SB
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W. EUGENE GUESS 1932-1975
JOSEPH RUDD 1933-1978
ROBERT C. ELY
THEODORE E. FLEISCHER
FRANCIS E. SMITH, JR.
HERBERT BERKOWITZ
MICHAEL G. BRIGGS
NORMAN C. GORSUCH
DAVID H. BUNDY
HARRIS SAXON
PHILLIP J. EIDE
GARY A. ZIPKIN
SANFORD SAGALKIN*
DONN T. WONNELL
JOSEPH M. WILSON
PAUL DeSTEFANO*
JOSEPH A. McLEAN, OF COUNSEL
GORDON E. EVANS
LOUIS R. VEERMAN
CLIFFORD W. HOLST
JOHN FOSTER
RICHARD M. ROSSTON
MONTE L. BRICE
LOUIS AGI
JOSEPH J. PERKINS, JR.
CHARLES W. COHEN
PEGGY MENTELE
SUSAN R. SHARROCK

LAW OFFICES OF
ELY, GUESS & RUDD
A PROFESSIONAL CORPORATION
510 L STREET
SEVENTH FLOOR
ANCHORAGE, ALASKA 99501
TELEPHONE [907] 276-5121
TELEX [090] 25-292
TELECOPIER [907] 279-8354

MENDENHALL BUILDING, SUITE A
JUNEAU, ALASKA 99801
TELEPHONE [907] 586-3210
TELEX [099] 45-365

1090 VERMONT AVE. N. W., SUITE 630
WASHINGTON, D. C. 20005
TELEPHONE [202] 842-3380

*ADMITTED IN D. C. AND ALASKA
OTHERS ADMITTED IN ALASKA

July 16, 1981

Andrew E. Hoge, Esq.
Hoge & Lekisch
437 E Street, Suite 500
Anchorage, Alaska 99501

Re: Administrative Law Committee - Draft APA

Dear Andy:

You will find enclosed a draft of APA sections regarding adjudicatory actions and judicial review in the format agreed upon at our last meeting. In connection with this draft I wish to bring to your attention the following considerations:

(1) Section .330 - This section has been rewritten to make the adjudicatory sections of the Act mandatory upon all state agencies except as any agency may be specifically exempted by the legislature, through statutory enactment, from the provisions of the same. The section has further been reworked to provide a substantive statutory foundation for the right to adjudication. As the draft comment to the section reflects, this section becomes in effect "the provision of law" which vouch saves adjudicatory proceedings, including hearing to a respondent/applicant. I believe such a statutory prescription to be consistent with the mandatory nature of the procedure. The section further reflects the existence of a subcategory of non-adjudicative actions which are provided for in the subsequent section .340. These sections taken together are intended to address the matter of, for example, the application and rejection thereof for a driver's license, which transaction does not warrant in the initial processing adjudicatory proceedings conducted under the provisions of this section. As this and subsequent sections make clear, however, review of such initial actions may fall within the scope of these statutory provisions;

(2) Section .340 - This section has been taken from the model APA and made consistent with the redrafted section .330. As indicated above, the section deals with specific actions which are sub-adjudicatory in nature and provides administrative agencies within the state substantial leeway in promulgating individual forms and formats for dealing with such matters -- all below the threshold of administrative adjudication. In this way a balance is maintained between the needs of administrative agencies for expedited and efficient processing of initial applications while yet preserving to applicants those due process rights and guarantees appropriately theirs. Further, in this regard, the subsequent section, .350, is also consistent with the initial section .330, the former being a particular subcategory of those activities referred to in the latter;

(3) Section .370 - This section has been rewritten to harmonize parts of the existing statute with those which have been derived from the model APA in the manner indicated both in the section itself and in the comments attendant thereupon;

(4) Section .380 - In this section and in subsequent sections dealing with or appertaining to the subject, the term "presiding officer" has been reestablished as the designation for the individual or individuals, in effect, "running" the procedural aspects of the hearing held under this section of the statute. Such a change appeared necessary because the mandatory requirement that the proceedings prescribed here be applied to all agencies; a number of agencies, such as the Alaska Public Utilities Commission, do not as a matter of practice employ hearing officers, but may identify a panel of commissioners to conduct hearings. From such a panel one commissioner may, in fact, run the hearings and thus should be subject to the requirements placed upon one occupying that position, that is, the presiding officer. Use of the term accommodates those circumstances contemplated in the existing statute as well as those which will now arise as a result of the engrafting of model APA sections into the law taking into account the functional realities of existing commissions within the state;

(5) Section .400 - (Accusation) and Section .410 (Statement of Issues) - These sections reflect held over provisions from the existing statute. I would draw to your attention the interrelationship between these sections and the proposed section .560, "Notice of Hearing" which is taken from

the model APA. Although not necessarily inconsistent, the sections do not precisely delineate their collective interrelated scope. It is not clear, for example, the extent to which one must proceed by accusation as opposed to a more general mode of procedure up to and including individualized formats in particular agencies. The matter should be reviewed by the committee;

(6) <u>Section .510</u> - This section contains emergency adjudication proceedings premised upon the procedure specified for stop orders issued by the Alaska Transportation Commission. The procedure contemplates an expedited initial proceeding which could be inaugurated by an ex parte order from the commission, followed by an immediate but potentially abbreviated hearing and a final emergency order of specified, limited duration. This format enables an agency to act expeditiously within an umbrella of time to deal with bona fide emergency problems while preserving minimal due process rights to respondents affected by such action. The agency is not relieved from the obligation to proceed more formally upon conclusion of the emergency procedures. Moreover, although the agency is granted latitude under the section to make provision in its regulations and rules for streamlined hearing procedures, the final emergency order of the commission is subject to other requirements of the section, including judicial review. Thus, the ongoing and more formal proceedings would not necessarily be a bar to legal challenge of the emergency order itself, though obviously a court may decide to hold in abeyance any decision on such an emergency order pending the outcome of such formal proceeding. As set forth in this section, the procedure for emergency orders would seem reasonably well delineated both in terms of scope and temporal applicability while yet achieving a balance between the needs of the agency representing the public at large and the rights of the individuals affected by such actions;

(7) <u>Section .630</u> - The hearing officer/agency dichotomy presently embodied in AS 44.62.450 has been modified to reflect the concerns discussed in (4) above regarding "presiding officers". The present section makes clear that matters may be heard by the agency alone without the benefit of a hearing officer; in such hearing one of the agency members may himself (or herself) be designated as the presiding officer. Further, the word "decision" has been eliminated in favor of "order" to focus on the conceptual basis of the adjudicatory section, namely that agencies must act by orders and, under the

initial section .330, may not issue orders except as prescribed in this chapter. The order is the repository for all findings of fact, conclusions of law and is the object of any further adjudicatory actions including reconsideration, and judicial review;

(8) Section .640 - This section has been substituted for the existing AS 44.62.510 which I believe is manifestly insufficient for the reasons set forth in the comments to and the text of the proposed section;

(9) Section .660 - This section is limited by implication to the accusation format. As such, it should be compared to the revised model APA section 4-208 which has broader implication and applies to the general range of parties to the proceeding. To some extent, the appropriateness of the one or the other section depends upon the policy determined upon in (5) above;

(10) Section .670 - To the extent that this section reflects the early days of Alaska history before the advent of the modern, not to say marvelous, long lines telecommunication system in this state, it might be appropriate to augment the statutory section to make allowance also for votes by telephone or teleconferencing;

(11) Section .700 - I would note that the draft does not define standing in the sense of who may seek review of administrative rulings made pursuant to the adjudicatory provisions of this chapter. The revised model APA section is 5-106; while not necessarily arguing in favor of such a section, the matter should, I believe, be noticed;

(12) Section .780 - When all sections of the draft have been melded, review should be undertaken for consistency of language and denominators and also to insure that the definition section is inclusive of all those matters warranting definitions. This would seem particularly desirable in the case of those words or phrases derived from the model APA which may not presently have such delineation in the existing definition section of the Alaska Statutes;

(13) I have reordered certain of the sections in an attempt to improve the cognitive flow of the chapter and to avoid misinterpretation or misimpression which might arise merely because of the juxtaposition of various sections.

Obviously, the sections can and should be reordered where other committee members feel that such is desirable;

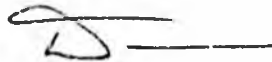
(14) The comments following each draft section represent my effort to distill and present the committee's collective wisdom on each section. In setting forth those comments, I have referred to my own notes of meetings, to prior committee drafts, and to the drafters notes accompanying the model Act. In certain cases, no comments are offered. Further, in certain cases there may be errors in the substance or the expression of such comments. I would accordingly recommend that each member of the committee take a few moments to review that material for any errors I may have inadvertently injected into it, since, of course, this is the committee's document;

(15) In a similar vein, I have attempted to reflect to the best of my knowledge the source of each draft section. Necessarily, that knowledge may also be imperfect and I would recommend review and supplementation or alteration of that material as warranted.

I recognize the tardiness of the submission under your inflexible schedule, and apologize for the same, but would submit by way of extenuation and mitigation that it is substantial in amount and reflects considerable effort on the part of the entire committee. If the legislature's consideration of it equals in depth our own, I am sure it will prove to be a truly model administrative procedure act. If I can be of further service in this matter, please call upon me.

Very truly yours,

ELY, GUESS & RUDD



Donn T. Wonnell

DTW:mr

Enclosure

RULEMAKING PROVISIONS AS 44.62.010-.300

SECTION-BY-SECTION COMMENTARY

Existing Section 010. The Committee proposed to delete this provision as superfluous. However, this proposed deletion should be reviewed carefully with the Revisor of Statutes in light of the Revisor's note published in the Michie codification.

A new Section 010 is proposed, which would represent an adaptation of existing section 280. The Committee felt that it would be most appropriate for this provision to appear at the beginning of the Act.

Existing Section 020. The Committee proposed deletion of existing section 020, for the reason that it appears to be superfluous.

A new Section 020 is proposed, the purpose of which is to state the requirement that any rule, regulation, order or standard meeting the definition of the term "regulation" be promulgated under the rulemaking provisions of the APA if it is to have legal effect. The committee's proposed Section 020 would also contain a definition of the term "regulation" for purposes of the APA. This is an adaptation of existing section 640(a)(2), where the important substantive standards as to what is a "regulation" subject to the rulemaking requirements lie hidden in a definition.

Existing Section 030, which deals with resolution of conflicts between regulations and statutes they are intended to implement or interpret, is proposed to be deleted. This provision merely restates a general rule of constitutional law and statutory construction. The provision of existing 060(b) to the effect that the Department of Law must approve proposed regulations for consistency with statutes, retained in the Committee's proposed draft as Section 030(b)(1) and (2), covers this point adequately.

Existing Section 040. The Committee felt that this provision, which deals with the question of when regulations must be filed with the Lt. Governor, as distinguished from when regulations must be promulgated under the rulemaking procedure of the APA, has been renumbered in the Committee's proposed revision of the Act as Section 095. As such, it would follow the provisions dealing with the rulemaking procedure, since submission of regulations to the Lt. Governor occurs after the adoption of the rule. The three listed exceptions to the submission requirement, set out in existing section 040(a), are proposed to be deleted. The Committee felt that some of these excepted cases do not meet the definition of the term "regulation" in the first place, and that the rest of the excepted matter should not be exempt from submission to the Lt.

