under:

(A) Subsection [63G-4-102\(6\)](#); or

(B) this title; and

(iv) the Utah Rules of Civil Procedure, in the absence of a procedure established under Subsection (3)(b)(i), (ii), or (iii).

(4) Except as provided in Section [19-2-113](#), an administrative law judge shall hear a party's request for agency action.

(5) The executive director shall appoint an administrative law judge who:

(a) is a member in good standing of the Utah State Bar;

(b) has a minimum of:

(i) 10 years of experience practicing law; and

(ii) five years of experience practicing in the field of:

(A) environmental compliance;

(B) natural resources;

(C) regulation by an administrative agency; or

59 (D) a field related to a field listed in Subsections (5)(b)(ii)(A) through (C); and
60 (c) has a working knowledge of the federal laws and regulations and state statutes and
61 rules applicable to a request for agency action.

62 (6) In appointing an administrative law judge who meets the qualifications described in
63 Subsection (5), the executive director may:

64 (a) compile a list of persons who may be engaged as an administrative law judge pro
65 tempore by mutual consent of the parties to an adjudicative proceeding;

66 (b) appoint an assistant attorney general as an administrative law judge pro tempore; or

67 (c) (i) appoint an administrative law judge as an employee of the department; and

68 (ii) assign the administrative law judge responsibilities in addition to conducting an
69 adjudicative proceeding.

70 (7) (a) An administrative law judge:

71 (i) shall conduct an adjudicative proceeding;

72 (ii) may take any action that is not a dispositive action; and

73 (iii) shall submit to the executive director a proposed dispositive action, including:

74 (A) written findings of fact;

75 (B) written conclusions of law; and

76 (C) a recommended order.

77 (b) The executive director may:

78 (i) approve, approve with modifications, or disapprove a proposed dispositive action
79 submitted to the executive director under Subsection (7)(a); or

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

82 (c) In making a decision regarding a dispositive action, the executive director may seek
83 the advice of, and consult with:

84 (i) the assistant attorney general assigned to the department; or

85 (ii) a special master who:

86 (A) is appointed by the executive director; and

87 (B) is an expert in the subject matter of the proposed dispositive action.

88 (d) The executive director shall base a final dispositive action on the record of the
89 proceeding before the administrative law judge.

90 (8) To conduct an adjudicative proceeding, an administrative law judge may:

91 (a) compel:

92 (i) the attendance of a witness; and

93 (ii) the production of a document or other evidence;

94 (b) administer an oath;

95 (c) take testimony; and

96 (d) receive evidence as necessary.

97 (9) A party may appear before an administrative law judge in person, through an agent
98 or employee, or as provided by department rule.

99 (10) (a) ~~[An]~~ Except as provided in Subsection (10)(b), an administrative law judge or
100 the executive director may not participate in an ex parte communication with a party to an
101 adjudicative proceeding regarding the merits of the adjudicative proceeding unless notice and
102 an opportunity to be heard are afforded to all parties.

103 (b) The executive director may discuss ongoing operational matters that require the
104 involvement of a division director without violating Subsection (10)(a).

105 (c) Upon receiving an ex parte communication with a party to a proceeding, an
106 administrative law judge or the executive director shall place the communication in the public
107 record of the proceeding and afford all parties to the proceeding with an opportunity to
108 comment on the communication.

109 ~~[(b)]~~ (d) If an administrative law judge or the executive director receives an ex parte
110 communication, the person who receives the ex parte communication shall place the
111 communication into the public record of the proceedings and afford all parties an opportunity
112 to comment on the information.

113 (11) Nothing in this section limits a party's right to an adjudicative proceeding under
114 Title 63G, Chapter 4, Administrative Procedures Act.

115 Section 2. Section **19-1-301.5** is amended to read:

116 **19-1-301.5. Permit review adjudicative proceedings.**

117 (1) As used in this section:

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

119 (i) the executive director takes as part of a special adjudicative proceeding; and

120 (ii) is subject to judicial review, in accordance with Subsection ~~[(15)]~~ (16).

- 121 (b) "Dispositive motion" means a motion that is equivalent to:
- 122 (i) a motion to dismiss under Utah Rules of Civil Procedure, Rule 12(b)(6);
- 123 (ii) a motion for judgment on the pleadings under Utah Rules of Civil Procedure, Rule
- 124 12(c); or
- 125 (iii) a motion for summary judgment under Utah Rules of Civil Procedure, Rule 56.
- 126 (c) "Financial assurance determination" means a decision on whether a facility, site,
- 127 plan, party, broker, owner, operator, generator, or permittee has met financial assurance or
- 128 financial responsibility requirements as determined by the director of the Division of Waste
- 129 Management and Radiation Control.
- 130 (d) "Party" means:
- 131 (i) the director who issued the permit order or financial assurance determination that is
- 132 being challenged in the special adjudicative proceeding under this section;
- 133 (ii) the permittee;
- 134 (iii) the person who applied for the permit, if the permit was denied;
- 135 (iv) the person who is subject to a financial assurance determination; or
- 136 (v) a person granted intervention by the administrative law judge.
- 137 (e) "Permit" means any of the following issued under this title:
- 138 (i) a permit;
- 139 (ii) a plan;
- 140 (iii) a license;
- 141 (iv) an approval order; or
- 142 (v) another administrative authorization made by a director.
- 143 (f) (i) "Permit order" means an order issued by a director that:
- 144 (A) approves a permit;
- 145 (B) renews a permit;
- 146 (C) denies a permit;
- 147 (D) modifies or amends a permit; or
- 148 (E) revokes and reissues a permit.
- 149 (ii) "Permit order" does not include an order terminating a permit.
- 150 (g) "Special adjudicative proceeding" means a proceeding under this section to resolve
- 151 a challenge to a:

