

REVISED MODEL STATE ADMINISTRATIVE PROCEDURE ACT

Drafted by the

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

and by it

APPROVED AND RECOMMENDED FOR ENACTMENT
IN ALL THE STATES

at its

ANNUAL CONFERENCE
MEETING IN ITS ONE-HUNDRED-AND-NINETEENTH YEAR
IN CHICAGO, ILLINOIS
JULY 9-16, 2010

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By

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

October 15, 2010

REVISED MODEL STATE ADMINISTRATIVE PROCEDURE ACT

[ARTICLE] 1

GENERAL PROVISIONS

SECTION 101. SHORT TITLE. This [act] may be cited as the [State] Administrative Procedure Act.

SECTION 102. DEFINITIONS. In this [act]:

(1) “Adjudication” means the process for determining facts or applying law pursuant to which an agency formulates and issues an order. “Adjudicate” has a corresponding meaning.

(2) “Adopt”, with respect to a rule, includes to adopt a new rule and to amend or repeal an existing rule. “Adoption” has a corresponding meaning.

(3) “Agency” means a state board, authority, commission, institution, department, division, office, officer, or other state entity that is authorized by law of this state to make rules or to adjudicate. The term does not include the Governor, the [Legislature], or the Judiciary.

(4) “Agency action” means:

(A) the whole or part of an order or rule;

(B) the failure to issue an order or rule; or

(C) an agency’s performing or failing to perform a duty, function, or activity or to make a determination required by law.

(5) “Agency head” means the individual in whom, or one or more members of the body of individuals in which, the ultimate legal authority of an agency is vested.

(6) “Agency record” means the agency rulemaking record required by Section 302, the hearing record in adjudication required by Section 406, the hearing record in an emergency adjudication under Section 407, or the record for review compiled under Section 507(b).

(7) “Contested case” means an adjudication in which an opportunity for an evidentiary

hearing is required by the federal constitution, a federal statute, or the constitution or a statute of this state.

(8) “Electronic” means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.

(9) “Electronic record” means a record created, generated, sent, communicated, received, or stored by electronic means.

(10) “Emergency adjudication” means an adjudication in a contested case when the public health, safety, or welfare requires immediate action.

(11) “Evidentiary hearing” means a hearing for the receipt of evidence on issues on which a decision of the presiding officer may be made in a contested case.

(12) “Final order” means the order issued by the agency head sitting as the presiding officer in a contested case, the order issued following the agency head review of a recommended order, the order issued following the agency head review of an initial order, or the order issued by the presiding officer when the presiding officer has been delegated final decisional authority with no subsequent agency head review.

(13) “Final rule” means a rule adopted, amended, or repealed under Sections 304 through 308, an emergency rule adopted under Section 309, or a direct final rule adopted under Section 310.

(14) “Guidance document” means a record of general applicability developed by an agency which lacks the force of law but states the agency’s current approach to, or interpretation of, law, or describes how and when the agency will exercise discretionary functions. The term does not include records described in paragraph (30)(A), (B), (C), or (D).

(15) “Index” means a searchable list in a record of subjects and titles with page numbers, hyperlinks, or other connectors that link each index entry to the text to which it refers.

(16) “Initial order” means an order that is issued by a presiding officer with final decisional authority if the order is subject to discretionary review by the agency.

(17) “Internet website” means a website on the Internet or other appropriate technology or successor technology that permits the public to search a database that archives materials required to be published by the [publisher] under this [act].

(18) “Law” means the federal or state constitution, a federal or state statute, a federal or state judicial decision, a federal or state rule of court, or an executive order that rests on statutory or constitutional authority.

(19) “License” means a permit, certificate, approval, registration, charter, or similar form of permission required by law and issued by an agency.

(20) “Licensing” means the grant, denial, renewal, revocation, suspension, annulment, withdrawal, or amendment of a license.

(21) “Notice” means a record containing information required to be sent to a person by this [act].

(22) “Notify” means to take steps reasonably required to inform a person, regardless of whether the person actually comes to know of the information.

(23) “Order” means an agency decision that determines or declares the rights, duties, privileges, immunities, or other interests of a specific person.

(24) “Party” means the agency taking action, the person against which the action is directed, any other person named as a party, or any person permitted to intervene and that does intervene.

(25) “Person” means an individual, corporation, business trust, statutory trust, estate, trust, partnership, limited liability company, association, joint venture, public corporation, government or governmental subdivision, agency, or instrumentality, or any other legal or

commercial entity.

(26) “Presiding officer” means an individual who presides over the evidentiary hearing in a contested case.

(27) “Proceeding” means any type of formal or informal agency process or procedure commenced or conducted by an agency. The term includes adjudication, rulemaking, and investigation.

(28) “Recommended order” means an order issued by a presiding officer if the officer does not have final decisional authority and the order is subject to review by the agency head.

(29) “Record” means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

(30) “Rule” means the whole or a part of an agency statement of general applicability that implements, interprets, or prescribes law or policy or the organization, procedure, or practice requirements of an agency and has the force of law. The term includes the amendment or repeal of an existing rule. The term does not include:

(A) a statement that concerns only the internal management of an agency and which does not affect private rights or procedures available to the public;

(B) an intergovernmental or interagency memorandum, directive, or communication that does not affect private rights or procedures available to the public;

(C) an opinion of the Attorney General;

(D) a statement that establishes criteria or guidelines to be used by the staff of an agency in performing audits, investigations, or inspections, settling commercial disputes, negotiating commercial arrangements, or defending, prosecuting, or settling cases, if disclosure of the criteria or guidelines would enable persons violating the law to avoid detection, facilitate disregard of requirements imposed by law, or give an improper advantage to persons that are in

an adverse position to the state;

(E) a form developed by an agency to implement or interpret agency law or policy; or

(F) a guidance document.

(31) “Rulemaking” means the process for the adoption of a new rule or the amendment or repeal of an existing rule.

(32) “Sign” means, with present intent to authenticate or adopt a record:

(A) to execute or adopt a tangible symbol; or

(B) to attach to or logically associate with the record an electronic symbol, sound, or process.

(33) “Writing” means a record inscribed on a tangible medium. “Written” has a corresponding meaning.

SECTION 103. APPLICABILITY.

(a) This [act] applies to an agency unless the agency is expressly exempted by a statute of this state.

(b) This [act] applies to all agency proceedings and all proceedings for judicial review or civil enforcement of agency action commenced after [the effective date of this [act]]. This [act] does not apply to an adjudication for which notice was given before that date and rulemaking for which notice was given or a petition was filed before that date.

[ARTICLE] 2

PUBLIC ACCESS TO AGENCY LAW AND POLICY

SECTION 201. PUBLICATION, COMPILATION, INDEXING, AND PUBLIC INSPECTION OF RULEMAKING DOCUMENTS.

(a) The [publisher] shall administer this section and other sections of this [act] that require publication. The [publisher] shall publish the [administrative bulletin] and the [administrative code].

(b) The [publisher] shall publish in [electronic and written] [electronic or written] [electronic] [written] format all rulemaking-related documents listed in Section 202(c). The [publisher] shall prescribe a uniform numbering system, form, and style for proposed rules.

(c) The [publisher] shall maintain the official record of a rulemaking, including the text of the rule and any supporting documents, filed with the [publisher] by an agency. An agency engaged in rulemaking shall maintain the rulemaking record required by Section 302(b) for that rule.

(d) The [publisher] shall create and maintain an Internet website. The [publisher] shall make available on the Internet website the [administrative bulletin], the [administrative code], and any guidance document filed with the [publisher] by an agency.

(e) The [publisher] shall publish the [administrative bulletin] at least once [each month].

(f) The [administrative bulletin] must be provided in written form on request, for which the [publisher] may charge a reasonable fee.

(g) The [administrative bulletin] must contain:

(1) notices of proposed rulemaking prepared so that the text of the proposed rule shows the text of any existing rule proposed to be changed and the change proposed;

(2) newly filed final rules prepared so that the text of a newly filed amended rule

shows the text of the existing rule and the change that is made;

(3) any other notice and material required to be published in the [administrative bulletin]; and

(4) an index.

(h) The [administrative code] must be compiled, indexed by subject, and published in a format and medium prescribed by the [publisher]. The rules of an agency must be published and indexed in the [administrative code].

(i) The [publisher] shall make the [administrative bulletin] and the [administrative code] available for public inspection and, for a reasonable charge, copying.

(j) The [publisher], with notification to the agency, may make minor nonsubstantive corrections in spelling, grammar, and format in a proposed or final rule. The [publisher] shall make a record of the corrections.

(k) The [publisher] shall make available on the [publisher's] Internet website, at no charge, all the documents provided by an agency under Section 202(c).

***Legislative Note:** Throughout this act the drafting committee has used the term [publisher] to describe the official or agency to which substantive publishing functions are assigned. All states have such an official, but their titles vary. Each state using this act should determine what that agency is, then insert its title in place of [publisher] throughout this act. Each state also has an [administrative bulletin] and an [administrative code]. The bulletin is similar to the Federal Register, and the code is similar to the Code of Federal Regulations. The names of the administrative bulletin and the administrative code vary from state to state. Each state should insert the proper title in place of [administrative bulletin], and [administrative code]. The [publisher] has statutory authority under subsections (f) and (i) to provide written materials for a reasonable charge. In many states, [publishers] have statutory authority under a public records act to adopt regulations setting fees for providing written copies of documents under this section.*

SECTION 202. PUBLICATION; AGENCY DUTIES.