Governor for filing. The question of whether any of that filed material should be excepted from the requirement of publication is a different issue taken up elsewhere in the draft. Subsection 040(b), requiring citation of specific statutory authority for each regulation, is retained in the Committee's proposal as new section 045 with minor modifications having no intended substantive effect.

Existing Section 050 has been retained and renumbered proposed Section 040. The Committee has left open the question of whether the responsibility for preparing and revising the drafting manual should remain with the Department of Law or should be transferred to another agency. Further, existing Section 050 has been modified to provide that the drafting manual prescribes the style and form for all regulations "promulgated" under the APA, rather than those "submitted".

Existing Section 060 is retained and renumbered in the Committee's draft as proposed Section 030 with minor editorial changes not intended to have substantive effect. Subsection (c) of existing Section 060, dealing with the Lt. Governor's acceptance of regulations and orders, has been eliminated. That subject is dealt with in a more comprehensive manner in Section 110 of the Committee's draft.

Existing Section 070, prohibiting the charging of fees for certification, submission or filing of regulations, is recommended for deletion. One state agency charging another for submission or filing of regulations is unlikely and is an internal executive branch matter for which no statute is required. As for individuals seeking to obtain certified copies of regulations or related materials, the Committee felt that the general rules under the public records statute were adequate, and in the interest of brevity recommended deleting this specific provision.

Eixsting Section 080. This section has been deleted in favor of a more substantial provision regarding the Lt. Governor's duties in accepting a regulation or order of repeal for filing, set forth in the Committee's proposed Section 110. Whereas existing law requires only `that the Lt. Governor receive and endorse regulations and orders of repeal, maintain a permanent file containing certified copies of them for inspection, and make sure that the Attorney General's written statement of approval accompanies the regulation, the Committee's proposal would prohibit the Lt. Governor from accepting a regulation or order of repeal for filing unless he has affirmatively determined that it is accompanied by all of the required supporting documents. This imposes a policing responsibility upon the Lt. Governor, and provides a focus for public objections which may arise as to the agency's compliance with the rulemaking procedure.

Section 090 was deleted in 1969.

Existing Section 100 is renumbered as Section 120 of the Committee's draft. No substantive changes have been made.

Existing Section 110, regarding publication, has been renumbered Section 140 in the Committee's proposed revision. The only change is addition of reference to the Alaska Administrative Code's Supplement.

Existing Section 120 provides for voluntary publication of a regulation which would be exempt (under proposed Section 020) from promulgation and publication under the APA. This provision has been modified and is included in the Committee's revision as prosposed Section 100.

Existing Section 125 requiring appointment of a particular attorney within the Department of Law as the "Regulations Attorney" and detailing the Department's responsibilities to advise state agencies on regulations matters, is proposed by the Committee to be deleted. This statute was passed by the legislature in 1969 in an effort to force the Department of Law to take seriously its obligations to state agencies under the APA. The Committee felt that the statute has served its purpose and that since it adds no specific obligations to the Department that the Department does not have under other existing laws, it should be deleted.

Existing section 130. This provision regarding codification and publication of regulations has been renumbered Section 130 in the Committee's proposed draft. Modifications have been made to provide for an Alaska Administrative Code Supplement issued quarterly. In addition, under Section 065 of the Committee's proposed revision, an Alaska Administrative Journal would also be published. A bill to establish the Alaska Administrative Journal was proposed (passed?) in the legislative session which just ended. (CSSB 6).

Existing Section 140 is proposed to be deleted as superfluous.

Original Section 150 was repealed in 1974.

Existing Section 160, dealing with the quarterly Alaska Administrative Register, is proposed to be deleted. The quarterly Register, (which is now simply now a supplement to the codified Administrative Code) would be renamed the Alaska Administrative Code Supplement, and the Alaska Administrative Journal would also be published.

Original Section 170 was deleted in 1969.

Existing Section 180 is renumbered Section 160 in the proposed revision. Rather than becoming effective upon the 30th day after its filing with the Lt. Governor, as is the case under the existing statute, a regulation would only become effective on the 30th day after its publication in the Journal. The Committee was concerned that, without such a provision, it is possible for a regulation to become law before it is made available to the public. Matter which is not within the "regulation", but is submitted voluntarily by the agency for publication in the Code would not be subject to that effective date rule.

Existing Section 190, dealing with public notice of the proposed adoption of a regulation, is renumbered Section 050 in the Committee's revision. This renumbering, as most of the others, is intended to reorganize the statute so that its provisions proceed in a chronological sequence which matches the process of drafting, promulgating, filing and publishing a regulation. The Committee's proposed revision of existing section 190 would delete Subsection (a)(4), since the requirement of that provision is left entirely to "the judgment of the agency" anyway. Instead of that provision, the Committee's proposed Section 050(c) makes it clear that the agency has the authority to use additional measures to give notice, if it chooses to do so. Under the Committee's proposal, the published notice would appear not only in a newspaper of general statewide circulation, but would also appear in the next periodic issue of the Journal.

Existing Section 195, dealing with the fiscal note requirement, is contained in the Committee's proposed Section 070. A majority of the Committee members, over a strong dissent by the minority, favored a substantial amendment to the rulemaking provisions of the APA to require both fiscal notes and a "regulatory analysis" in conjunction with the promulgation of a new regulation whenever certain triggering requirements were met. Proposed Section 070 is self-explanatory in this respect. The dissenting minority on the Committee opposed both the fiscal notes and the regulatory analysis based upon two concerns: (1) that those requirements would make rulemaking, which is generally required of agencies by the legislature rather left to the discretion of the agency, more expensive and time consuming, and (2) that the requirements would invite obstructive litigation. The minority was concerned that, as with the environmental impact statement requirement of the National Environmental Policy Act, it is inherently impossible to establish to a certainty that an agency has complied with the regulatory analysis requirement by simply examining the documents; for that reason, the compliance issue is always open to litigation by an opponent of the regulations.

Existing Section 200 is retained and renumbered as proposed Section 060. Subsection (b) has been modified in an effort to clarify the degree and manner in which a proposed regulation can be changed after public notice without requiring a new notice. It should be noted that, in addition to the notice required under existing section 190, the contents of which are dealt with in this Section, a "concise summary of the regulatory analysis" must also be published to pursuant to proposed Section 070(c). Depending upon the timing of the publication of that summary, it may not be possible to include that summary with the general notice of the proposed rulemaking.

Existing Section 210 is renumbered Section 080 in the Committee's proposed revision.

Existing Section 220 is renumbered proposed Section 190. The initial limiting clause of that provision, which could give rise to unnecessary disputes as to the right to petition for adoption of a regulation, is proposed to be deleted.

Existing Section 230, dealing with the procedure to be followed by an agency upon receipt of a petition for a rulemaking, is revised and renumbered proposed Section 200. The only substantive change is to require that if the agency denies the petition, it must provide the petitioner with a written statement of reasons for denial.

Existing Section 240 is renumbered proposed Section 210, and is amended to include specific definitions of the term "legislative" and "interpretative" as those terms are used in the section.

Existing Section 250 is renumbered proposed Section 170. The final sentence of the existing statute has been rewritten to clarify the possible ambiguity between the statute's requirement that an agency must give notice within <u>five</u> days of the adoption of an emergency regulation if the agency wishes the regulation to continue in effect past the tenth day.

Existing Section 260 is renumbered proposed section 180. The period within which an emergency regulation may remain in effect pending promulgation of permanent regulations would be reduced from 120 days to 90 days.

Existing Section 270 is combined with existing Section 250, and appears as the final sentence of proposed Section 170. Existing Section 280 is modified and appears as Section 010 of the revision.

Existing Section 290 is deleted. Subsection (a) of that provision is inconsistent with the Committee's position that any matter falling within the definition of "regulation" must be promulgated and filed with the Lt. Governor. The Committee felt that Subsection (b)(1) creates a serious ambiguity as to whether agency rules establishing procedure in administrative tribunals, which are clearly withing the definition of "regulation," are subject to the rule-making requirements of the APA.

In addition to the foregoing revision and reorganization of the existing sections of the rulemaking provisions of the APA, the Committee proposed the addition of several new sections. Proposed Section 090 would require that an agency adopting a regulation issue an "explanatory statement". This new requirement is an adaptation of Section 3-110 of the revised model Administrative Procedure Act. The Committee draft also includes a new provision dealing with the time and manner of adoption of regulations following the public comment period. This provision, proposed Section 085, is an adaptation of Section 3-106 of the revised model Administrative Procedure Act. Among other things, it would provide that the rulemaking procedure is terminated if the agency has not adopted a regulation within 180 days following the date of public notice or hearing. An agency wishing to promulgate a regulation after that time had run would be required to recommence the rulemaking procedure.

In general, the effect of this proposed revision of the rulemaking provisions of the APA is to eliminate superfluous or ambiguous provisions and to reorganize the sections so that they correspond to the chronological sequence followed in promulgating a regulation. The Committee hopes that this reorganization will make it easier for a stranger to the Act to read it from one end to the other and understand how the process is supposed to work.

Sec. 44.62.010. Purpose of §§ __________ of this Chapter. It is the purpose of §§ __________ of this chapter to establish minimum procedural requirements for the adoption, amendment or repeal of administrative regulations. Nothing in §§ __________ of this chapter repeals or diminishes additional requirements imposed by any statute.

COMMENT: Adaptation of A.S. 44.62.280.

Sec. 44.62.020. Regulations required.

(a) Subject to the exemption set forth in subsection (b), every rule, regulation, order or standard of general application adopted by a state agency to implement, interpret or make specific the law enforced or administered by it, or to govern its procedure, is valid ony if it is promulgated by the agency as a regulation under the procedures set forth in sections of this chapter. The term "regulation" includes manuals, policies, instructions, guides to enforcement, interpretative bulletins, interpretations and the like, which have the effect of rules, orders, regulations or standards of general application.

(b) The term "regulation" does not include (1) a rule or policy relating only to internal management of a state agency, or (2) a form prescribed by a state agency or instructions relating to the use of the form.

(c) The ____________________ may by regulation prescribe detailed rules to implement this section by describing what kinds of "internal policies" are exempt.

<u>COMMENT:</u> Adaptation of A.S. 44.62.640(a)(2), which is a "stuffed definition" of the term "regulation."

Sec. 44.62.030. Department of Law Review. (a) Every state agency which by statute possesses regulation-making authority shall work with the Department of Law in the preparation and revision of its regulations and shall adhere to the "Drafting Manual for Administrative Regulations" published pursuant to § 40 of this chapter.

(b) The Department of Law shall advise the agencies on legal matters relevant to the promulgation of regulations. In addition, the department shall prepare a written statement of approval or disapproval after each regulation has been reviewed in order to determine

(1) its legality, constitutionality and consistency with other regulations;

(2) the existence of statutory authority and the correctness of the required citation of statutory authority following each section;

(3) its clarity, simplicity of expression and absence of possibility of misapplication; and

(4) compliance with the Drafting Manual for Administrative Regulations.

COMMENT: Adaptation of A.S. 44.62.060.