152 (i) permit order; or

153 (ii) financial assurance determination.

154 (2) This section governs special adjudicative proceedings.

155 (3) Except as expressly provided in this section, the provisions of Title 63G, Chapter 4,
156 Administrative Procedures Act, do not apply to a special adjudicative proceeding under this
157 section.

158 (4) If a public comment period was provided during the permit application process or
159 the financial assurance determination process, a person who challenges an order[~~-, application,~~]
160 or determination may only raise an issue or argument during the special adjudicative
161 proceeding that:

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

163 (b) was supported with information or documentation that is cited with reasonable
164 specificity and sufficiently enables the director to fully consider the substance and significance
165 of the issue.

166 (5) (a) Upon request by a party, the executive director shall issue a notice of
167 appointment appointing an administrative law judge, in accordance with Subsections
168 [19-1-301](#)(5) and (6), to conduct a special adjudicative proceeding under this section.

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

171 (c) A notice of appointment shall include:

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

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

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

177 (6) (a) Only the following may file a petition for review of a permit order or financial
178 assurance determination:

179 (i) a party; or

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

181 (b) A person who files a petition for review of a permit order or a financial assurance
182 determination shall file the petition for review within 30 days after the day on which the permit

183 order or the financial assurance determination is issued.

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

187 (d) A petition for review shall:

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

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

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

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

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

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

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

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

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

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

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

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

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

209 (I) a claim for relief.

210 (e) A person may not raise an issue or argument in a petition for review unless the
211 issue or argument:

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

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

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

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

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

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

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

223 (7) (a) A person who is not a party may not participate in a special adjudicative
224 proceeding under this section unless the person is granted the right to intervene under this
225 Subsection (7).

226 (b) A person who seeks to intervene in a special adjudicative proceeding under this
227 section shall, within 30 days after the day on which the permit order or the financial assurance
228 determination being challenged was issued, file:

229 (i) a petition to intervene that:

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

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

232 and

233 (ii) a timely petition for review.

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

237 (d) An administrative law judge shall grant a petition to intervene in a special
238 adjudicative proceeding, if:

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

240 (ii) the petitioner:

241 (A) demonstrates that the petitioner's legal interests may be substantially affected by
242 the special adjudicative proceeding;

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

245 and

246 (C) in the petitioner's petition for review, raises issues or arguments that are preserved
247 in accordance with Subsection (4).

248 (e) An administrative law judge:

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

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

253 (f) The department may, in accordance with Title 63G, Chapter 3, Utah Administrative
254 Rulemaking Act, make rules allowing the extension of the filing deadline described in
255 Subsection (7)(b).

256 (8) (a) Unless the parties otherwise agree, [~~the schedule for~~] or the administrative law
257 judge otherwise orders, a special adjudicative proceeding [~~is~~] shall be conducted as follows:

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

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

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

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

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

269 (iv) each responding party shall file and serve a response brief of no more than [~~15~~] 30
270 pages within 15 days after the day on which the petitioner files and serves the opening brief;

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

273 (vi) if the petitioner files and serves a reply brief, each responding party may file and
274 serve a surreply brief of no more than [~~five~~] 15 pages within five business days after the day on
275 which the petitioner files and serves the reply brief.

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

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

278 (9) (a) An administrative law judge shall conduct a special adjudicative proceeding
279 based only on the administrative record and not as a trial de novo.

280 (b) To the extent relative to the issues and arguments raised in the petition for review,
281 the administrative record consists of the following items, if they exist:

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

284 (B) for review of a financial assurance determination, the proposed financial assurance
285 determination from the owner or operator of the facility, the draft financial assurance
286 determination, and the final financial assurance determination;

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

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

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

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

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

296 (vii) any information that is:

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

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

300 (viii) any additional information specified by rule;

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

302 (x) information supplementing the record under Subsection (9)(c).

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

304 (ii) A party may move to supplement the record described in Subsection (9)(b) with
305 technical or factual information.

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

307 described in Subsection (9)(b) with technical or factual information if the moving party proves
308 that:

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

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

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

312 (iv) The department may, in accordance with Title 63G, Chapter 3, Utah

313 Administrative Rulemaking Act, make rules permitting further supplementation of the record.

314 (10) (a) Except as otherwise provided by this section, the administrative law judge shall
315 review and respond to a petition for review in accordance with Subsections 63G-4-201(3)(d)
316 and (e), following the relevant procedures for formal adjudicative proceedings.