(a) Unless the record is exempt from disclosure under law of this state other than this [act], an agency shall publish on its Internet website and, on request and for a reasonable charge, make available through the regular mail:

- (1) each notice of a proposed rule under Section 304;
- (2) each rule filed under Section 316;
- (3) each summary of regulatory analysis required by Section 305;
- (4) each declaratory order issued under Section 204;
- (5) the index of declaratory orders prepared under Section 204(g);
- (6) each guidance document issued under Section 311;
- (7) the index of currently effective guidance documents prepared under Section 311(e);
- (8) each final order in a contested case issued under Section 413, 414, or 415; and
- (9) the index of final orders in contested cases prepared under Section 418(a).

(b) An agency may provide for electronic distribution to a person that requests electronic distribution of notices related to rulemaking or guidance documents. If a notice is distributed electronically, the agency need not transmit the actual notice but must send all the information contained in the notice.

(c) An agency shall file with the [publisher] in an electronic format acceptable to the [publisher]:

- (1) notice of the adoption of a final rule;
- (2) a summary of the regulatory analysis required by Section 305 for each proposed rule;
- (3) each final rule;
- (4) an index of currently effective guidance documents under Section 311(f); and
- (5) any other notice or matter that an agency is required to publish under this [act].

Legislative Note: Agencies have statutory authority under subsection (a) to provide written materials for a reasonable charge. In many states, agencies have statutory authority under a

public records act to adopt regulations setting reasonable charges for providing written copies of documents under this section.

SECTION 203. REQUIRED AGENCY PUBLICATION AND

RECORDKEEPING. An agency shall:

(1) publish a description of its organization, stating the general course and method of its operations and the methods by which the public may obtain information or make submissions or requests;

(2) publish a description of all formal and informal procedures available, including a description of all forms and instructions used by the agency;

(3) publish a description of the process for application for a license, available benefits, or other matters for which an application is appropriate, unless the process is prescribed by law other than this [act];

(4) adopt rules for the conduct of public hearings [if the standard procedural rules adopted under Section 205 do not include provisions for the conduct of public hearings];

(5) maintain the agency's current rulemaking docket required by Section 301(b); and

(6) maintain a separate, official, current, and dated index and compilation of all final rules filed with the [publisher], make the index and compilation available for public inspection and, for a reasonable charge, copying at the principal office of the agency [and online on the [publisher]'s Internet website], update the index and compilation at least [monthly], and file the index and the compilation and all changes to both with the [publisher].

SECTION 204. DECLARATORY ORDER.

(a) A person may petition an agency for a declaratory order that interprets or applies a statute administered by the agency or states whether or in what manner a rule, guidance document, or order issued by the agency applies to the petitioner.

(b) An agency shall adopt rules prescribing the form of a petition under subsection (a)

and the procedure for its submission, consideration, and prompt disposition. The provisions of this [act] concerning formal, informal, or other applicable hearing procedure do not apply to an agency proceeding for a declaratory order, except to the extent provided in this [article] or to the extent the agency provides by rule or order.

(c) Not later than 60 days [or at the next regularly scheduled meeting of the agency, whichever is later,] after receipt of a petition under subsection (a), an agency shall issue a declaratory order in response to the petition, decline to issue the order, or schedule the matter for further consideration.

(d) If an agency declines to issue a declaratory order requested under subsection (a), it shall notify promptly the petitioner of its decision. The decision must be in a record and must include a brief statement of the reasons for declining. An agency decision to decline to issue a declaratory order is subject to judicial review for abuse of discretion. An agency failure to act within the applicable time under subsection (c) is subject to judicial action under Section 501(d).

(e) If an agency issues a declaratory order, the order must contain the names of all parties to the proceeding, the facts on which it is based, and the reasons for the agency's conclusion. If an agency is authorized not to disclose certain information in its records to protect confidentiality, the agency may redact confidential information in the order. The order has the same status and binding effect as an order issued in an adjudication and is subject to judicial review under Section 501.

(f) An agency shall publish each currently effective declaratory order.

(g) An agency shall maintain an index of all of its currently effective declaratory orders, file the index [annually] with the [publisher], make the index readily available for public inspection, and make available for public inspection and, for a reasonable charge, copying the full text of all declaratory orders to the extent inspection is permitted by law of this state other

than this [act].

SECTION 205. STANDARD PROCEDURAL RULES.

(a) The [Governor] [Attorney General] [designated state agency] shall adopt standard procedural rules for use by agencies. The standard rules must provide for the procedural functions and duties of as many agencies as is practicable.

(b) Except as otherwise provided in subsection (c), an agency shall use the standard procedural rules adopted under subsection (a).

(c) An agency may adopt a rule of procedure that differs from the standard procedural rules adopted under subsection (a) if it explains with particularity the reasons for the variation.

[ARTICLE] 3

**RULEMAKING; PROCEDURAL REQUIREMENTS AND
EFFECTIVENESS OF RULES**

SECTION 301. RULEMAKING DOCKET.

(a) In this section, “rule” does not include an emergency rule adopted under Section 309 or a direct final rule adopted under Section 310.

(b) An agency shall maintain a rulemaking docket for all pending rulemaking proceedings that is indexed.

(c) The agency shall maintain a rulemaking docket under subsection (b) that must for each pending rulemaking proceeding state or contain:

- (1) the subject matter of the proposed rule;
- (2) notices related to the proposed rule;
- (3) how comments on the proposed rule may be submitted;
- (4) the time within which comments may be submitted;
- (5) where comments may be inspected;
- (6) requests for a public hearing;
- (7) appropriate information concerning a public hearing, if any; and
- (8) the timetable for action on the proposed rule.

(d) On request, the agency shall provide, for a reasonable charge, a written rulemaking docket maintained under subsection (c).

SECTION 302. RULEMAKING RECORD.

(a) An agency shall maintain a rulemaking record for each proposed rule. Unless the record and any materials incorporated by reference are privileged or exempt from disclosure under law of this state other than this [act], the record and materials must be readily available for

public inspection in the principal office of the agency and available for public display on the Internet website maintained by the [publisher]. If an agency determines that any part of the rulemaking record cannot be displayed practicably or is inappropriate for public display on the Internet website, the agency shall describe the part and note that the part is not displayed.

(b) A rulemaking record must contain:

(1) a copy of all publications in the [administrative bulletin] relating to the rule and the proceeding on which the rule is based;

(2) a copy of any part of the rulemaking docket containing entries relating to the rule and the proceeding on which the rule is based;

(3) a copy and, if prepared, an index, of all factual material, studies, and reports agency personnel relied on or consulted in formulating the proposed or final rule;

(4) any official transcript of oral presentations made in the proceeding on which the rule is based or, if not transcribed, any audio recording or verbatim transcript of the presentations, and any memorandum summarizing the contents of the presentations prepared by the agency official who presided over the hearing;

(5) a copy of all comments received by the agency under Section 306(a) in response to the notice of proposed rulemaking;

(6) a copy of the rule and explanatory statement filed with the [publisher]; and

(7) any petition for agency action on the rule, except a petition governed by Section 204.

**SECTION 303. ADVANCE NOTICE OF PROPOSED RULEMAKING;
NEGOTIATED RULEMAKING.**

(a) An agency may gather information relevant to the subject matter of a potential rulemaking proceeding and may solicit comments and recommendations from the public by

publishing an advance notice of proposed rulemaking in the [administrative bulletin] and indicating where, when, and how persons may comment.

(b) An agency may engage in negotiated rulemaking by appointing a committee to comment or make recommendations on the subject matter of a proposed rulemaking under active consideration within the agency. In making appointments to the committee, the agency shall make reasonable efforts to establish a balance in representation among members of the public known to have an interest in the subject matter of the proposed rulemaking. At least annually, the agency shall publish in the [administrative bulletin] a list of all committees with their membership. Notice of a meeting of the committee must be published in the [administrative bulletin] at least [15 days] before the meeting. A meeting of the committee is open to the public.

(c) A committee appointed under subsection (b), in consultation with one or more agency representatives, shall attempt to reach a consensus on the terms or substance of a proposed rule. The committee shall present the consensus recommendation, if any, to the agency.

The agency shall consider whether to use it as the basis for a proposed rule under Section 304, but the agency is not required to propose or adopt the recommendation.

(d) This section does not prohibit an agency from obtaining information and opinions from members of the public on the subject of a proposed rule by any other method or procedure.

SECTION 304. NOTICE OF PROPOSED RULE.