Sec. 44.62.040. Drafting Manual. The ______________ shall prepare and shall revise when necessary a "Drafting Manual for Administrative Regulations" which prescribes the style and forms for regulations promulgated under this chapter.

COMMENT: Adaptation of A.S. 44.62.050.

Sec. 44.62.045. Statutory Authority. No regulation adopted under this chapter is valid unless both general statutory authority under which it is adopted and the specific statutory sections being implemented, interpreted or made clear by the regulation are cited immediately following its text.

COMMENT: Adaptation of A.S. 44.62.040(8).

Sec. 44.62.050. Notice of proposed action. (a) At least 30 days before the adoption, amendment or repeal of a regulation, notice of the proposed action shall be

(1) published in a newspaper of general statewide circulation and in the next periodic issue of the Alaska Administrative Journal;

(2) mailed to every person who has filed a request for notices of proposed regulations with the state agency;

(3) if the agency is within a department, mailed or delivered to the commissioner of the department; and

(4) furnished to all incumbent state legislators.

(b) If the form or manner of notice is prescribed by statute, in addition to the requirements of fling and mailing notice under this chapter, the notice shall be published, posted, mailed, filed or otherwise publicized as prescribed by the statute.

(c) In addition to the requirements set forth in subsections (a) and (b) of these sections, an agency may use additional measures to give notice of the proposed action.

(d) The failure to mail notice to a person as provided in paragraphs (2) - (4) of subsection (a) of this section does not invalidate an action taken by an agency under this chapter.

COMMENT: Adaptation of A.S. 44.62.190.

§44.62.070 - Fiscal notes and regulatory analysis. (a) If the adoption, amendment, or repeal of a regulation would require increased appropriations by the State, then, prior to giving notice of the proposed action under § .050, the department or agency affected shall prepare a fiscal note setting forth an estimate of the appropriation increase for the fiscal year following adoption, amendment, or repeal of the regulation and for at least two succeeding fiscal years. In the event the regulation as adopted varies from the original proposed regulation in such a manner as to make the original fiscal note inapplicable, an amended fiscal note addressed to the modified proposed regulation shall be prepared prior to its adoption.

(b) An agency shall issue a regulatory analysis with respect to the adoption, amendment or repeal of a regulation if, within 15 days after the published notice of adoption, amendment or repeal, a written request for the analysis is filed in the office of the Lieutenant Governor by the Governor, the Administrative Rules Review Committee or 50 Alaska citizens signing a single request. A certified copy of the filed request must be forwarded immediately by the Lieutenant Governor to the agency.

(1) Except to the extent the written request expressly waives any one or more of the following, the regulatory analysis must contain:

(A) A description of the classes of persons who will probably be directly affected by the proposed adoption, amendment or repeal, including those classes that will bear the

costs of the proposed adoption, amendment or repeal and those classes that will benefit from the proposed adoption, amendment or repeal;

(B) A description of the probable quantitative and qualitative impact of the proposed adoption, amendment or repeal, economic or otherwise, upon the affected classes of persons;

(C) The probable cost to any other agency for the implementation and enforcement of the proposed adoption, amendment or repeal and any anticipated affect on state revenues;

(D) An analysis comparing the probable cost and benefits of the proposed adoption, amendment or repeal to the probable cost and benefits of inaction;

(E) An analysis that determines whether there are less costly methods or less intrusive methods for achieving the purpose of the proposed adoption, amendment or repeal; and

(F) A list of the alternative methods for achieving the purpose of the proposed adoption, amendment or repeal that were seriously considered by the agency and the reasons why they were rejected in favor of the proposed adoption, amendment or repeal.

(c) A concise summary of the regulatory analysis must be published in an administrative journal or a newspaper of general circulation in the state at least 10 days before the earliest of:

(1) The end of the period during which persons may make written submissions on the proposed adoption, amendment or repeal; or

(2) The date of any required oral proceeding on the proposed adoption, amendment or repeal.

(d) The public summary of the regulatory analysis must also indicate where persons may obtain copies of the full text of the regulatory analysis and when, where and how persons may present their views on the proposed adoption, amendment or repeal.

(e) The sufficiency and accuracy of the contents of the regulatory analysis required by this section is not subject to judicial review.

Sec. 44.62.080. Public proceedings. (a) On the date and at the time and place designated in the notice the agency shall give each interested person or his authorized representative, or both, the opportunity to present statements, arguments, or contentions in writing, with or without opportunity to present them orally. The state agency shall consider all relevant matter presented to it before adopting, amending or repealing a regulation.

(b) At a hearing under this section the agency or its authorized representative may administer oaths or affirmations, and may continue or postpone the hearing to the time and place which it determines.

COMMENT: Adaptation of AS 44.62.210.

Sec. 44.62.060. Contents of notice. (a) The notice of proposed adoption, amendment or repeal of a regulation shall include

(1) a statement of the time, place and nature of proceedings for adoption, amendment or repeal of the regulation;

(2) reference to the authority under which the regulation is proposed and a reference to the particular code section or other provisons of law which are being implemented, interpreted or made specific;

(3) an informative summary of the proposed subject of agency action;

(4) other matters prescribed by a statute applicable to the specific agency or to the specific regulation or class of regulations; and

(5) a summary of the fiscal information required to be prepared under A.S. 44.62.070(a), if applicable.

(b) A regulation which is adopted, amended or repealed may vary in content from the informative summary specified in (a)(3) of this section if the subject matter of the regulation remains the same and the informative summary contained in the original notice was comprehensive of the regulation as finally adopted, so as reasonably to assure that members of the public are notified of the proposed subject of agency action in order for them to determine whether their interests could be affected by agency action on that subject.

COMMENT: Adaptation of A.S. 44.62.200.

Sec. 44.62.065. Alaska Administrative Journal. [See CSSB 6 (3-9-81)].

Sec. .085. Time and Manner of Adoption of Regulations. (a) An agency may not adopt a regulation until the period for making written submissions and oral presentations thereon has expired.

(b) Within [180] days following (i) publication of the notice of proposed rule adoption, or (ii) the end of oral proceedings thereon, an agency shall either adopt a regulation pursuant to the rule-making proceeding or terminate the proceeding by publication of a notice to that effect in the Alaska Administrative Journal.

(c) Before the adoption of a regulation, an agency shall consider all written and oral submissions received pursuant to § 080 of this chapter.

(d) Within the scope of its delegated authority, an agency may utilize its own experience, technical competence, specialized knowledge and judgment in the adoption of a rule.

COMMENT: Adaptation of Revised Model APA § 3-106.

Written or oral?

Sec. 090. Explanatory Statement. (a) At the time it adopts a regulation, an agency shall also issue a concise explanatory statement containing:

(1) the principal reasons for and against the regulation considered by the agency;

(2) its reasons for adopting the regulation;

(3) its reasons for rejecting the arguments against adoption of the regulation; and

(4) an indication of any change between the text of the proposed regulation contained in the published notice of proposed adoption and the text of the regulation as finally adopted, with the reasons for any change.

(b) Upon judicial review of the lawfulness of an agency regulation, a court may not consider any reason for adopting the regulation that was not relied on by the agency in its explanatory statement, or any representations made by the agency that are inconsistent with the explanatory statement.

COMMENT: Adaptation of Revised Model APA § 3-110.

Sec. 44.62.095. Filing Regulations. Every state agency which by statute possesses regulation-making authority shall submit to the lieutenant governor for filing a certified original and one duplicate copy of every regulation or order of repeal adopted by it.

COMMENT: Adaptation of A.S. 44.62.040.

Sec. 44.62.100. Voluntary Publication. A state agency may submit to the lieutenant governor for publication a regulation or order of repeal of a regulation which is subject to one of the exceptions set out in § 020 to the term "regulation."

COMMENT: Adaptation of A.S. 44.62.120.

Sec. 44.62.110. Endorsement and Filing. (a) The lieutenant governor may accept a regulation or order of repeal for filing only if it is accompanied by the following supporting documents:

(1) Certified copy of the notice required under § ______;

(2) Affidavit of publication of notice;

(3) Affidavit of compliance with other notice requirements;

(4) Attorney general's statement of approval required by § _____;

(5) Fiscal note or, if applicable, amended fiscal note required by § _____;

(6) Regulatory analysis, if applicable, issued under § _____;

(7) Explanatory statement issued under § _____; and

(8) Order of adoption executed by the official adopting the regulation or the order of repeal.

(b) Upon receipt of a regulation and supporting documentation, the lieutenant governor shall (1) endorse on each regulation or order of repeal and supporting document filed by him, the time and date of filing, and (2) maintain a permanent file of the certified copies of regulations, orders of repeal and supporting documentation for public inspection.

COMMENT: Adaptation of A.S. 44.62.080 and 060(c).

Sec. 44.62.120. Presumptions from filing. (a) The filing of a certified copy of a regulation or an order of repeal by the lieutenant governor raises the rebuttable presumptions that

(1) it was duly adopted;

(2) it was duly filed and made available for public inspection in the lieutenant governor's office at the day and hour endorsed on it;

(3) all requirements of this chapter and the regulations relative to the regulation have been complied with;

(4) the text of the certified copy of a regulation or order of repeal is the text of the regulation or order of repeal as adopted.

(b) The courts shall take judicial notice of the contents of the certified copy of each regulation and of each order of repeal duly filed.

COMMENT: This is an adaptation of AS 44.62.100.

Sec. 44.62.130. Codification and Publication. The lieutenant governor shall provide for the continuing compilation, codification and publication, with quarterly supplements, of all regulations filed by his office, or of appropriate references to any regulations the printing of which he finds to be impractical, such as detailed schedules of forms otherwise available to the public, or which are of limited or particular application. The publication of compiled regulations is the Alaska Administrative Code. The quarterly supplements to it are the Alaska Administrative Code Supplements. All regulations which are filed by the first day of the month preceding publication shall be published in the Code Supplement for that quarter. If during quarter no regulation, amendment or order of repeal has been filed the regular quarterly Code Supplement shall be published reflecting that fact.

COMMENT: Adaptation of A.S. 44.62.130.

Sec. 44.62.140. Presumptions from publication.
(a) The publication of a regulation in the Alaska Administrative Code or Code Supplement raises a rebuttable presumption that the text of the regulation as so published is the text of the regulation adopted.

(b) The courts shall take judicial notice of the contents of each regulation or notice of the repeal of a regulation printed in the Alaska Administrative Code or Code Supplement.

COMMENT: This is an adaptation of AS 44.62.110.

Sec. 44.62.160. Effective Date. A regulation or an order of repeal filed by the lieutenant governor becomes effective on the 30th day after its publication in the Alaska Administrative Journal unless

(1) otherwise specifically provided by the statute under which the regulation or order of repeal is adopted, in which event it beocmes effective on the day prescribed by the statute;

(2) it is outside the scope of the defintion of the term "regulation" contained in § 020(a) of this chapter, in which event it becomes effective upon filing by the lieutenant governor or upon a later date specified by the state agency in a written instrument submitted with, or as part of, the regulation or order of repeal;

(3) it is an emergency regulation or order of repeal adopted under § 170 of this chapter, in which case the written finding required under that provision shall be submitted to the lieutenant governor, together with the emergency regulation or order of repeal, which, in that event only, becomes effecive upon filing by the lieutenant governor or upon a later date specified by the state agency in a written instrument submitted with, or as part of, the regulation or order of repeal; and

(4) a later date is prescribed by the state agency in a written instrument submitted with, or as part of, the regulation or order of repeal.

