

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 (l) 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

480 (7)~~(c)~~(d)(ii); 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 ~~(c)~~ (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 ~~(c)~~ (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."