(a) At least [30] days before the adoption of a rule, an agency shall file notice of the proposed rulemaking with the [publisher] for publication in the [administrative bulletin]. The notice must include:

- (1) a short explanation of the purpose of the proposed rule;
- (2) a citation or reference to the specific legal authority authorizing the proposed

rule;

(3) the text of the proposed rule;

(4) how a copy of the full text of any regulatory analysis of the proposed rule may be obtained;

(5) where, when, and how a person may comment on the proposed rule and request a hearing;

(6) a citation to and summary of each scientific or statistical study, report, or analysis that served as a basis for the proposed rule, together with an indication of how the full text of the study, report, or analysis may be obtained; and

(7) any summary of a regulatory analysis prepared under Section 305(d).

(b) Not later than three days after publication of the notice of the proposed rulemaking in the [administrative bulletin], the agency shall mail the notice or send it electronically to each person that has made a timely request to the agency for a mailed or electronic copy of the notice. An agency may charge a reasonable fee for a mailed copy requested by a person.

SECTION 305. REGULATORY ANALYSIS.

(a) An agency shall prepare a regulatory analysis for a proposed rule that has an estimated economic impact of more than \$[]. The analysis must be completed before notice of the proposed rulemaking is published. The summary of the analysis prepared under subsection (d) must be published with the notice of proposed rulemaking.

(b) If a proposed rule has an economic impact of less than \$[], the agency shall prepare a statement of minimal estimated economic impact.

(c) A regulatory analysis must contain:

(1) an analysis of the benefits and costs of a reasonable range of regulatory alternatives reflecting the scope of discretion provided by the statute authorizing the proposed

rule; and

(2) a determination whether:

(A) the benefits of the proposed rule justify the costs of the proposed rule;

and

(B) the proposed rule will achieve the objectives of the authorizing statute in a more cost-effective manner, or with greater net benefits, than other regulatory alternatives.

(d) An agency preparing a regulatory analysis under this section shall prepare a concise summary of the analysis.

(e) An agency preparing a regulatory analysis under this section shall submit the analysis to the [appropriate state agency].

(f) If an agency has made a good faith effort to comply with this section, a rule is not invalid solely because the regulatory analysis for the proposed rule is insufficient or inaccurate.

Legislative Note: State laws vary as to which state agency or body an agency preparing the regulatory analysis should submit the analysis. In some states, it is the department of finance or revenue; in others it is a regulatory review agency or regulatory review committee. The appropriate state agency in each state should be inserted into the brackets.

SECTION 306. PUBLIC PARTICIPATION.

(a) An agency proposing a rule shall specify a public comment period of at least [30] days after publication of notice of the proposed rulemaking during which a person may submit information and comment on the proposed rule. The information or comment may be submitted in an electronic or written format. The agency shall consider all information and comment on a proposed rule which is submitted pursuant to this subsection within the comment period.

(b) An agency may consider any other information it receives concerning a proposed rule during the rulemaking. Any information considered by the agency must be incorporated into the record under Section 302(b)(3). The information need not be submitted in an electronic or written format. Nothing in this section prohibits an agency from discussing with any person at

any time the subject of a proposed rule.

(c) Unless a hearing is required by law of this state other than this [act], an agency is not required to hold a hearing on a proposed rule but may do so. A hearing must be open to the public, recorded, and held at least [10] days before the end of the public comment period.

(d) A hearing on a proposed rule may not be held earlier than [20] days after notice of its location, date, and time is published in the [administrative bulletin].

(e) An agency representative shall preside over a hearing on a proposed rule. If the representative is not the agency head, the representative shall prepare a memorandum summarizing the contents of the presentations made at the hearing for consideration by the agency head.

***Legislative Note:** State laws vary on the length of public comment periods and on whether a rulemaking hearing is required. The bracketed number of days in subsections (a) and (d) should be interpreted to require that if a rulemaking hearing is held, it will be held before the end of the public comment period. In that case, the minimum time period would be 50 days rather than 30 days.*

SECTION 307. TIME LIMIT ON ADOPTION OF RULE.

(a) An agency may not adopt a rule until the public comment period has ended.

(b) Not later than [two years] after a notice of proposed rulemaking is published, the agency shall adopt the rule or terminate the rulemaking by publication of a notice of termination in the [administrative bulletin]. [The agency may extend the time for adopting the rule once for an additional [two years] by publishing a statement of good cause for the extension but must provide for additional public participation as provided in Section 306 before adopting the rule.]

(c) An agency shall file an adopted rule with the [publisher] not later than [] days after the adoption of the rule.

(d) A rule is void unless it is adopted and filed within the time limits in this section.

SECTION 308. VARIANCE BETWEEN PROPOSED AND FINAL RULE. An

agency may not adopt a rule that differs from the rule proposed in the notice of proposed rulemaking unless the final rule is a logical outgrowth of the rule proposed in the notice.

SECTION 309. EMERGENCY RULE. If an agency finds that an imminent peril to the public health, safety, or welfare or the loss of federal funding for an agency program requires the immediate adoption of an emergency rule and publishes in a record its reasons for that finding, the agency, without prior notice or hearing or on any abbreviated notice and hearing that it finds practicable, may adopt an emergency rule without complying with Sections 304 through 307. The emergency rule may be effective for not longer than [180] days [renewable once for no more than [180] days]. The adoption of an emergency rule does not preclude the adoption of a rule under Sections 304 through 307. The agency shall file with the [publisher] a rule adopted under this section as soon as practicable given the nature of the emergency, publish the rule on its Internet website, and notify persons that have requested notice of rules related to that subject matter. This section does not prohibit the adoption of a new emergency rule if, at the end of the effective period of the original emergency rule, the agency finds that the imminent peril to the public health, safety, or welfare or the loss of federal funding for an agency program still exists.

SECTION 310. DIRECT FINAL RULE. If an agency proposes to adopt a rule which is expected to be noncontroversial, it may use direct final rulemaking authorized by this section and must comply with Section 304(a)(1), (2), (3), and (5), Section 304(b), and Section 313(1). The proposed rule must be published in the [administrative bulletin] with a statement by the agency that it does not expect the adoption of the rule to be controversial and that the proposed rule takes effect 30 days after publication if no objection is received. If no objection is received, the rule becomes final under Section 317(e). If an objection to the rule is received from any person not later than [] days after publication of the notice of the proposed rule, the proposed rule does not become final. The agency shall file notice of the objection with the [publisher] for

publication in the [administrative bulletin], and may proceed with rulemaking under Sections 304 through 307.

SECTION 311. GUIDANCE DOCUMENT.

(a) An agency may issue a guidance document without following the procedures set forth in Sections 304 through 307.

(b) An agency that proposes to rely on a guidance document to the detriment of a person in any administrative proceeding shall afford the person an adequate opportunity to contest the legality or wisdom of a position taken in the document. The agency may not use a guidance document to foreclose consideration of issues raised in the document.

(c) A guidance document may contain binding instructions to agency staff members if, at an appropriate stage in the administrative process, the agency's procedures provide an affected person an adequate opportunity to contest the legality or wisdom of a position taken in the document.

(d) If an agency proposes to act in an adjudication at variance with a position expressed in a guidance document, it shall provide a reasonable explanation for the variance. If an affected person in an adjudication may have relied reasonably on the agency's position, the explanation must include a reasonable justification for the agency's conclusion that the need for the variance outweighs the affected person's reliance interest.

(e) An agency shall maintain an index of all of its effective guidance documents, publish the index on its Internet website, make all guidance documents available to the public, and file the index [annually] with the [publisher]. The agency may not rely on a guidance document, or cite it as precedent against any party to a proceeding, unless the guidance document is published on its Internet website.

(f) A guidance document may be considered by a presiding officer or final decision

maker in an agency adjudication, but it does not bind the presiding officer or the final decision maker in the exercise of discretion.

(g) A person may petition an agency under Section 318 to adopt a rule in place of a guidance document.

(h) A person may petition an agency to revise or repeal a guidance document. Not later than [60] days after submission of the petition, the agency shall:

- (1) revise or repeal the guidance document;
- (2) initiate a proceeding to consider a revision or repeal; or
- (3) deny the petition in a record and state its reasons for the denial.

SECTION 312. REQUIRED INFORMATION FOR RULE. A final rule filed by an agency with the [publisher] under Section 316 must contain the text of the rule and be accompanied by a record that contains:

- (1) the date the final rule was adopted by the agency;
- (2) a reference to the specific statutory or other authority authorizing the rule;
- (3) any finding required by law as a prerequisite to adoption or effectiveness of the rule;
- (4) the effective date of the rule; and
- (5) the concise explanatory statement required by Section 313.

SECTION 313. CONCISE EXPLANATORY STATEMENT. When an agency adopts a final rule, the agency shall issue a concise explanatory statement that contains:

- (1) the agency's reasons for adopting the rule, including the agency's reasons for not accepting substantial arguments made in testimony and comments;
- (2) subject to Section 308, the reasons for any change between the text of the proposed rule contained in the notice of proposed rulemaking and the text of the final rule; and
- (3) the summary of any regulatory analysis prepared under Section 305(d).