COMMENT: Adaptation of A.S. 44.62.180.

Sec. 44.62.170. Emergency Regulations. A regulation or order of repeal may be adopted as an emergency regulation or order of repeal if a state agency makes a written finding, including a statement of the facts which constitute the emergency, that the adoption of the regulation or order of repeal is necessary for the immediate preservation of the public peace, health, safety or general welfare. The requirements of §§ ________________ of this chapter do not apply to the intial adoption of emergency regulations; however, upon adoption of an emergency regulation, the adopting agency shall immediately submit a copy of it to the lieutenant governor for filing and for publication in the Alaska Administrative Journal, and within five days after adoption, the agency shall give notice of the adoption in accordance with § _________ of this chapter. Failure to give the required notice wihtin five days after adoption will result in automatic expiration of the regulation at the end of the tenth day after its adoption. It is the state policy that emergencies are held to aminimum and are rarely found to exist.

COMMENT: Adaptation of A.S. 44.62.250 and .270.

Sec. 44.62.180. Limitation on Effective Period of Emergency Regulations. (a) No regulation adopted as an emergency regulation remains in effect more than 90 days unless the adopting agency complies with §§ _________ of this chapter during the 90-day period.

(b) Before the expiration of the 90-day period, the agency shall transmit to the lieutenant governor for filing a certification that §§ ___________________ and _______________ of this chapter were complied with before submitting the regulation to the lieutenant governor, or that the agency complied with those sections within the 90-day period. Failure to so certify repeals the emergency regulation; it may not be renewed or refiled as an emergency regulation.

COMMENT: Adaptation of A.S. 44.62.260.

Sec. 44.62.190. Right to Petiton. Any person may petition an agency for the adoption, amendment or repeal of a regulation. The petition shall state clearly and concisely

(1) the substance or nature of the regulation, amendment or repeal requested;

(2) the reasons for the request; and

(3) reference to the authority of the agency to take the action requested.

COMMENT: Adaptation of A.S. 44.62.220.

Sec. 44.62.200. Procedure on Petition. (a) Upon receipt of a petition requesting the adoption, amendment or repeal of a regulation, a state agency shall, within 30 days, either (1) deny the petition in writing, which shall include a statement of reasons for denial, or (2) initiate the procedures set forth in this chapter for the promulgation of a regulation.

(b) If the petition seeks promulgation of an emergency regulation or order of repeal, the agency shall, within 10 days, either (1) deny the petition in writing, which shall include a statement of the agency's reasons for denial, or (2) promulgate the emergency regulation or order of repeal pursuant to the procedure prescribed in § _____ of this chapter.

COMMENT: Adaptation of A.S. 44.62.230.

Sec. 44.62.210. Limitation on Retroactive Action. (a) If a regulation adopted by an agency under this chapter is primarily legislative, the regulation has prospective effect only. A regulation adopted under this chapter which is primarily an "interpretative regulation" has retroactive effect only if the agency adopting it has adopted no earlier inconsistent regulation and has followed no earlier course of conduct inconsistent with the regulation. Silence or failure to follow any course of conduct is considered earlier inconsistent conduct.

(b) For purposes of this section,

(1) "legislative" means ______________________; and

(2) "interpretative" means ______________________
______________________.

COMMENT: Adaptation of A.S. 44.62.240.

(1) Proposed Section:

Sec. 44.62.330, Availability of adjudicative proceedings

(a) Unless expressly exempted by the Legislature, every state agency, in any matter other than a rule-making or a declaratory order proceeding, shall conduct adjudicative proceedings under §§.330-.790 of this chapter:

(1) prior to the formulation and issuance of an order; or

(2) upon request of a party, following exhaustion or waiver of any available pre-adjudicative processes, after the agency has

(i) issued a complaint, citation, response to an application, petition or request, or other preliminary determination, or

(ii) taken or indicated its intent to take final action affecting the substantial interests Of the party.

(b) Except in a case of reinstatement or reduction of penalty, the provisions of this chapter do not affect statutory provisions concerning

(1) civil or criminal penalties

(2) additional relief by injunction or restraining order

(3) penalty provisions relating to suspension, revocation, reissuance and other similar matters of licenses, permits, lease, concessions, and other similar matters

(4) related matters which in their context do not relate to procedure

(c) [Repealer of specific extent statutory exemptions from APA]

(2) Current Section:

(Attached at end of this draft section)

(3) Comments:

This section describes the circumstances in which an agency must undertake adjudicative proceedings. In essence, no agency may act through the device of making or issuing any "order", as defined by the statute, unless adjudicative proceedings are first invoked. Excepted from this requirement are non-adjudicative proceedings involving rule-making and declaratory proceedings. Also excepted are certain preadjudicative actions, including actions concerning complaints, citations, applications and preliminary decisions. This latter category of exceptions recognizes a threshold below which certain agency actions may occur which are not in themselves part of the adjudicative process. Such preadjudicative actions are covered by draft §.340. Parties

affected by such a preadjudicative action, nonetheless, are afforded the right to invoke adjudicative proceedings upon request following exhaustion or waiver of any available preadjudicative review process, thereby balancing the requirements of administrative efficiency with the due process rights of the party in interest.

Unlike the Revised Model State Administrative Procedure Act, 1980 ("Revised Model APA"), this section sets forth the general substantive basis in law granting the right to adjudicative proceedings. Whereas the Revised Model APA at §4-101 specifies commencement of adjudicative proceedings where "required by any provision of law", this section becomes, in effect, that "provision of law". This grant of substantive right is consistent with the mandatory general application of the adjudicative sections of the draft and with the repealer of all existing exemptions from the APA.

The mandatory application of §§.330-.790 reflects the Committee consensus favoring universal application of the procedures specified therein to all agencies unless expressly exempted from such by the Legislature. Because of the inherent qualities of the specified procedures, universal application will tend to diminish inequities or irregularities which individually derived agency regulations might, advertently or inadvertently, embody. Universal application will also facilitate administrative efficiency through uniformity of interpretation and practice under the specified procedures.

Such uniformity will further serve to increase and to enhance public awareness of and familiarity with the means and mode of agency decision-making, thereby increasing public confidence in the workings of government.

Where an individual agency can demonstrate a bona fide need for exemption from one or more requirements of this act, it may apply to the Legislature to obtain a specific exemption by statutory enactment.

(4) Source:

Administrative Committee Draft (July 1981)

Sec. 44.62.330. Application of AS 44.62.330 — 44.62.630. (a) The procedure of the state boards, commissions, and officers listed in this subsection or of their successors by reorganization under the constitution shall be conducted under AS 44.62.330 — 44.62.630. This procedure, including, but not limited to, accusations and statements of issues, service, notice and time and place of hearing, subpoenas, depositions, matters concerning evidence and decisions, conduct of hearing, judicial review and scope of judicial review, continuances, reconsideration, reinstatement or reduction of penalty, contempt, mail vote, oaths, impartiality, and similar matters shall be governed by this chapter, notwithstanding similar provisions in the statutes dealing with the state boards, commissions, and officers listed. Where indicated, the procedure that shall be conducted under AS 44.62.330 — 44.62.630 is limited to named functions of the agency.

(1) Repealed by § 5 ch 159 SLA 1980.

(2) Board of Chiropractic Examiners

(3) Board of Dental Examiners

(4) State Board of Registration for Architects, Engineers and Land Surveyors

(5) Repealed by § 13 ch 218 SLA 1976.

(6) Board of Examiners in Optometry

(7) Repealed by § 5 ch 159 SLA 1980.

(8) State Medical Board

(9) Division of Lands under Alaska Land Act where applicable

(10) Board of Nursing

(11) Board of Pharmacy

(12) Board of Public Accountancy

(13) Department of Labor as to functions relating to employment security only as provided in (c) of this section

(14) Real Estate Commission

(15) Alaska Workers' Compensation Board, where procedures are not otherwise expressly provided by the Alaska Workers' Compensation Act

(16) Department of Transportation and Public Facilities, as to functions relating to aeronautics and communications

(17) Repealed by § 12 ch 131 SLA 1980.

(18) Repealed by § 49 ch 94 SLA 1980.

(19) Repealed by § 54 ch 169 SLA 1978.

(20) Department of Revenue, under Cigarette Tax Act

(21) Repealed by § 54 ch 169 SLA 1973.

(22) Repealed by § 11 ch 181 SLA 1976.

(23) Department of Public Safety, as to suspension or revocation of a security guard's license under AS 18.65.400 — 18.65.490

(24) Department of Health and Social Services, under AS 47.35.010 — 47.35.080, relating to boarding and foster homes for children

(25) Deleted by § 60 ch 98 SLA 1966.

(26) Repealed by § 4 ch 120 SLA 1971.

(27) Department of Health and Social Services under Alaska Food, Drug, and Cosmetic Act (AS 17.20), and in connection with the licensing of embalmers under AS 03.44.010

(28) Department of Health and Social Services and the Hospital Advisory Council, under AS 18.20.010 — 18.20.130

(29) Repealed by § 4 ch 120 SLA 1971.

(30) Department of Health and Social Services, under AS 18.35.010 — 18.35.090, concerning the regulation of tourist and trailer camps, motor courts, and motels

(31) Repealed by § 40 ch 206 SLA 1975.

(32) Repealed by § 4 ch 106 SLA 1970.

(33) Board of Marine Pilots

(34) Alaska Police Standards Council

(35) Guide Licensing and Control Board

(36) Board of Dispensing Opticians

(37) Alaska Pipeline Commission as to functions relating to common purchasers under AS 31.15

(38) Expired.

(39) Alaska Public Offices Commission

(40) Board of Fisheries

(41) Board of Game.

(42) the Department of Education and the Professional Teaching Practices Commission with regard to proceedings to revoke or suspend a teacher's certificate under AS 14.20.030 — 14.20.040 and AS 14.20.470(a)(4)

(43) Alaska Commission on Postsecondary Education under AS 14.48 as to denial of applications and revocation of authorizations and permits

(44) Department of Environmental Conservation, except to the extent that AS 44.62.360 — 44.62.400 are inconsistent with the manner in which proceedings are initiated under the provisions of AS 46.03

(45) University of Alaska, except to the extent that its inclusion is inconsistent with the provisions of AS 14.40

(46) Department of Commerce and Economic Development concerning the fisheries enhancement loan program (AS 16.10.500 — 16.10.620)

(47) Board of Psychologist and Psychological Associate Examiners (AS 08.86.010)

(48) the Department of Fish and Game as to functions relating to the protection of fish and game under AS 16.05.870

(49) Board of Veterinary Examiners (AS 08.98.010)

(50) Board of Nursing Home Administrators (AS 08.70.010)

(51) Board of Barbers and Hairdressers (AS 08.13.010).

(b) The procedure of an agency not listed in (a) of this section shall be conducted under AS 44.62.330 — 44.62.630 only as to those functions to which AS 44.62.330 — 44.62.630 are made applicable by the statutes relating to that agency.