317 (b) The administrative law judge shall require the parties to file responsive briefs in
318 accordance with Subsection (8).

319 (c) If an administrative law judge enters an order of default against a party, the
320 administrative law judge shall enter the order of default in accordance with Section 63G-4-209.

321 (d) The administrative law judge, in conducting a special adjudicative proceeding:

322 (i) may not participate in an ex parte communication with a party to the special
323 adjudicative proceeding regarding the merits of the special adjudicative proceeding unless
324 notice and an opportunity to be heard are afforded to all parties; and

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

328 (e) In conducting a special adjudicative proceeding, the administrative law judge may
329 take judicial notice of matters not in the administrative record, in accordance with Utah Rules
330 of Evidence, Rule 201.

331 (f) An administrative law judge may take any action in a special adjudicative
332 proceeding that is not a dispositive action.

333 (11) (a) A person who files a petition for review has the burden of demonstrating that
334 an issue or argument raised in the petition for review has been preserved in accordance with
335 Subsection (4).

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

338 (12) In response to a dispositive motion, within 45 days after the day on which oral
339 argument takes place, or, if there is no oral argument, within 45 days after the day on which the
340 reply brief on the dispositive motion is due, the administrative law judge shall:

341 (a) submit a proposed dispositive action to the executive director recommending full or
342 partial resolution of the special adjudicative proceeding, that includes:

- 343 (i) written findings of fact;
- 344 (ii) written conclusions of law; and
- 345 (iii) a recommended order; or

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

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

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

353 (b) conduct a review of the director's order or determination, based on the record
354 described in Subsections (9)(b), (9)(c), and (10)(e); and

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

- 357 (i) written findings of fact;
- 358 (ii) written conclusions of law; and
- 359 (iii) a recommended order.

360 (14) (a) When the administrative law judge submits a proposed dispositive action to
361 the executive director, the executive director may:

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

365 (b) On review of a proposed dispositive action, the executive director shall uphold all
366 factual, technical, and scientific agency determinations that are not clearly erroneous based on
367 the petitioner's marshaling of the evidence.

368 (c) In reviewing a proposed dispositive action during a special adjudicative proceeding,

369 the executive director may take judicial notice of matters not in the record, in accordance with
370 Utah Rules of Evidence, Rule 201.

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

373 (15) (a) Except as provided in Subsection (15)(b), the executive director may not
374 participate in an ex parte communication with a party to a special adjudicative proceeding
375 regarding the merits of the special adjudicative proceeding, unless notice and opportunity to be
376 heard are afforded to all parties involved in the proceeding.

377 (b) The executive director may discuss ongoing operational matters that require the
378 involvement of a division director without violating Subsection (15)(a).

379 (c) Upon receiving an ex parte communication with a party to a proceeding, the
380 executive director shall place the communication in the public record of the proceeding and
381 afford all parties to the proceeding with an opportunity to comment on the communication.

382 ~~[(15)]~~ (16) (a) A party may seek judicial review in the Utah Court of Appeals of a
383 dispositive action in a special adjudicative proceeding, in accordance with Sections 63G-4-401,
384 63G-4-403, and 63G-4-405.

385 (b) An appellate court shall limit its review of a dispositive action of a special
386 adjudicative proceeding under this section to:

387 (i) the record described in Subsections (9)(b), (9)(c), (10)(e), and (14)(c); and
388 (ii) the record made by the administrative law judge and the executive director during
389 the special adjudicative proceeding.

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

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

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

396 ~~[(16)]~~ (17) (a) The filing of a petition for review does not:

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

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

400 (b) A permit order or a financial assurance determination may not be stayed or delayed
401 unless a stay is granted under this Subsection [~~(16)~~] (17).

402 (c) The administrative law judge shall:

403 (i) consider a party's motion to stay a permit order or a financial assurance
404 determination during a special adjudicative proceeding; and

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

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

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

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

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

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

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

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

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

422 [~~(17)~~] (18) (a) Subject to Subsection [~~(17)~~] (18)(c), the administrative law judge shall
423 issue a written response to a non-dispositive motion within 45 days after the day on which the
424 reply brief on the non-dispositive motion is due or, if the administrative law judge grants oral
425 argument on the non-dispositive motion, within 45 days after the day on which oral argument
426 takes place.

427 (b) If the administrative law judge determines that the administrative law judge needs
428 more time to issue a response to a non-dispositive motion, the administrative law judge may
429 issue a response after the deadline described in Subsection [~~(17)~~] (18)(a) if, before the deadline
430 expires, the administrative law judge gives notice to the parties that includes:

- 431 (i) the amount of additional time that the administrative law judge requires; and
432 (ii) the reason the administrative law judge needs the additional time.
433 (c) If the administrative law judge grants oral argument on a non-dispositive motion,
434 the administrative law judge shall hold the oral argument within 30 days after the day on which
435 the reply brief on the non-dispositive motion is due.

Legislative Review Note
Office of Legislative Research and General Counsel