SECTION 314. INCORPORATION BY REFERENCE. A rule may incorporate by reference all or any part of a code, standard, or rule that has been adopted by an agency of the United States, this state, or another state, or by a nationally recognized organization or association, if:

(1) repeating verbatim the text of the code, standard, or rule in the rule would be unduly cumbersome, expensive, or otherwise inexpedient;

(2) the reference in the rule fully identifies the incorporated code, standard, or rule by citation, place of inspection, and date[, and states whether the rule includes any later amendments or editions of the incorporated code, standard, or rule];

(3) the code, standard, or rule is readily available to the public in written or electronic form at no charge or for a reasonable charge;

(4) the rule states where copies of the code, standard, or rule are available from the agency adopting the rule for a reasonable charge, if any, or where copies are available from the agency of the United States, this state, another state, or the organization or association originally issuing the code, standard, or rule; and

(5) the agency maintains a copy of the code, standard, or rule readily available for public inspection at the principal office of the agency.

SECTION 315. COMPLIANCE. An action taken under this [article] is not valid unless taken in substantial compliance with this [article].

SECTION 316. FILING OF RULE. An agency shall file in written and electronic form with the [publisher] each final rule. In filing a final rule, an agency shall use a standard form prescribed by the [publisher]. The agency shall file the rule not later than [] days after adoption. The [publisher] shall maintain a permanent register of all filed rules and concise explanatory statements for the rules. The [publisher] shall affix to each final rule a certification

of the time and date of filing. The [publisher] shall publish the notice of each final rule in the [administrative bulletin].

SECTION 317. EFFECTIVE DATE OF RULE.

(a) Except as otherwise provided in this section, [unless disapproved by the [rules review committee][,] [or] [withdrawn by the agency under Section 703,] a rule becomes effective [30] days after publication of the rule [in the administrative bulletin] [on the [publisher=s] Internet website].

(b) A rule may become effective on a date later than that established by subsection (a) if that date is specified in the rule or required by law other than this [act].

(c) A rule becomes effective immediately on its filing with the [publisher] or on any subsequent date earlier than that established by subsection (a) if it is required to be implemented by a certain date by law other than this [act].

(d) An emergency rule under Section 309 becomes effective on adoption by the agency.

(e) A direct final rule under Section 310 to which no objection is made becomes effective [30] days after publication, unless the agency specifies a later effective date.

SECTION 318. PETITION FOR ADOPTION OF RULE. Any person may petition an agency to adopt a rule. An agency shall prescribe by rule the form of the petition and the procedure for its submission, consideration, and disposition. Not later than [60] days after submission of a petition, the agency shall:

- (1) deny the petition in a record and state its reasons for the denial; or
- (2) initiate rulemaking.

[ARTICLE] 4

ADJUDICATION IN CONTESTED CASE

SECTION 401. CONTESTED CASE. This [article] applies to an adjudication made by an agency in a contested case.

SECTION 402. PRESIDING OFFICER.

(a) A presiding officer must be an administrative law judge assigned in accordance with Section 604(2), the individual who is the agency head, a member of a multi-member body of individuals that is the agency head, or, unless prohibited by law of this state other than this [act], an individual designated by the agency head.

(b) An individual who has served as investigator, prosecutor, or advocate at any stage in a contested case or who is subject to the authority, direction, or discretion of an individual who has served as investigator, prosecutor, or advocate at any stage in a contested case may not serve as the presiding officer in the same case. An agency head that has participated in a determination of probable cause or other preliminary determination in an adjudication may serve as the presiding officer or final decision maker in the adjudication unless a party demonstrates grounds for disqualification under subsection (c).

(c) A presiding officer or agency head acting as a final decision maker is subject to disqualification for bias, prejudice, financial interest, ex parte communications as provided in Section 408, or any other factor that would cause a reasonable person to question the impartiality of the presiding officer or agency head. A presiding officer or agency head, after making a reasonable inquiry, shall disclose to the parties any known facts related to grounds for disqualification which are material to the impartiality of the presiding officer or agency head in the proceeding.

(d) A party may petition for the disqualification of a presiding officer or agency head

promptly after notice that the person will preside or, if later, promptly on discovering facts establishing a ground for disqualification. The petition must state with particularity the ground on which it is claimed that a fair and impartial hearing cannot be accorded or the applicable rule or canon of practice or ethics that requires disqualification. The petition may be denied if the party fails to exercise due diligence in requesting disqualification after discovering a ground for disqualification.

(e) A presiding officer or agency head whose disqualification is requested shall decide whether to grant the petition and state in a record facts and reasons for the decision. The decision to deny disqualification is not subject to interlocutory judicial review.

(f) If a substitute presiding officer is required, the substitute must be appointed [as required by law, or if no law governs,] by:

(1) the Governor, if the original presiding officer is an elected official; or

(2) the appointing authority, if the original presiding officer is an appointed official.

(g) If participation of the agency head is necessary to enable the agency to take action, the agency head may continue to participate notwithstanding a ground for disqualification or exclusion.

Legislative Note: The first alternative under subsection (a) would be applicable in states that have adopted central panel hearing offices but would not apply to states that do not have central panel hearing offices. Article 6 governs central panel hearing offices under this act. If a state does not have a central panel hearing agency, presiding officers would include administrative law judges who are employees of the agency with final decision authority. States vary in the terms used to describe agency employees who are presiding officers. The term includes administrative judges, hearing officers, and hearing examiners. Administrative law judges can be employees of the central panel hearing office or of the agency with final decision authority.

SECTION 403. CONTESTED CASE PROCEDURE.

(a) This section does not apply to an emergency adjudication under Section 407.

(b) An agency shall give notice of the agency decision to a person when the agency takes

an action as to which the person has a right to a contested case hearing. The notice must be in writing, set forth the agency action, inform the person of the right, procedure, and time limit to file a contested-case petition, and provide a copy of the agency procedures governing the contested case.

(c) In a contested case, the presiding officer shall give all parties a timely opportunity to file pleadings, motions, and objections. The presiding officer may give all parties the opportunity to file briefs, proposed findings of fact and conclusions of law, and proposed recommended, initial, or final orders. The presiding officer, with the consent of all parties, may refer the parties in a contested case to mediation or other dispute resolution procedure.

(d) In a contested case, to the extent necessary for full disclosure of all relevant facts and issues, the presiding officer shall give all parties the opportunity to respond, present evidence and argument, conduct cross-examination, and submit rebuttal evidence.

(e) Except as otherwise provided by law other than this [act], the presiding officer may conduct all or part of an evidentiary hearing or a prehearing conference by telephone, television, video conference, or other electronic means. The hearing may be conducted by telephone or other method by which the witnesses may not be seen only if all parties consent [or the presiding officer finds that this method will not impair reliable determination of the credibility of testimony]. Each party must be given an opportunity to attend, hear, and be heard at the proceeding as it occurs. This subsection does not prevent an agency from providing by rule for electronic hearings.

(f) Except as otherwise provided in subsection (g), a hearing in a contested case must be open to the public. A hearing conducted by telephone, television, video conference, or other electronic means is open to the public if members of the public have an opportunity to attend the hearing at the place where the presiding officer is located or to hear or see the proceeding as it

occurs.

(g) A presiding officer may close a hearing to the public on a ground on which a court of this state may close a judicial proceeding to the public or pursuant to law of this state other than this [act].

(h) Unless prohibited by law of this state other than this [act], a party, at the party's expense, may be represented by counsel or may be advised, accompanied, or represented by another individual.

(i) A presiding officer shall ensure that a hearing record is created that complies with Section 406.

(j) The decision in a contested case must be based on the hearing record and contain a statement of the factual and legal bases of the decision. If a finding of fact is set forth in language of a statute of this state other than this [act], it must be accompanied by a concise and explicit statement of the underlying facts supporting the finding of fact. The decision must be prepared electronically and, on request, made available in writing.

(k) Subject to Section 205, the rules by which an agency conducts a contested case may include provisions more protective than the requirements of this section of the rights of parties other than the agency.

(l) Unless prohibited by law of this state other than this [act], an agency may dispose of a contested case without a hearing by stipulation, agreed settlement, consent order, or default.

SECTION 404. EVIDENCE IN CONTESTED CASE. The following rules apply in a contested case:

(1) Except as otherwise provided in paragraph (2), all relevant evidence is admissible, including hearsay evidence, if it is of a type commonly relied on by a reasonably prudent individual in the conduct of the affairs of the individual.

(2) The presiding officer may exclude evidence in the absence of an objection if the evidence is irrelevant, immaterial, unduly repetitious, or excludable on constitutional or statutory grounds or on the basis of an evidentiary privilege recognized in the courts of this state. The presiding officer shall exclude the evidence if objection is made at the time the evidence is offered.

(3) If the presiding officer excludes evidence with or without objection, the offering party may make an offer of proof before further evidence is presented or at a later time determined by the presiding officer.

(4) Evidence may be received in a record if doing so will expedite the hearing without substantial prejudice to a party. Documentary evidence may be received in the form of a copy if the original is not readily available or by incorporation by reference. On request, parties must be given an opportunity to compare the copy with the original.

(5) Testimony must be made under oath or affirmation.

(6) Evidence must be made part of the hearing record of the case. Information or evidence may not be considered in determining the case unless it is part of the hearing record. If the hearing record contains information that is confidential, the presiding officer may conduct a closed hearing to discuss the information, issue necessary protective orders, and seal all or part of the hearing record.