(c) Judicial review and scope of judicial review of all final decisions of the commissioner of labor on an appeal relating to employment security shall be in accord with this chapter notwithstanding anything to the contrary in the Alaska Employment Security Act (AS 23.20). All other procedures of the Department of Labor relating to employment security shall be as provided in the Alaska Employment Security Act and the regulations under the Alaska Employment Security Act.

(d) Except in a case of reinstatement or reduction of penalty, the provisions of this chapter do not affect statutory provisions concerning

(1) civil or criminal penalties;

(2) additional relief by injunction or restraining order;

(3) penalty provisions relating to suspension, revocation, reissuance, and other similar matters of licenses, permits, leases, concessions, and other similar matters;

(4) related matters which in their context do not relate to procedure. (§ 2 (ch 2) ch 143 SLA 1959; am § 14 ch 2 SLA 1964; am § 60 ch 98 SLA 1966; am § 2 ch 120 SLA 1966; am § 1 ch 58 SLA 1967; am § 18 ch 143 SLA 1968; am § 2 ch 83 SLA 1969; am § 2 ch 118 SLA 1969; am §§ 3, 4 ch 106 SLA 1970; am § 6 ch 104 SLA 1971; am § 4 ch 120 SLA 1971; am § 2 ch 178 SLA 1972; am § 5 ch 179 SLA 1972; am § 2 ch 17 SLA 1973; am § 3 ch 45 SLA 1973; am § 2 ch 82 SLA 1973; am § 2 ch 7 FSSLA 1973; am § 5 ch 76 SLA 1974; am § 2 ch 128 SLA 1974; am § 6 ch 9 SLA 1975; am § 25 ch 25 SLA 1975; am §§ 39, 40 ch 206 SLA 1975; am § 4 ch 25 SLA 1976; am § 2 ch 59 SLA 1976; am § 11 ch 181 SLA 1976; am §§ 13, 106 ch 218 SLA 1976; am § 18 ch 220 SLA 1976; am § 9 ch 46 SLA 1977; am § 3 ch 140 SLA 1977; am § 54 ch 169 SLA 1978; am § 10 ch 59 SLA 1979; am § 23 ch 58 SLA 1980; am § 3 ch 84 SLA 1980; am §§ 49, 60 ch 94 SLA 1980; am § 15 ch 130 SLA 1980; am § 12 ch 131 SLA 1980; am § 15 ch 141 SLA 1980; am §§ 4, 5 ch 159 SLA 1980)

(1) Proposed Section

Sec. 44.62.340, Agency action on applications, petitions and requests

(a) An agency's initial processing of an application, petition, or request in any matter other than rule-making or a declaratory order is governed by this section. Further agency action after a response to an application, petition, or request is made shall be governed by the provision of §.330 of this chapter.

(b) In the case of an application for a license, benefit, contract, lease or other interest in property, ratemaking, or other agency action specifically addressed to the applicant:

(1) Within 60 days after receipt of the application, the agency shall examine the application, notify the applicant of any apparent errors or omissions, request any additional information that the agency is permitted by law to require, and notify the applicant of the name, official title, address and telephone number of an agency member or employee who may be contacted regarding the application,

(2) Within 120 days after receipt of the application or of the response to a timely request made by the agency pursuant to paragraph (1), the agency shall

. . .

(i) approve or deny the application, in whole or in part, on the basis of pre-adjudicative processes, if disposition of the application by the use of these processes is not precluded by any provision of law, or

(ii) commence an adjudicative proceeding in accordance with this chapter.

Any disposition that denies, in whole or in part, an application shall include a brief discussion of the issues involved in the reasons for such denial.

(3) Failure of the agency to act on any action provided for in subsection (2) above within the 120 day period specified therein shall be deemed an automatic approval of the application, petition or request in issue.

(c) An agency shall give prompt notice of the disposition in whole or in part of any written application, petition, or request not governed by (b) of this section or of any written petition or request. The notice must include a brief statement discussing the issues involved and the reasons for any disposition that denies, in whole or in part, an application, petition or request.

(d) When a timely and sufficient application has been made for renewal of a license with reference to any activity of a continuing nature that does not automatically expire by statute, the existing license does not expire until the agency

has taken final action upon the application for renewal, including proceedings under this chapter, or, in case the agency's action is unfavorable, until the last day for seeking judicial review of the agency's action or a later date fixed by the reviewing court.

(2) Current Section:

(None)

(3) Comments:

This section recognizes that initial agency responses to applications, petition, or requests are not part of the adjudicative process and are not subject to the procedural requirements embodied in the same. Agencies are thus free, within the confines of general due process considerations and statutory constraints arising elsewhere in the law, to formulate individualized procedures for the form, submission, and initial processing of applications, petitions and requests. Once initial action is taken upon such applications, petitions, or requests, however, subsequent agency action, if any, must be undertaken in conformity with the uniform adjudicative procedures provided by the draft. This section is consistent with and interrelates to §.330, specifically subsection (a)(2)(i).

While latitude is afforded under this section for individualized adjudicative procedures, certain minimal

requirements are imposed in the interests of efficiency and basic fairness. Agencies must give prompt notice of their disposition of any application, petition, or request, thereby discouraging the desuetudinous conduct which reflects adversely upon government in the public eye. Where such disposition involves a denial, in whole or in part, of an application, petition, or request, the agency must accompany its denial with a brief discussion of the issues and of the reasons involved in that denial. Such a discussion will tend to deter arbitrary denial made without review of the substance of the application, etc. Such a discussion will further apprise the applicant, etc., of the nature of any defects, omissions, errors, and so on in the applications, etc.; permitting possible correction of the same, or delineating and narrowing the areas which might warrant pursuit of the matter under formal a udicative proceedings.

Further, in the case of particular types of applications, specific time limits are set forth within which initial agency action must be taken. These types of applications have as a common nexus the existence of a right or interest in property. The time requirements are a recognition that delay in the administrative process in such cases can work injury to property, contrary to the substantive due process requi ements of the Constitutions of Alaska and the United States. The time limitations incorporated would not seem unduly burdensome to the agencies affected: simple matters

should be simply disposed of; more complicted matters should be determined upon the whole of the complications, which consideration tends toward the use of the hearing procedures provided for in the draft. The commencement of such formal adjudicative procedures is a course available to an agency which would comply with the temporal limitations of this section.

Subsection (c) makes clear that for licenses which have no statutory expiration date, where application for renewal is timely and well filed, no expiration occurs until all available legal process has been exhausted.

(4) Source:

Administrative Law Committee Draft (July 1981)

Revised Model APA, §4-102.

(1) Proposed Section:

Sec. 44.62.350, Agency action against licensees

An agency may not revoke, suspend, modify, annul, withdraw or amend a license unless the agency first gives notice by accusation and affords an opportunity for an appropriate adjudicative proceeding under this chapter. This section does not preclude an agency from taking immediate action to protect the public interest under Section 44.62.510, or from adopting regulations pertaining to a class of licensees.

(2) Current Section:

(None)

(3) Comments:

See Drafter's Comments, Revised Model APA

(4) Source:

Revised Model APA, §4-103

(1) Proposed Section:

Sec. 44.62.360, Delegation of power by agencies

(a) An agency may delegate the power to act, to hear and to decide, unless expressly prohibited by law.

(b) Where the word "agency" alone is used, the power to act may be delegated by the agency, and where the words "agency itself" are used, the power to act may not be delegated unless a statute relating to that agency authorizes the delegation of its power to hear and decide.

(2) Current Section:

(Attach d at end of this draft section)

(3) Comments:

(4) Source:

AS 44.62.340

Sec. 44.62.340. Delegation of power by agencies. (a) An agency listed in AS 44.62.330 may delegate the power to act, to hear and to decide, unless expressly prohibited by law.

(b) In a law enacted after April 29, 1959, where the word "agency" alone is used, the power to act may be delegated by the agency, and where the words "agency itself" are used, the power to act may not be delegated unless a statute relating to that agency authorizes the delegation of its power to hear and decide. (§ 1(1) (ch 2) ch 143 SLA 1959)

(1) Proposed Section:

Sec. 44.62.370, Hearing officers

(a) No person may be employed or assigned as a hearing officer unless he or she shall have been admitted to practice law for at least two years immediately before such employment or assignment.

(b) An agency may employ hearing officers on an unbiased and impartial basis within the particular agency and may prescribe additional qualifications.

(c) When an agency which does not have hearing officers available to it so requests, the lieutenant governor shall assign a qualified, unbiased, and impartial hearing officer, with experience in the general practice of law, to conduct hearings under this chapter.

(2) Current Section:

(Attached at end of this draft section)

(3) Comments:

This section permits individual agencies to employ hearing officers on a full-time or case-by-case basis, so long as such officers remain impartial and unbiased. Where, for reasons of economy or otherwise, an agency does not wish or is unable to directly employ hearing officers, it may request the

Lieutenant Governor to provide such. Because of the quasi-judicial nature of administrative adjudicative proceedings, a legal background is required of all hearing officers.

(4) Source:

AS 44.62.350

Sec. 44.62.350. Appointment of hearing officers. (a) The governor shall assign a qualified, unbiased, and impartial hearing officer, with experience in the general practice of law, to conduct hearings under this chapter. The hearing officer may perform other duties in connection with the administration of this chapter and other laws.

(b) An agency with hearing officers may continue their employment as hearing officers on an unbiased and impartial basis within the particular agency and may hire additional officers and prescribe additional qualifications.

(c) A hearing officer hired after April 29, 1959, except to conduct hearings under the Alaska Employment Security Act (AS 23.20), shall have been admitted to practice law for at least two years immediately before his appointment. (§ 3 (ch 2) ch 143 SLA 1959; am § 7 ch 5 SLA 1966)

(1) Proposed Section:

Sec. 44.62.380, Presiding officer; disqualification; powers

(a) One or more qualified members of the agency head, or one or more duly appointed hearing officers may, in the discretion of the agency, be the presiding officer.

(b) Any individual serving or designated to serve alone or with others as presiding officer shall be disqualified from the hearing for bias, prejudice, interest, or any other cause provided in this chapter or for which a judge is disqualified.

(c) The presiding officer may:

(1) administer oaths and affirmations;

(2) issue subpoenas authorized by law;

(3) order discovery by the parties as provided in AS 44.62.600 and issue protective orders;

(4) rule on offers of proof and receive relevant evidence;

(5) order depositions or have depositions taken when the ends of justice would be served;

(6) regulate the course of the hearing, including continuances;

(7) hold conferences for the settlement or simplification of the issues by consent of the parties;

(8) dispose of prodecural requests or similar matters;

(9) advise the agency on matters of law; and

(10) exercise other powers necessary for the orderly conduct of the hearing not expressly prohibited by this chapter or reserved to the agency itself.

(2) Current Section:

(None)

(3) Comments:

This section provides for the identification of a presiding officer who will have principal responsibility for the conduct of adjudicative hearings under this draft. The presiding officer may be a member of the agency head or may be a hearing officer; one or more persons may be designated as presiding officer, as would be the case in multiple hearings on discrete aspects of a single proceeding. Presiding officers may be disqualified for bias upon petition of a party and determination by the agency. Should the need arise, additional hearing officers could be sought under the provisions of §.370(c) until an unbiased presiding officer is found.

(4) Source:

Administrative Law Committee Draft (July 1981)

Draft Model APA §4-202

(1) Proposed Section:

Sec. 44.62.390, Power to administer oaths

In an adjudicatory proceeding under this chapter an agency, agency member, hearing officer, presiding officer or other person authorized by law may administer oaths and affirmations and certify official acts.

(2) Current Section:

(Attached at end of this draft section)

(3) Comments:

(4) Source:

AS 44.62.620

Sec. 44.62.620. Power to administer oaths. In a proceeding under AS 44.62.330 — 44.62.630 an agency, agency member, secretary of an agency or hearing officer may administer oaths and affirmations and certify official acts. (§ 30 (ch 2) ch 143 SLA 1959)

(1) Proposed Section:

Sec. 44.62.400, Accusation

A hearing to determine whether a right, authority, license or privilege should be revoked, suspended, limited or conditioned is initiated by filing an accusation. The accusation shall (1) be a written statement of charges setting out in ordinary and concise language the acts or omissions with which the respondent is charged, so that the respondent is able to prepare his defense; and (2) specify the statute and rule which the respondent is alleged to have violated, but may not consist merely of charges phrased in the language of the statute and rule.

(2) Current Section:

(Attached at end of this draft section)

(3) Comments:

(4) Source:

AS 44.62.360

Sec. 44.62.360. Accusation. A hearing to determine whether a right, authority, license or privilege should be revoked, suspended, limited or conditioned is initiated by filing an accusation. The accusation shall (1) be a written statement of charges setting out in ordinary and concise language the acts or omissions with which the respondent is charged, so that the respondent is able to prepare his defense; (2) specify the statute and rule which the respondent is alleged to have violated, but may not consist merely of charges phrased in the language of the statute and rule; and (3) be verified, unless made by a public officer acting in his official capacity or by an employee of the agency on whose behalf the proceeding is to be held; the verification may be on information and belief. (§ 4 (ch 2) ch 143 SLA 1959)

(1) Proposed Section:

Sec. 44.62.420, Statement of issues

(a) A hearing to determine whether a right, authority, license or privilege should be granted, issued or renewed is initiated by filing a statement of issues. The statement of issues is a written statement specifying

(1) the statute and rule with which the respondent must show compliance by producing proof at the hearing, and

(2) particular matters which have come to the attention of the initiating party and which would authorize a denial of the agency action sought.

(b) The statement of issues shall be served in the same manner as an accusation.

(2) Current Section:

(Attached at end of this draft section)

(3) Comments:

(4) Source:

AS 44.62.370

Sec. 44.62.370. Statement of issues. (a) A hearing to determine whether a right, authority, license or privilege should be granted, issued or renewed is initiated by filing a statement of issues. The statement of issues is a written statement specifying (1) the statute and rule with which the respondent must show compliance by producing proof at the hearing, and (2) particular matters which have come to the attention of the initiating party and which would authorize a denial of the agency action sought.

(b) The statement of issues shall be verified unless made by a public officer acting in his official capacity or by an employee of the agency before which the proceeding is to be held. The verification may be on information and belief.

(c) The statement of issues shall be served in the same manner as an accusation, except that if the hearing is held at the request of the respondent (1) AS 44.62.380 and 44.62.390 do not apply, and (2) the statement of issues together with the notice of hearing shall be delivered or mailed to the parties as provided in § 420 of this chapter. (§ 5 (ch 2) ch 143 SLA 1959)

(1) Proposed Section:

Sec. 44.62.420, Limitation on initiation of proceedings

Only a public officer acting in his official capacity or an employee of the agency on whose behalf the proceeding is to be held may file an accusation or statement of issues unless the statute or regulation governing the respondent or his activities expressly confers upon third persons the right to initiate an administrative proceeding, in which case the accusation or statement of issues must be verified. The verification may be on information and belief.

(2) Current Statute:

(None)

(3) Comments:

This section is intended to reflect in statute the decision of the Alaska Supreme Court in Vick v. Board of Electrical Examiners, 626 P.2d 90 (Alaska 1981) to the effect that a private citizen has no legal power to compel agency action by the filing of an accusation or statement of issues.

(4) Source:

Administrative Law Committee Draft (July 1981)

(1) <u>Proposed Section:</u>

Sec. 44.62.430, <u>Service of accusation</u>

(a) Upon filing the accusation, the agency

(1) shall serve a copy of the accusation on the respondent as provided in (c) of this section;

(2) shall include with the accusation a post card or other form entitled "Notice of Defense" which, when signed by or on behalf of the respondent and returned to the agency, acknowledges service of the accusation and constitutes a notice of defense under §44.62.450 of this chapter;

(3) shall include in or with the copy of the accusation a statement that respondent may request a hearing by filing a notice of defense as provided in §44.62.450 of this chapter within 20 days after the accusation is served on him and that failure to do so constitutes a waiver of his right to a hearing;

(4) may include with the accusation any information which it considers appropriate.

(b) The statement to respondent shall be substantially in the following form:

Unless a written request for a hearing signed by or on behalf of the person named as respondent in the accompanying accusation is delivered or mailed to the agency within 15 days

after the accusation was personally served on you or mailed to you, (here insert name of agency) may proceed upon the accusation without a hearing. The request for a hearing may be made by delivering or mailing the enclosed form entitled "Notice of Defense", or by delivering or mailing a notice of defense as provided by AS 44.62.450 to: (here insert name and address of agency).

(c) The accusation and all accompanying information may be sent to the respondent by any means selected by the agency. However, no order adversely affecting the rights of the respondent may be made by the agency unless the respondent is served personally or by registered mail, files a notice of defense, or otherwise appears. Service may be proved in the manner authorized in civil actions. Service by registered mail is effective if a statute or agency rule requires the respondent to file his address with the agency and to notify the agency of a change, and if a registered letter containing the accusation and accompanying material is mailed, addressed to respondent at the latest address on file with the agency.

(2) Current Section:

(Attached at end of this draft section)

(3) Comments:

(4) Source:

AS 44.62.380

Sec. 44.62.380. Service of accusation. (a) Upon filing the accusation, the agency

(1) shall serve a copy of the accusation on the respondent as provided in (c) of this section;

(2) shall include with the accusation a post card or other form entitled "Notice of Defense" which, when signed by or on behalf of the respondent and returned to the agency, acknowledges service of the accusation and constitutes a notice of defense under AS 44.62.390;

(3) shall include in or with the copy of the accusation a statement that respondent may request a hearing by filing a notice of defense as provided in AS 44.62.390 within 15 days after the accusation is served on him and that failure to do so constitutes a waiver of his right to a hearing;

(4) may include with the accusation any information which it considers appropriate.

(b) The statement to respondent shall be substantially in the following form:

Unless a written request for a hearing signed by or on behalf of the person named as respondent in the accompanying accusation is delivered or mailed to the agency within 15 days after the accusation was personally served on you or mailed to you, (here insert name of agency) may proceed upon the accusation without a hearing. The request for a hearing may be made by delivering or mailing the enclosed form entitled "Notice of Defense," or by delivering or mailing a notice of defense as provided by AS 44.62.390 to: (here insert name and address of agency).

(c) The accusation and all accompanying information may be sent to the respondent by any means selected by the agency. However, no order adversely affecting the rights of the respondent may be made by the agency unless the respondent is served personally or by registered mail, files a notice of defense, or otherwise appears. Service may be proved in the manner authorized in civil actions. Service by registered mail is effective if a statute or agency rule requires the respondent to file his address with the agency and to notify the agency of a change, and if a registered letter containing the accusation and accompanying material is mailed, addressed to respondent at the latest address on file with the agency. (§ 6 (ch 2) ch 143 SLA 1959)

but the agency in its discretion may nevertheless grant a hearing. Unless objection is taken as provided in (a)(3) of this section, all objections to the form of the accusation are waived.

(d) The notice of defense shall be in writing signed by or on behalf of the respondent and shall state his mailing address. It need not be verified or follow a particular form.

(2) Current Section:

(Attached at end of this draft section)

(3) Comments:

(4) Source:

AS 44.62

Sec. 44.62.390. Notice of defense. (a) Within 15 days after service upon him of the accusation, the respondent may file with the agency a notice of defense. In the notice he may

(1) request a hearing;

(2) object to the accusation upon the ground that it does not state acts or omissions upon which the agency may proceed;

(3) object to the form of the accusation on the ground that it is so indefinite or uncertain that he cannot identify the transaction or prepare his defense;

(4) admit the accusation in whole or in part;

(5) present new matter by way of defense.

(b) Within the time specified the respondent may file one or more notices of defense upon any or all of the grounds set out in (a) of this section but all of the notices shall be filed within that period unless the agency in its discretion authorizes the filing of a later notice.

(c) The respondent is entitled to a hearing on the merits if he files a notice of defense, and the notice of defense is considered a specific denial of all parts of the accusation not expressly admitted. Failure to file the notice constitutes a waiver of the respondent's right to a hearing, but the agency in its discretion may nevertheless grant a hearing. Unless objection is taken as provided in (a) (3) of this section, all objections to the form of the accusation are waived.

(d) The notice of defense shall be in writing, signed by or on behalf of the respondent, and shall state his mailing address. It need not be verified or follow a particular form. (§ 7 (ch 2) ch 143 SLA 1959)

(1) Proposed Section:

Sec. 44.62.450, Amended or supplemental accusation

At any time before the matter is submitted for decision the agency may file or permit the filing of an amended or supplemental accusation. All parties shall be notified of the filing. If the amended or supplemental accusation presents new charges the agency shall give the respondent a reasonable opportunity to respond to the new charges, including the right to advice of counsel, presentation of evidence, hearing, cross-examination, discovery and rebuttal. New charges are considered controverted. Objections to the amended or supplemental accusation may be made orally and shall be noted in the record.

(2) Current Section:

(Attached at end of this draft section)

(3) Comments:

The existing statutory provision has been modified to provide a respondent with an opportunity to answer new charges made by amended or supplemental accusation, equal to the opportunity he or she would have had if such new charges had been originally made in the initial accusation. The proposed

section, in effect, balances the right of the agency to alter the accusation with the right of the party affected to respond to such alterations.

(4) Source:

AS 44.62.400

Sec. 44.62.400. Amended or supplemental accusation. At any time before the matter is submitted for decision the agency may file or permit the filing of an amended or supplemental accusation. All parties shall be notified of the filing. If the amended or supplemental accusation presents new charges the agency shall give the respondent a reasonable opportunity to prepare his defense to it, but he is not entitled to file a further pleading unless the agency in its discretion so orders. New charges are considered controverted. Objections to the amended or supplemental accusation may be made orally and shall be noted in the record. (§ 8 (ch 2) ch 143 SLA 1959)

(1) Proposed Section:

Sec. 44.62.460, Representation at hearing

(a) Any party may participate in any hearing under this chapter in person or, if the party is a corporation or other artificial person, by a duly authorized representative.

(b) Whether or not participating in person, any party may be advised and represented at hearing at the party's cost by counsel or, unless prohibited by any provision of law, other representative.

(2) Current Section:

(None)

(3) Comments:

This section makes explicit the general right of a party to be represented by counsel, at that party's expense, or by other representative, at all adjudicatory hearings.