(7) The presiding officer may take official notice of all facts of which judicial notice may be taken and of scientific, technical, or other facts within the specialized knowledge of the agency. A party must be notified at the earliest practicable time of the facts proposed to be noticed and their source, including any staff memoranda or data. The party must be afforded an opportunity to contest any officially noticed fact before the decision becomes final.

(8) The experience, technical competence, and specialized knowledge of the presiding

officer or members of an agency head that is a multi-member body that is hearing the case may be used in evaluating the evidence in the hearing record.

SECTION 405. NOTICE IN CONTESTED CASE.

(a) Except as otherwise provided in an emergency adjudication under Section 407, an agency shall give notice in a contested case that complies with this section.

(b) In a contested case initiated by a person other than an agency, not later than [five] days after filing, the agency shall give notice to all parties that the case has been commenced.

The notice must contain:

(1) the official file or other reference number, the name of the proceeding, and a general description of the subject matter;

(2) contact information for communicating with the agency, including the agency mailing address [, electronic mail address,] [,] [facsimile number,] and telephone number;

(3) a statement of the date, time, place, and nature of the prehearing conference or hearing, if any;

(4) the name, official title, mailing address, [electronic mail address,] [facsimile number,] and telephone number of any attorney or employee who has been designated to represent the agency; and

(5) the names and last known addresses of all parties and other persons to which notice is being given by the agency.

(c) In a contested case initiated by an agency, the agency shall give notice to the party against which the action is brought. The notice must contain:

(1) a statement that a case that may result in an order has been commenced against the party;

(2) a short and plain statement of the matters asserted, including the issues

involved;

(3) a statement of the legal authority under which the hearing will be held citing the statutes and any rules involved;

(4) the official file or other reference number and the name of the proceeding;

(5) the name, official title, mailing address, [and] [electronic mail address,] [and] [facsimile number,] [and] [telephone number] of the presiding officer and the name, official title, mailing address, [electronic mail address,] [facsimile number,] and telephone number of the agency's representative;

(6) a statement that a party that fails to attend or participate in any subsequent proceeding in the case may be held in default;

(7) a statement that the party served may request a hearing and includes instructions in plain English about how to request a hearing; and

(8) the names and last known addresses of all parties and other persons to which notice is being given by the agency.

(d) When a hearing or a prehearing conference is scheduled, the agency shall give parties notice that contains the information required by subsection (c) at least [30] days before the hearing or prehearing conference.

(e) A notice under this section may include other matters that the presiding officer considers desirable to expedite the proceedings.

SECTION 406. HEARING RECORD IN CONTESTED CASE.

(a) An agency shall maintain the hearing record created under Section 403(i) in each contested case.

(b) The hearing record must contain:

(1) a recording of each proceeding;

- (2) notice of each proceeding;
- (3) any prehearing order;
- (4) any motion, pleading, brief, petition, request, and intermediate ruling;
- (5) evidence admitted;
- (6) a statement of any matter officially noticed;
- (7) any proffer of proof and objection and ruling thereon;
- (8) any proposed finding, requested order, and exception;
- (9) any transcript of the proceeding prepared at the direction of the agency;
- (10) any recommended order, final order, or order on reconsideration; and
- (11) any matter placed on the record after an ex parte communication under

Section 408(f).

(c) The hearing record constitutes the exclusive basis for agency action in a contested case.

SECTION 407. EMERGENCY ADJUDICATION PROCEDURE.

(a) Unless prohibited by law of this state other than this [act], an agency may conduct an emergency adjudication in a contested case under this section.

(b) An agency may take action and issue an order under this section only to deal with an imminent peril to the public health, safety, or welfare.

(c) Before issuing an order under this section, an agency, if practicable, shall give notice and an opportunity to be heard to the person to which the agency action is directed. The notice of the hearing and the hearing may be oral or written and may be by telephone, facsimile, or other electronic means.

(d) An order issued under this section must briefly explain the factual and legal reasons for using emergency adjudication procedures.

(e) To the extent practicable, an agency shall give notice to the person to which the agency action is directed that an order has been issued. The order is effective when signed by the agency head or the designee of the agency head.

(f) After issuing an order pursuant to this section, an agency shall proceed as soon as practicable to provide notice and an opportunity for a hearing following the procedure under Section 403 to determine the issues underlying the order.

(g) An order issued under this section may be effective for not longer than [180] days or until the effective date of any order issued under subsection (f), whichever is shorter.

SECTION 408. EX PARTE COMMUNICATIONS.

(a) In this section, “final decision maker” means the person with the power to issue a final order in a contested case.

(b) Except as otherwise provided in subsection (c), (d), (e), or (h), while a contested case is pending, the presiding officer and the final decision maker may not make to or receive from any person any communication concerning the case without notice and opportunity for all parties to participate in the communication. For the purpose of this section, a contested case is pending from the issuance of the agency’s pleading or from an application for an agency decision, whichever is earlier.

(c) A presiding officer or final decision maker may communicate about a pending contested case with any person if the communication is required for the disposition of ex parte matters authorized by statute or concerns an uncontested procedural issue.

(d) A presiding officer or final decision maker may communicate about a pending contested case with an individual authorized by law to provide legal advice to the presiding officer or final decision maker and may communicate on ministerial matters with an individual who serves on the [administrative] [personal] staff of the presiding officer or final decision

maker if the individual providing legal advice or ministerial information has not served as investigator, prosecutor, or advocate at any stage of the case, and if the communication does not augment, diminish, or modify the evidence in the record.

(e) An agency head that is the presiding officer or final decision maker in a pending contested case may communicate about that case with an employee or representative of the agency if:

(1) the employee or representative:

(A) has not served as investigator, prosecutor, or advocate at any stage of the case;

(B) has not otherwise had a communication with any person about the case other than a communication a presiding officer or final decision maker is permitted to make or receive under subsection (c) or (d) or a communication permitted by paragraph (2); and

(2) the communication does not augment, diminish, or modify the evidence in the agency hearing record and is:

(A) an explanation of the technical or scientific basis of, or technical or scientific terms in, the evidence in the agency hearing record;

(B) an explanation of the precedent, policies, or procedures of the agency;

or

(C) any other communication that does not address the quality or sufficiency of, or the weight that should be given to, evidence in the agency hearing record or the credibility of witnesses.

(f) If a presiding officer or final decision maker makes or receives a communication in violation of this section, the presiding officer or final decision maker:

(1) if the communication is in a record, shall make the record of the

communication a part of the hearing record and prepare and make part of the hearing record a memorandum that contains the response of the presiding officer or final decision maker to the communication and the identity of the person that communicated; or

(2) if the communication is oral, shall prepare a memorandum that contains the substance of the verbal communication, the response of the presiding officer or final decision maker to the communication, and the identity of the person that communicated.

(g) If a communication prohibited by this section is made, the presiding officer or final decision maker shall notify all parties of the prohibited communication and permit parties to respond in a record not later than 15 days after the notice is given. For good cause, the presiding officer or final decision maker may permit additional testimony in response to the prohibited communication.

(h) If a presiding officer is a member of a multi-member body of individuals that is the agency head, the presiding officer may communicate with the other members of the body when sitting as the presiding officer and final decision maker. Otherwise, while a contested case is pending, no communication, direct or indirect, regarding any issue in the case may be made between the presiding officer and the final decision maker. Notwithstanding any provision of [state open meetings law], a communication permitted by this subsection is not a meeting.

(i) If necessary to eliminate the effect of a communication received in violation of this section, a presiding officer or final decision maker may be disqualified under Section 402(d) and (e), the parts of the record pertaining to the communication may be sealed by protective order, or other appropriate relief may be granted, including an adverse ruling on the merits of the case or dismissal of the application.

SECTION 409. INTERVENTION.

(a) A presiding officer shall grant a timely petition for intervention in a contested case,

with notice to all parties, if:

(1) the petitioner has a statutory right under law of this state other than this [act] to initiate or to intervene in the case; or

(2) the petitioner has an interest that may be adversely affected by the outcome of the case and that interest is not adequately represented by existing parties.

(b) A presiding officer may grant a timely petition for intervention in a contested case, with notice to all parties, if the petitioner has a permissive statutory right to intervene under law of this state other than this [act] or if the petitioner's claim or defense is based on the same transaction or occurrence as the case.

(c) A presiding officer may impose conditions at any time on an intervener's participation in the contested case.

(d) A presiding officer may permit intervention provisionally and, at any time later in the contested case or at the end of the case, may revoke the provisional intervention.

(e) On request by the petitioners or a party or by action of the presiding officer, the presiding officer may hold a hearing on the intervention petition.

(f) A presiding officer shall promptly give notice of an order granting, denying, or revoking intervention to the petitioner for intervention and to the parties. The notice must allow parties a reasonable time to prepare for the hearing on the merits.

SECTION 410. SUBPOENAS.

(a) On a request in a record by a party in a contested case, the presiding officer or any other officer to whom the power to issue a subpoena is delegated pursuant to law, on a showing of general relevance and reasonable scope of the evidence sought for use at the hearing, shall issue a subpoena for the attendance of a witness and the production of books, records, and other evidence.