(4) Source:

Revised Model APA, §4-203

(1) <u>Proposed Section:</u>

Sec. 44.62.470, <u>Intervention</u>

(a) The presiding officer shall grant one or more petitions for intervention if

(1) The petition is submitted in writing to the presiding officer, with copies mailed to all parties named in the presiding officer's notice of the hearing, at least 10 days before the hearing;

(2) The petition states facts demonstrating that the petitioner's rights, duties, privileges, immunities or other substantial interests may be affected by the proceeding or that the petitioner qualifies as an intervenor under any provision of law; and

(3) The presiding officer determines that the interests of justice and the orderly and prompt conduct of the proceedings would not be impaired by allowing the intervention.

(b) The presiding officer may grant one or more petitions for intervention at any time, upon determining that such intervention would be in the interests of justice and would not impair the orderly and prompt conduct of the proceedings.

(c) If a petitioner qualifies for intervention, the presiding officer may impose conditions upon the intervenor's

participation in the proceedings, either at the time that intervention is granted or at any subsequent time. Such conditions may include:

(1) Limitation on the intervenor's participation to designate issues in which the intervenor has a particular interest demonstrated by the petition;

(2) Limitation of the intervenor's use of discovery, cross-examination and other procedures so as to promote the orderly and prompt conduct of the proceedings; and

(3) Requiring two or more intervenors to combine their presentations of evidence and argument, cross-examination, discovery and other participation in the proceedings.

(d) The presiding officer shall render an order granting or denying each petition for intervention, specifying any conditions, and briefly stating the reasons for the order. The presiding officer may modify the order at any time, stating the reasons for the modification.

(2) Current Section:

(None)

(3) Comments:

See related Drafter's Comments, Revised Model APA

(4) Source:

Revised Model APA, §4-209

(1) Proposed Section:

Sec. 44.62.480, Informal disposition

Unless precluded by law, informal disposition may be made of any contested cause whether by stipulation, agreed settlement, consent order, default, or other form.

(2) Current Section:

(None)

(3) Comments:

This section is intended to enhance the efficiency of administrative proceedings by fostering the settlement of matters by other than invocation of the full formal hearing process. Such settlement, however, may not occur in contravention of other legal requirements.

(4) Source:

Administrative Law Committee Draft (July 1981)

(1) Proposed Section:

Sec. 44.62.490, Summary proceedings

(a) Summary proceedings may be used in adjudication in lieu of formal hearings if the use of such proceedings in the circumstances does not violate any provision of law, and if the matter is entirely within one or more of the following categories for which the agency has adopted a regulation:

(1) A matter that can be expressed solely in monetary terms and that involves an amount of not more than $100,

(2) A reprimand, warning, disciplinary report or a verbal sanction without continuing impact against a prisoner, student, public employee or licensee,

(3) The denial of an application after the applicant has abandoned the application,

(4) The denial of an application for admission to an educational institution or for employment by an agency,

(5) A matter that is resolved on the sole basis of inspections, examinations or tests, or

(6) Any matter with only trivial potential impact on the affected parties.

(b) The agency head, one or more members of the agency head, or one or more other persons designated by the

agency head may, in the discretion of the agency head, be the presiding officer, subject to the requirements of §.380 of this chapter.

(c) If the proceeding involves a monetary matter or a reprimand, warning, disciplinary report of other sanction:

(1) The presiding officer shall, before taking action, give each party an opportunity to know the agency's view of the matter and to explain the party's view of the matter; and

(2) The presiding officer shall, at the time when any unfavorable action is taken, give each party a brief statement of conclusions of law, the policy reasons therefor, and findings of fact to justify the action and a notice of any available administrative review.

(d) The order rendered in a proceeding that involves a monetary matter must be in writing. Orders in other summary proceedings may be oral or written, unless otherwise prescribed by any provision of law.

(e) If review is available within the agency, the presiding officer for the review shall give each party an opportunity to explain the party's view of the matter unless the party's view is apparent from the written materials in the file submitted to this presiding officer. Action on review must be in writing, including a brief statement of conclusions of law, the policy reasons therefor, and findings of fact to

justify the action and a notice of any further administrative review available. The presiding officer in the initial summary proceeding shall not be the presiding officer for the review.

(f) The record consists of any documents and any oral communications regarding the matter that were considered, prepared by or for, or made to the presiding officer for the summary proceeding and for any review. Oral communications shall be reduced to writing and placed in the record.

(2) Current Section:

(None)

(3) Comments:

This section provides an agency with an alternative, summary means of administrative adjudication in certain factual circumstances set forth in the text. The election of such a procedure resides in the sole discretion of the agency. Such discretion is warranted by the limitations imposed by the section upon the scope of matters subject to summary disposition and by the need for administrative efficiency where relatively minor matters are concerned. Summary proceedings are in place of formal hearing procedures; final decisions resulting from such proceedings, following exhaustion of any available internal agency review, would be subject to further review, if at all, under the provisions of §.700 of this draft.

To avail itself of the procedures set forth in this section, an agency must adopt conforming regulations specifying when and under what conditions such a summary proceeding will be used.

(4) <u>Source:</u>

Revised Model APA, §4-502

Administrative law Committee Draft (July 1981)

(1) Proposed Section:

Sec. 44.62.500, Conference hearing

(a) A conference hearing may be used in adjudication if its use in the circumstances does not violate any provision of law, and if the matter is entirely within one or more categories for which the agency has by rule adopted this section; however, those categories may include only the following:

(1) Adjudication in which no disputed issue of material fact has appeared; or

(2) Adjudication in which a disputed issue of material fact has appeared, and that involves only:

(i) A matter that can be expressed solely in monetary terms and that involves an amount of not more than $1,000;

(ii) A disciplinary sanction against a prisoner;

(iii) A disciplinary sanction against a student that does not involve expulsion from an academic institution or suspension for more than 10 days;

(iv) A disciplinary sanction against a public employee that does not involve discharge from employment or suspension for more than 10 days; or

(v) A disciplinary sanction against a licensee that does not involve revocation, suspension, annulment, withdrawal, or amendment or a license.

(b) The procedures of this Act pertaining to formal hearings apply to a conference hearing, except to the extent otherwise provided in this subsection.

(1) Pre-hearing conference.

If an adjudication is initiated as a conference hearing, no pre-hearing conference may be held.

(2) Subpoenas, discovery and protective orders.

The provisions of §§600-620 do not apply to conference hearings insofar as these provisions authorize the issuance and enforcement of subpoenas and discovery orders, but do apply to conference hearings insofar as these provisions authorize the presiding officer to issue protective orders, at the request of any party or upon the presiding officer's motion.

(3) Procedure at hearing.

(i) The provisions of §44.62.570 shall apply.

(ii) The presiding officer shall regulate the course of the proceedings.

(iii) Only the parties may testify and present written exhibits.

(iv) The parties may offer comments on the issues.

(A) If the presiding officer has reason to believe that material facts are in dispute, the presiding officer may require any party to state the identity of the witnesses or other sources through whom the party would propose to present proof if the proceeding were converted to a formal hearing, except that if disclosure of any fact, allegation or source is privileged or expressly prohibited by any provision of law, the party shall indicate that confidential facts, allegations or sources are involved but shall not disclose the confidential facts, allegations or sources.

(B) If a party has reason to believe that essential facts must be obtained in order to permit an adequate presentation of the case, the party may inform the presiding officer regarding the general nature of the facts and the sources from whom the party would propose to obtain such facts if the proceeding were converted to a formal hearing.

(2) Current Section:

(None)

(3) Comments:

This section provides for a more expeditious form of hearing where no material fact is in issue or in specified factual circumstances. Streamlined hearing procedures are set forth, consistent with the limited scope of the proceeding. Certain matters may fall within the scope of both this section and §.490 of this draft. As with §.490, an agency must adopt conforming regulations to make use of this section; further regulations would appear desirable to distinguish between the use of this section and §.490 in each contest where both might apply.

(4) Source:

Revised model APA, §4-401

(1) <u>Proposed Section:</u>

Sec. 44.62.510, <u>Emergency adjudication</u>

(a) Emergency adjudication may be used in situations involving an immediate danger to the public health, safety or welfare requiring agency action without waiting for any other proceeding that might otherwise be available.

(b) The agency may take only that action necessary to prevent or to avoid the immediate danger to the public health, safety or welfare that justifies use of an emergency adjudication.

(c) An initial emergency order may be issued by an agency under this section and shall be effective for no more than 10 days. The order shall provide for commencement of a hearing within 10 days of issuance. The procedure for such a hearing shall be specified by rule adopted by the agency..

(d) The agency shall give such notice as is practicable to persons who are required to comply with the order. The order is effective when rendered.

(e) If a hearing has been commenced within 10 days of the issuance of an initial emergency order under this section, the agency may extend the order for one additional 10-day-period to enable the agency to decide the matter and to issue a final emergency order. A final emergency order issued pursuant to the provisions of this section shall be effective

for no more than 160 days, may not be renewed or extended, and is subject to the further provisions of this chapter, including §§.640, .680 and.700.

(f) After issuing a final emergency order under this section, the agency shall proceed as quickly as feasible to initiate any proceedings that would be required if the matter did not involve an immediate danger.

(g) The agency shall modify or rescind the final emergency order when the magnitude of the danger lessens or when the danger is dissipated.

(h) It is the policy of the state that emergencies are held to a minimum and are rarely found to exist.

(2) Current Section:

(None)

(3) Comments:

This section provides for a separate category of adjudicative proceedings to be employed in the context of an emergency situation. Under such circumstances, an agency may issue an initial order without prior notice or hearing. Such an order is limited to 10 days duration, during which time a hearing must be commenced. The form of that hearing, however, need not be that provided for in this draft, but may be tailored by any agency to fit the particular emergency circumstnces likely to be faced by such agency. Such hearings

may incorporate provisions accelerating, restricting, or reducing various procedural aspects of the more formal hearing process. An agency must adopt conforming regulations specifying the nature of such proceedings.

If such a hearing is held, the initial order may be extended once for an additional 10 days to permit the agency to issue a final emergency order. Such an order may have a maximum duration of 160 days, the entire emergency cycle thus extending 180 days. Final emergency orders cannot be renewed or extended. Further, although the hearing prescribed by this section is exempted from the provision of the draft, the final emergency order is not. Thus, such an order must be in appropriate form (§.640) and is subject to reconsideration (§.650) and judicial review (§.700), the same as any other final order.

(4) Source:

Administrative Law committee Draft (July 1981)

Revised Model APA, §4-501

AS 42.07.181

(1) Proposed Section:

Sec. 44.62.520, Availability of pre-hearing conference

(a) The presiding officer may determine whether a pre-hearing conference shall be conducted. If a conference is conducted, this section applies.

(b) The presiding officer shall set the time and place of the pre-hearing conference and shall give reasonable written notice to all parties of record and to all persons who have filed written petitions to intervene in the matter. The agency shall promptly give notice to other categories of persons to whom notice is required by any provision of law.