(b) Unless otherwise provided by law or agency rule, a subpoena issued under subsection (a) shall be served and, on application to the court by a party or the agency, enforced in the manner provided by law for the service and enforcement of a subpoena in a civil action.

(c) Witness fees shall be paid by the party requesting a subpoena in the manner provided by law for witness fees in a civil action.

SECTION 411. DISCOVERY.

(a) In this section, “statement” includes a record of a person’s written statement signed by the person and a record that summarizes an oral statement made by the person.

(b) Except in an emergency hearing under Section 407, a party, on written notice to another party at least [30] days before an evidentiary hearing, unless otherwise provided by agency rule under subsection (g), may:

(1) obtain the names and addresses of witnesses the other party will present at the hearing to the extent known to the other party; and

(2) inspect and copy any of the following material in the possession, custody, or control of the other party:

(A) statements of parties and witnesses proposed to be called by the other party;

(B) all records, including reports of mental, physical, and blood examinations, and other evidence the other party proposes to offer;

(C) investigative reports made by or on behalf of the agency or other party pertaining to the subject matter of the adjudication;

(D) statements of expert witnesses proposed to be called by the other party;

(E) any exculpatory material in the possession of the agency; and

(F) other materials for good cause.

(c) Parties to a contested case have a duty to supplement responses provided under subsection (b) to include information thereafter acquired, to the extent that the information will be relied on in the hearing.

(d) On petition, the presiding officer may issue a protective order for any material for which discovery is sought under this section which is exempt, privileged, or otherwise made confidential or protected from disclosure by law of this state other than this [act] and material the disclosure of which would result in annoyance, embarrassment, oppression, or undue burden or expense to any person.

(e) On petition, the presiding officer shall issue an order compelling discovery for refusal to comply with a discovery request unless good cause exists for refusal. Failure to comply with the order may be enforced according to the rules of civil procedure.

(f) On petition and for good cause, the presiding officer shall issue an order authorizing discovery in accordance with the rules of civil procedure.

(g) An agency may provide by rule that some or all discovery procedures under this section do not apply to a specified program or category of cases if it finds that:

(1) the availability of discovery would unduly complicate or interfere with the hearing process in the program or cases, because of the volume of the applicable caseload and the need for expedition and informality in that process; and

(2) alternative procedures for the sharing of relevant information are sufficient to ensure the fundamental fairness of the proceedings.

SECTION 412. DEFAULT.

(a) Unless otherwise provided by law of this state other than this [act], if a party without good cause fails to attend or participate in a prehearing conference or hearing in a contested case,

the presiding officer may issue a default order.

(b) If a default order is issued, the presiding officer may conduct any further proceedings necessary to complete the adjudication without the defaulting party and shall determine all issues in the adjudication, including those affecting the defaulting party.

(c) A recommended, initial, or final order issued against a defaulting party may be based on the defaulting party's admissions or other evidence that may be used without notice to the defaulting party. If the burden of proof is on the defaulting party to establish that the party is entitled to the agency action sought, the presiding officer may issue a recommended, initial, or final order without taking evidence.

(d) Not later than [15] days after notice to a party subject to a default order that a recommended, initial, or final order has been rendered against the party, the party may petition the presiding officer to vacate the recommended, initial, or final order. If good cause is shown for the party's failure to appear, the presiding officer shall vacate the decision and, after proper service of notice, conduct another evidentiary hearing. If good cause is not shown for the party's failure to appear, the presiding officer shall deny the motion to vacate.

SECTION 413. ORDERS: RECOMMENDED, INITIAL, OR FINAL.

(a) If the presiding officer is the agency head, the presiding officer shall issue a final order.

(b) Except as otherwise provided by law of this state other than this [act], if the presiding officer is not the agency head and has not been delegated final decisional authority, the presiding officer shall issue a recommended order. If the presiding officer is not the agency head and has been delegated final decisional authority, the presiding officer shall issue an initial order that becomes a final order [30] days after issuance, unless reviewed by the agency head on its own initiative or on petition of a party.

(c) A recommended, initial, or final order must be served in a record on each party and the agency head not later than [90] days after the hearing ends, the record closes, or memoranda, briefs, or proposed findings are submitted, whichever is latest. The presiding officer may extend the time by stipulation, waiver, or for good cause.

(d) A recommended, initial, or final order must separately state findings of fact and conclusions of law on all material issues of fact, law, or discretion, the remedy prescribed, and, if applicable, the action taken on a petition for a stay. The presiding officer may permit a party to submit proposed findings of fact and conclusions of law. The order must state the available procedures and time limits for seeking reconsideration or other administrative relief and must state the time limits for seeking judicial review of the agency order. A recommended or initial order must state any circumstances under which the order, without further notice, may become a final order.

(e) Findings of fact must be based exclusively on the evidence and matters officially noticed in the hearing record in the contested case.

Alternative A

(f) Hearsay evidence may be used to supplement or explain other evidence, but on timely objection, is not sufficient by itself to support a finding of fact unless it would be admissible over objection in a civil action.

Alternative B

(f) Hearsay evidence is sufficient to support a finding of fact if it constitutes reliable, probative, and substantial evidence.

End of Alternatives

(g) An order is issued under this section when it is signed by the agency head, presiding officer, or an individual authorized by law of this state other than this [act] to sign the order.

(h) A final order is effective [30] days after all parties are notified of the order unless reconsideration is granted under Section 416 or a stay is granted under Section 417.

SECTION 414. AGENCY REVIEW OF INITIAL ORDER.

(a) An agency head may review an initial order on its own initiative.

(b) A party may petition an agency head to review an initial order. On petition by a party, the agency head may review an initial order.

(c) A petition for review of an initial order must be filed with the agency head or with any person designated for this purpose by agency rule not later than [15] days after notice to the parties of the order. If the agency head decides to review an initial order on its own initiative, the agency head shall give notice in a record to the parties that it intends to review the order. The notice must be given not later than [15] days after the parties are notified of the order. If a petition for review is not filed or the agency head does not elect to review the initial order within the prescribed time limit, the initial order becomes a final order.

(d) The period in subsection (c) for a party to file a petition or for the agency head to notify the parties of its intention to review an initial order is tolled by the submission of a timely petition under Section 416 for reconsideration of the order. A new [15]-day period begins on disposition of the petition for reconsideration. If an order is subject both to a timely petition for reconsideration and a petition for review by the agency head, the petition for reconsideration must be disposed of first, unless the agency head determines that action on the petition for reconsideration has been unreasonably delayed.

(e) When reviewing an initial order, the agency head shall exercise the decision-making power that the agency head would have had if the agency head had conducted the hearing that produced the order, except to the extent that the issues subject to review are limited by law of this state other than this [act] or by order of the agency head on notice to the parties. In

reviewing findings of fact in an initial order, the agency head shall consider the presiding officer's opportunity to observe the witnesses and to determine the credibility of witnesses. The agency head shall consider the hearing record or parts of the record designated by the parties.

(f) If an agency head reviews an initial order, the agency head shall issue a final order disposing of the proceeding not later than 120 days after the decision to review the initial order or remand the matter for further proceedings with instructions to the presiding officer who issued the initial order. On remanding a matter, the agency head may order such temporary relief as is authorized and appropriate.

(g) A final order or an order remanding the matter for further proceedings must identify any difference between the order and the initial order and must state the facts of record that support any difference in findings of fact, the law that supports any difference in legal conclusions, and the policy reasons that support any difference in the exercise of discretion. Findings of fact must be based exclusively on the evidence and matters officially noticed in the hearing record in the contested case. A final order under this section must include, or incorporate by express reference to the initial order, the matters required by Section 413(d). The agency head shall deliver the order to the presiding officer and notify the parties of the order.

SECTION 415. AGENCY REVIEW OF RECOMMENDED ORDER.

(a) An agency head shall review a recommended order pursuant to this section.

(b) When reviewing a recommended order, the agency head shall exercise the decision-making power that the agency head would have had if the agency head had conducted the hearing that produced the order, except to the extent that the issues subject to review are limited by law of this state other than this [act] or by order of the agency head on notice to the parties. In reviewing findings of fact in a recommended order, the agency head shall consider the presiding officer's opportunity to observe the witnesses and to determine the credibility of

witnesses. The agency head shall consider the hearing record or parts that are designated by the parties.

(c) An agency head may render a final order disposing of the proceeding or remand the matter for further proceedings with instructions to the presiding officer who rendered the recommended order. On remanding a matter, the agency head may order such temporary relief as is authorized and appropriate.

(d) A final order or an order remanding the matter for further proceedings must identify any difference between the order and the recommended order and must state the facts of record that support any difference in findings of fact, the law that supports any difference in legal conclusions, and the policy reasons that support any difference in the exercise of discretion. Findings of fact must be based exclusively on the evidence and matters officially noticed in the hearing record in the contested case. A final order under this section must include, or incorporate by express reference to the recommended order, the matters required by Section 413(d). The agency head shall deliver the order to the presiding officer and notify the parties of the order.

SECTION 416. RECONSIDERATION.

(a) A party, not later than [15] days after notice to the parties that a final order has been issued, may file a petition for reconsideration that states the specific grounds on which relief is requested. The place of filing and other procedures, if any, must be specified by agency rule and must be stated in the final order.

(b) If a petition for reconsideration is timely filed, and if the petitioner has complied with the agency's procedural rules for reconsideration, if any, the time for filing a petition for judicial review does not begin until the agency disposes of the petition for reconsideration as provided in Section 503(d).

(c) Not later than [20] days after a petition is filed under subsection (a), the decision maker shall issue a written order denying the petition, granting the petition and dissolving or modifying the final order, or granting the petition and setting the matter for further proceedings. If the decision maker fails to respond to the petition not later than [30] days after filing, or a longer period agreed to by the parties, the petition is deemed denied. The petition may be granted only if the decision maker states findings of facts, conclusions of law, and the reasons for granting the petition.

SECTION 417. STAY. Except as otherwise provided by law of this state other than this [act], a party, not later than [seven] days after the parties are notified of the order, may request the agency to stay a final order pending judicial review. The agency may grant the request for a stay pending judicial review if the agency finds that justice requires. The agency may grant or deny the request for stay of the order before, on, or after the effective date of the order.

SECTION 418. AVAILABILITY OF ORDERS; INDEX.

(a) Except as otherwise provided in subsections (b) and (c), an agency shall create an index of all final orders in contested cases and make the index and all final orders available for public inspection and copying, at cost, in its principal offices.

(b) Except as otherwise provided in subsection (c), final orders that are exempt, privileged, or otherwise made confidential or protected from disclosure by [the public records law of this state] are not public records and may not be indexed. The final order may be excluded from an index and disclosed only by order of the presiding officer with a written statement of reasons attached to the order.

(c) If the presiding officer determines it is possible to redact a final order that is exempt, privileged, or otherwise made confidential or protected from disclosure by law of this state other than this [act] so that it complies with the requirements of that law, the redacted order may be

placed in the index and published.

(d) An agency may not rely on a final order adverse to a party other than the agency as precedent in future adjudications unless the agency designates the order as a precedent, and the order has been published, placed in an index, and made available for public inspection.

SECTION 419. LICENSES.

(a) If a licensee has made timely and sufficient application for the renewal of a license or a new license for any activity of a continuing nature, the existing license does not expire until the agency takes final action on the application and, if the application is denied or the terms of the new license are limited, until the last day for seeking review of the agency order or a later date fixed by the reviewing court.

(b) A revocation, suspension, annulment, or withdrawal of a license is not lawful unless, before the institution of agency proceedings, the agency notifies the licensee of facts or conduct that warrants the intended action, and the licensee is given an opportunity to show compliance with all lawful requirements for the retention of the license. If the agency finds that imminent peril to public health, safety, or welfare requires emergency action and incorporates a finding to that effect in its order, summary suspension of a license may be ordered pending proceedings for revocation or other action. These proceedings must be promptly instituted and concluded.

[ARTICLE] 5

JUDICIAL REVIEW

SECTION 501. RIGHT TO JUDICIAL REVIEW; FINAL AGENCY ACTION REVIEWABLE.

(a) In this [article], “final agency action” means an act of an agency which imposes an obligation, grants or denies a right, confers a benefit, or determines a legal relationship as a result of an administrative proceeding. The term does not include agency action that is a failure to act.

(b) Except to the extent that a statute of this state other than this [act] limits or precludes judicial review, a person that meets the requirements of this [article] is entitled to judicial review of a final agency action.

(c) A person entitled to judicial review under subsection (b) of a final agency action is entitled to judicial review of an agency action that is not final if postponement of judicial review would result in an inadequate remedy or irreparable harm that outweighs the public benefit derived from postponing judicial review.

(d) A court may compel an agency to take action that is unlawfully withheld or unreasonably delayed.

SECTION 502. RELATION TO OTHER JUDICIAL REVIEW LAW AND RULES.

(a) Except as otherwise provided by law of this state other than this [act], judicial review of final agency action may be taken only as provided by rules of [appellate] [civil] procedure [of this state]. The court may grant any type of legal and equitable remedies that are appropriate.

(b) This [article] does not limit use of or the scope of judicial review available under other means of review, redress, relief, or trial de novo provided by law of this state other than this [act]. Except to the extent that prior, adequate, and exclusive opportunity for judicial review

is available under this [article] or under law of this state other than this [act], final agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement.

SECTION 503. TIME TO SEEK JUDICIAL REVIEW OF AGENCY ACTION; LIMITATIONS.

(a) Judicial review of a rule on the ground of noncompliance with the procedural requirements of this [act] must be commenced not later than [two] years after the effective date of the rule. Judicial review of a rule or guidance document on other grounds may be sought at any time.

(b) Judicial review of an order or other final agency action other than a rule or guidance document must be commenced not later than [30] days after the date the parties are notified of the order or other agency action.

(c) The time for seeking judicial review under this section is tolled during any time a party pursues an administrative remedy before the agency which must be exhausted as a condition of judicial review.

(d) A party may not petition for judicial review while seeking reconsideration under Section 416. During the time a petition for reconsideration is pending before an agency, the time for seeking judicial review in subsection (b) is tolled.

SECTION 504. STAYS PENDING APPEAL. A petition for judicial review does not automatically stay an agency decision. A challenging party may request the reviewing court for a stay on the same basis as stays are granted under the rules of [appellate] [civil] procedure [of this state], and the reviewing court may grant a stay regardless of whether the challenging party first sought a stay from the agency.

SECTION 505. STANDING. The following persons have standing to obtain judicial review of a final agency action:

- (1) a person aggrieved or adversely affected by the agency action; and
- (2) a person that has standing under law of this state other than this [act].

SECTION 506. EXHAUSTION OF ADMINISTRATIVE REMEDIES.

(a) Subject to subsection (d) or law of this state other than this [act] which provides that a person need not exhaust administrative remedies, a person may file a petition for judicial review under this [act] only after exhausting all administrative remedies available within the agency the action of which is being challenged and within any other agency authorized to exercise administrative review.

(b) Filing a petition for reconsideration or a stay of proceedings is not a prerequisite for seeking judicial review.

(c) A petitioner for judicial review of a rule need not have participated in the rulemaking proceeding on which the rule is based or have filed a petition to adopt a rule under Section 318.

(d) The court may relieve a petitioner of the requirement to exhaust any or all administrative remedies to the extent the administrative remedies are inadequate or the requirement would result in irreparable harm.

SECTION 507. AGENCY RECORD ON JUDICIAL REVIEW; EXCEPTIONS.

(a) If an agency was required by [Article] 3 or 4, or by law of this state other than this [act], to maintain an agency record during the proceeding that gave rise to the action under review, the court review is confined to that record and to matters arising from that record.

(b) In any case to which subsection (a) does not apply, the record for review consists of the unprivileged materials that agency decision makers directly or indirectly considered, or which were submitted for consideration by any person, in connection with the action under review, including information that is adverse to the agency's position. If the agency action was ministerial or was taken on the basis of a minimal or no administrative record, the court may

receive evidence relating to the agency's basis for taking the action.

(c) The court may supervise an agency's compilation of the agency record. If a challenging party makes a substantial showing of need, the court may allow discovery or other evidentiary proceedings and consider evidence outside the agency record to:

(1) ensure that the agency record is complete as required by this [act] and other applicable law;

(2) adjudicate allegations of procedural error not disclosed by the record; or

(3) prevent manifest injustice.

SECTION 508. SCOPE OF REVIEW.

(a) Except as provided by law of this state other than this [act], in judicial review of an agency action, the following rules apply:

(1) The burden of demonstrating the invalidity of agency action is on the party asserting invalidity.

(2) The court shall make a ruling on each material issue on which the court's decision is based.

(3) The court may grant relief only if it determines that a person seeking judicial review has been prejudiced by one or more of the following:

(A) the agency erroneously interpreted the law;

(B) the agency committed an error of procedure;

(C) the agency action is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(D) an agency determination of fact in a contested case is not supported by substantial evidence in the record as a whole; or

(E) to the extent that the facts are subject to a trial de novo by the

reviewing court, the action was unwarranted by the facts.

(b) In making a determination under this section, the court shall review the agency record or the parts designated by the parties and shall apply the rule of harmless error.

[ARTICLE] 6

OFFICE OF ADMINISTRATIVE HEARINGS

SECTION 601. CREATION OF OFFICE OF ADMINISTRATIVE HEARINGS.

(a) In this [article], “office” means the [Office of Administrative Hearings].

(b) The [Office of Administrative Hearings] is created in the executive branch of state government [within the [] agency].

SECTION 602. CHIEF ADMINISTRATIVE LAW JUDGE; APPOINTMENT; QUALIFICATIONS; TERM; REMOVAL.

(a) The office is headed by a chief administrative law judge appointed by [the Governor] [with the advice and consent of the Senate].

(b) A chief administrative law judge serves a term of [five] years and until a successor is appointed and qualifies for office, is entitled to the salary provided by law, and may be reappointed.

(c) At the time of appointment, the chief administrative law judge must have been admitted to the practice of law in this state for at least five years and have substantial experience in administrative law.

(d) A chief administrative law judge:

(1) must take the oath of office required by law before beginning the duties of the office;

(2) shall devote full time to the duties of the office and may not engage in the private practice of law; and

(3) is subject to the code of conduct for administrative law judges adopted pursuant to Section 604(7).

(e) A chief administrative law judge may be removed from office only for cause and

only after notice and an opportunity for a contested case hearing.

**SECTION 603. ADMINISTRATIVE LAW JUDGES; APPOINTMENT;
QUALIFICATIONS; DISCIPLINE.**

(a) The chief administrative law judge shall appoint administrative law judges pursuant to the [state merit system].

(b) In addition to meeting other requirements of the [state merit system], to be eligible for appointment as an administrative law judge, an individual must have been admitted to the practice of law in this state for at least [three] years.

(c) An administrative law judge:

(1) shall take the oath of office required by law before beginning duties as an administrative law judge;

(2) is subject to the code of conduct for administrative law judges adopted pursuant to Section 604(7);

(3) is entitled to the compensation provided by law; and

(4) may not perform any act inconsistent with the duties and responsibilities of an administrative law judge.

(d) An administrative law judge:

(1) is subject to the administrative supervision of the chief administrative law judge;

(2) may be disciplined pursuant to the [state merit system law];

(3) except as otherwise provided in paragraph (4), may be removed from office only for cause and only after notice and an opportunity for a contested case hearing; and

(4) is subject to a reduction in force in accordance with the [state merit system law].

(e) On [the effective date of this [act]], administrative law judges employed by agencies to which this [article] applies are transferred to the office and, regardless of the minimum qualifications imposed by this [article], are administrative law judges in the office.

SECTION 604. CHIEF ADMINISTRATIVE LAW JUDGE; POWERS; DUTIES.

The chief administrative law judge has the powers and duties specified in this section. The chief administrative law judge:

- (1) shall supervise and manage the office;
- (2) shall assign administrative law judges in a case referred to the office;
- (3) shall assure the decisional independence of each administrative law judge;
- (4) shall establish and implement standards for equipment, supplies, and technology for administrative law judges;
- (5) shall provide and coordinate continuing education programs and services for administrative law judges and advise them of changes in the law concerning their duties;
- (6) shall adopt rules pursuant to this [act] to implement [Article] 4 and this [article];
- (7) shall adopt a code of conduct for administrative law judges;
- (8) shall monitor the quality of adjudications conducted by administrative law judges;
- (9) shall discipline [pursuant to the state merit system law] administrative law judges who do not meet appropriate standards of conduct and competence;
- (10) may accept grants and gifts for the benefit of the office; and
- (11) may contract with other public agencies for services provided by the office.

SECTION 605. COOPERATION OF AGENCIES.

(a) Every agency shall cooperate with the chief administrative law judge in the discharge of the duties of the office.

(b) Subject to Section 402, an agency may not reject a particular administrative law

judge for a particular hearing.

**SECTION 606. ADMINISTRATIVE LAW JUDGES; POWERS; DUTIES;
DECISION MAKING AUTHORITY.**

(a) In a contested case, unless the hearing is conducted by a presiding officer assigned under Section 402(a) other than an administrative law judge, an administrative law judge must be assigned to be the presiding officer. If the administrative law judge is delegated final decisional authority, the administrative law judge shall issue a final order. If the administrative law judge is not delegated final decisional authority, the administrative law judge shall issue to the agency head a recommended order in the contested case.

(b) Except as otherwise provided by law of this state other than this [act], if a contested case is referred to the office by an agency, the agency may not take further action with respect to the proceeding, except as a party, until a recommended, initial, or final order is issued. [This subsection does not prevent an appropriate interlocutory review by the agency or an appropriate termination or modification of the proceeding by the agency when authorized by law of this state other than this [act].]

(c) In addition to acting as the presiding officer in contested cases under this [act], subject to the direction of the chief administrative law judge, an administrative law judge may perform duties authorized by law of this state other than this [act].

SECTION 607. AGENCIES EXCLUDED. [This [article] does not apply to the following agencies: [list agencies exempted]].

[[ARTICLE] 7

RULES REVIEW

SECTION 701. [LEGISLATIVE RULES REVIEW COMMITTEE]. There is created a standing committee of the [Legislature] designated the [rules review committee].

Legislative Note: States that have existing rules review committees can incorporate the provisions of Sections 701 and 702, using the existing number of members of their current rules review committee. Because state practice varies as to how these committees are structured, and how many members of the legislative body serve on this committee, as well as how they are selected, the act does not specify the details of the legislative review committee selection process. Details of the committee staff and adoption of rules to govern the rules review committee staff and organization are governed by law other than this act including the existing law in each state.

SECTION 702. REVIEW BY [RULES REVIEW COMMITTEE].

(a) An agency shall file a copy of an adopted rule with the [rules review committee] at the same time it is filed with the [publisher]. An agency is not required to file an emergency rule adopted under Section 309 with the [rules review committee].

(b) The [rules review committee] may examine each rule in effect and each newly adopted rule to determine whether the:

- (1) rule is a valid exercise of delegated legislative authority;
- (2) statutory authority for the rule has expired or been repealed;
- (3) rule is necessary to accomplish the apparent or expressed intent of the specific statute that the rule implements;
- (4) rule is a reasonable implementation of the law as it applies to any affected class of persons; and
- (5) agency complied with the regulatory analysis requirements of Section 305 and the analysis properly reflects the effect of the rule.

(c) The [rules review committee] may request from an agency information necessary to exercise its powers under subsection (b). The [rules review committee] shall consult with

standing committees of the [Legislature] with subject matter jurisdiction over the subjects of the rule under examination.

(d) The [rules review committee] shall:

- (1) maintain oversight over agency rulemaking; and
- (2) exercise other duties assigned to it under this [article].

SECTION 703. [RULES REVIEW COMMITTEE] PROCEDURE AND POWERS.

(a) Not later than [30] days after receiving a copy of an adopted rule from an agency under Section 702, the [rules review committee] may:

- (1) approve the adopted rule;
- (2) disapprove the rule and propose an amendment to the adopted rule; or
- (3) disapprove the adopted rule.

(b) If the [rules review committee] approves an adopted rule or does not disapprove and propose an amendment under subsection (a)(2) or disapprove under subsection (a)(3), the adopted rule becomes effective on the date specified in Section 317.

(c) If the [rules review committee] proposes an amendment to an adopted rule under subsection (a)(2), the agency may make the amendment and resubmit the rule, as amended, to the [rules review committee]. The amended rule must be one that the agency could have adopted on the basis of the record in the rulemaking proceeding and the legal authority granted to the agency. The agency shall provide an explanation for the amended rule as provided in Section 313. An agency is not required to hold a hearing on an amendment made under this subsection. If the agency makes the amendment, it shall give notice to the [publisher] for publication of the rule, as amended, in the [administrative bulletin]. The notice must include the text of the rule as amended. If the [rules review committee] does not disapprove the rule, as amended, or propose a further amendment, the rule becomes effective on the date specified under Section 317.

(d) If the [rules review committee] disapproves the adoption of a rule under subsection (a)(3), the adopted rule becomes effective on adjournment of the next regular session of the [Legislature] unless before adjournment the [Legislature] [adopts a [joint] [concurrent] resolution] [enacts a bill] sustaining the action of the committee.

(e) Before the effective date specified in Section 317, the agency may withdraw the adoption of a rule by giving notice of the withdrawal to the [rules review committee] and to the [publisher] for publication in the [administrative bulletin]. A withdrawal under this subsection terminates the rulemaking with respect to the adoption but does not prevent the agency from initiating new rulemaking for the same or substantially similar adoption.]

Legislative Note: *The 30-day time period in subsection (a) is the same as the 30-day period in Section 317. State constitutions vary as to whether or not a joint resolution is a valid way of disapproving an agency rule. In some states, the Legislature must use the bill process with approval by the Governor. In other states, the joint resolution process is proper. States should use the alternative that complies with their state constitution. State constitutions vary on the federal constitutional issue decided by the U.S. Supreme Court in *I.N.S. v. Chadha* (1983) 462 U.S. 919, 103 S.Ct. 2764. The U.S. Supreme Court held that the one house legislative veto provided for in Section 244(c)(2) violated the Article I requirement that legislative action requires passage of a law by both Houses of Congress (bicameralism) and presentation to the President for signing or veto (presentation requirement). Those state constitutions that require presentation to the Governor need an additional step, presentation of the joint resolution to the Governor for approval or disapproval. With state constitutions that do not require presentation of a resolution to the Governor, the rules review process can be completed with legislative adoption of a joint resolution.*

[ARTICLE] 8

MISCELLANEOUS PROVISIONS

SECTION 801. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL COMMERCE ACT. This [act] modifies, limits, and supersedes the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001 et seq., but does not modify, limit, or supersede Section 101(c) of that act, 15 U.S.C. Section 7001(c), or authorize electronic delivery of any of the notices described in Section 103(b) of that act, 15 U.S.C. Section 7003(b).

SECTION 802. REPEALS. [The State Administrative Procedure Act] is repealed.

SECTION 803. EFFECTIVE DATE. This [act] takes effect []... .