(c) The notice must include:

(1) The names and addresses of all parties and other persons to whom notice is being given by the hearing officer;

(2) The name, official title, mailing address and telephone number of any counsel or agency employee who has been designated to appear for the agency;

(3) The official title or other reference number, the name of the proceeding, and a general description of the subject-matter;

(4) A statement of the time, place, and nature of the pre-hearing conference including the issues to be addressed at the conference;

(5) The name, official title, mailing address and telephone number of the hearing officer for the pre-hearing conference; and

(6) A short and plain statement that at the pre-hearing conference the proceeding may, without further notice, be converted into a conference hearing or summary proceeding for disposition of the matter as provided by this chapter.

(d) The notice may include any other matters that the hearing officer considers desirable to expedite the proceedings.

(2) Current Section:

(None)

(3) Comments:

See related Drafter's Comments, Revised Model APA

(4) Source:

Revised Model APA, §4-204

(1) Proposed Section:

Sec. 44.62.530, Pre-hearing conference procedure and pre-hearing order

(a) At the discretion of the presiding officer, all or part of the pre-hearing conference may be conducted by telephone, television, or other electronic means, if each participant in the pre-hearing conference has an opportunity to participate in, to hear and, except when telephone is used, to see the entire proceeding while it is taking place.

(b) The presiding officer shall conduct the pre-hearing conference to discuss where applicable, such matters as conversion of the proceeding to another type, exploration of settlement possibilities, preparation of stipulations, simplification of issues, rulings on identity and limitation of the number of witnesses objections to proffers of evidence, determination of the extent to which direct evidence, rebuttal evidence or cross-examination will be presented in written form and the extent to which telephone, television or other electronic means will be used as a substitute for proceedings in person, order of presentation of evidence and cross-examination, rulings regarding issuance of subpoenas, discovery orders and protective orders, and other matters that will promote the orderly and prompt conduct of the hearing. The presiding officer shall issue a pre-hearing order incorporating the matters determined at the pre-hearing conference.

(c) If a pre-hearing conference is not held, the presiding officer for the formal hearing may issue a pre-hearing order, based on the pleadings, to regulate the conduct of the proceedings.

(2) Current Section:

(None)

(3) Comments:

See Drafter's Comments, Revised Model APA

(4) Source:

Revised Model APA, §4-205

(1) Proposed Section:

Sec. 44.62.540, Pleadings, briefs, motions, service

(a) The presiding officer shall give all parties full opportunity, at appropriate stages of the proceedings, to file pleadings, motions, objections and offers of settlement.

(b) The presiding officer may give all parties full opportunity, at appropriate stages of the proceedings, to file briefs, proposed findings of fact and conclusions of law and proposed initial or final orders.

(c) A party who files any papers shall simultaneously serve copies on all parties.

(2) Current Section:

(None)

(3) Comments:

See Drafter's Comments, Revised Model APA

(4) Source:

Revised Model APA, §4-207

(1) Proposed Section:

Sec. 44.62.550, Time and place of hearing

(a) The hearing shall be held in the community:

(1) Nearest to where the transaction occurred or where the respondent resides; and

(2) Which has a district or superior court.

(b) The agency may select a place different from that prescribed in (a) of this section for either of the following reasons:

(1) When the convenience of witnesses and the ends of justice would be promoted by the change;

(2) If the agency finds that the respondent otherwise would be put to unnecessary inconvenience.

(c) Notwithstanding (a) or (b) of this section, the parties by agreement may select any place in the state.

(2) Current Section:

(Attached at end of this draft section)

(3) Comments:

(4) Source:

Administrative Law Committee Draft (July 1981)

AS 44.62.410

Sec. 44.62.410. Time and place of hearing. The agency shall determine the time and place of hearing. The hearing shall be held in Juneau or Ketchikan, whichever is closer to the place where the transaction occurred or where the respondent resides, if the transaction occurred in or the respondent resides in the Southeastern Senate District; in Anchorage if the transaction occurred or the respondent resides within the South Central Senate District; in Fairbanks or Nome, whichever is closer to the place where the transaction occurred or where the respondent resides, if the transaction occurred in or the respondent resides in the Central or Northwestern Senate Districts. The agency may, if the transaction occurred in a senate district other than that of respondent's residence, select the place of hearing appropriate for either district. The agency may select a different place nearer the place where the transaction occurred or where the respondent resides, or the parties by agreement may select any place in the state. (§ 9 (ch 2) ch 143 SLA 1959)

(1) Proposed Section:

Sec. 44.62.560, Notice of hearing

(a) The presiding officer for the hearing shall set the time and place of the hearing and shall give reasonable written notice to all parties of record and to all persons who have filed written petitions to intervene in the matter.

(b) To the extent not included in a pre-hearing order accompanying it, the notice must include:

(1) The names and addresses of all parties and other persons to whom notice is being given by the presiding officer;

(2) The name, official title, mailing address and telephone number of any counsel or agency employee who has been designated to appear for the agency;

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

(4) A statement of the time, place and nature of the hearing;

(5) A statement of the legal authority and jurisdiction under which the hearing is to be held;

(6) The name, official title, mailing address and telephone number of the presiding officer;

(7) A short and plain statement of the issues involved and to the extent known to the presiding officer, of the matters asserted by the parties; and

(c) The notice may include any other matters that the presiding officer considers desirable to expedite the proceedings.

(d) The agency shall promptly give notice to categories of persons to whom notice is required by any provision of law but has not been given by the presiding officer. Notice under this subsection may include all types of information provided in subsections (a)-(c), or may consist of a brief statement indicating the subject matter, parties, time, place and nature of the hearing, manner in which copies of the notice to the parties may be inspected and copied, and name and telephone number of the presiding officer.

(2) Current Section:

(Attached at end of this draft section)

(3) Comments:

See Drafter's Comments, Revised Model APA

(4) Source:

Revised Model APA, §4-206

Sec. 44.62.420. Form of notice of hearing. (a) The agency shall deliver or mail a notice of hearing to all parties at least 10 days before the hearing. The hearing shall not be held before the expiration of the time within which the respondent is entitled to file a notice of defense.

(b) The notice to respondent shall be substantially in the following form but may include other information:

You are notified that a hearing will be held before (here insert name of agency) at (here insert place of hearing) upon the .... day of ...., 19 .... at the hour of ...., upon the charges made in the accusation served upon you. You may be present at the hearing, may be but need not be represented by counsel, may present any relevant evidence, and will be given full opportunity to cross-examine all witnesses testifying against you. You may have subpoenas issued to compel the attendance of witnesses and the production of books, documents or other things by applying to (here insert appropriate office or agency). (§ 10 (ch 2) ch 143 SLA 1959)

(1) Proposed Section:

Sec. 44.62.570. Conduct of the hearing

(a) At the discretion of the presiding officer, all or part of the hearing may be conducted by telephone, television, or other electronic means, if each participant in the hearing has an opportunity to participate in, to hear and, except when telephone is used, to see the entire proceeding while it is taking place.

(b) The presiding officer shall cause the hearing to be recorded by tape recording or stenographic notes or symbols at the agency's expense. The agency is not required, at its expense, to prepare a transcript, unless such a requirement is imposed by law. Any party may, at the party's expense, cause a transcript to be prepared by a reporter approved by the agency from the agency's tape recording or stenographic notes or symbols, or cause additional recordings to be made during the hearing, if the making of the recording does not cause distraction or disruption.

(c) The hearing is open to public observation, except for the parts that the presiding officer states to be closed pursuant to a statute expressly authorizing that closure. To the extent that a hearing is conducted by telephone, television, or other electronic means, the availability of public observation is satisfied by giving members of the public an opportunity, at reasonable times, to hear the tape

recordings and inspect any transcript prepared from the recordings, except for those portions of the hearing that are closed by the presiding officers.

(2) Current Section:

(Attached at end of this draft section)

(3) Comments:

See Drafter's Comments, Revised Model APA

(4) Source:

Revised Model APA, §4-211

(1) <u>Proposed Section:</u>

Sec. 44.62.580, <u>Evidence rules generally</u>

(a) Oral evidence may be taken only on oath or affirmation.

(b) Each party may:

(1) Call and examine witnesses;

(2) Introduce exhibits;

(3) Cross-examine opposing witnesses on matters relevant to the issues, even though that matter was not covered in the direct examination;

(4) Impeach a witness regardless of which party first called the witness to testify; and

(5) Rebut the evidence against himself.

(c) If the respondent does not testify in his own behalf he may be called and examined as if under cross-examination.

(d) The hearing need not be conducted according to technical rules related to evidence and witnesses. Relevant evidence shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of a common law or statutory rule which makes improper the admission of the evidence over objection in a civil action. Hearsay evidence may be used to supplement or explain direct evidence but is not

Sec. 44.62.450. Hearings. (a) A hearing in a contested case shall be presided over by a hearing officer. The agency itself shall determine whether the hearing officer hears the case alone or whether the agency hears the case with the hearing officer.

(b) If the agency hears the case the hearing officer shall preside at the hearing, rule on the admission and exclusion of evidence, and advise the agency on matters of law. The agency shall exercise all other powers relating to the conduct of the hearing, but may delegate any or all of these other powers to the hearing officer. If the hearing officer hears a case alone, he shall exercise all powers relating to the conduct of the hearing.

(c) A hearing officer or agency member shall voluntarily disqualify himself and withdraw from a case in which he cannot accord a fair and impartial hearing or consideration. A party may request the disqualification of a hearing officer or agency member by filing an affidavit, before the taking of evidence at a hearing, stating with particularity the grounds upon which it is claimed that a fair and impartial hearing cannot be accorded. If the request concerns an agency member the issue shall be determined by the other members of the agency. If the request concerns the hearing officer, the issue shall be determined by the agency when the agency hears the case with the hearing officer, and by the hearing officer when he hears the case alone. No agency member may withdraw voluntarily or be disqualified if his disqualification would prevent the existence of a quorum qualified to act in the particular case.

(d) The proceedings at the hearing shall be reported by a phonographic reporter or recorder, or other adequate means of assuring an accurate record. (§ 13 (ch 2) ch 143 SLA 1959)

(3) Comments:

(4) Source:

Administrative Law Committee Draft (July 1981)

AS 44.62.460

sufficient by itself to support a finding unless it would be admissible over objection in a civil action. The rules of privilege are effective to the same extent that they are recognized in a civil action. Irrelevant and unduly repititious evidence shall be excluded.

(e) Documentary evidence may be received in the form of copies or excerpts, if the original is not readily available. Upon request, parties shall be given an opportunity to compare the copy with the original.

(f) In the discretion of the presiding officer, non-parties may be given an opportunity to present oral or written statements. If the presiding officer proposes to consider such a statement, all parties shall be given an opportunity to challenge, cross examine or rebut it, and on motion of any party the presiding officer shall require the oral or written statement of a non-party to be given under oath or affirmation.

(g) In a statement-of-issues proceeding, the respondent must establish by a preponderance of the evidence that he is entitled to the agency action which he seeks. In an accusation proceeding, the agency must establish by a preponderance of the evidence that it is entitled to the action it seeks.

(2) Current Section:

(Attached at end of this draft section)

Sec. 44.62.460. Evidence rules. (a) Oral evidence may be taken only on oath or affirmation.

(b) Each party may (1) call and examine witnesses; (2) introduce exhibits; (3) cross-examine opposing witnesses on matter relevant to the issues, even though that matter was not covered in the direct examination; (4) impeach a witness regardless of which party first called the witness to testify; and (5) rebut the evidence against himself.

(c) If the respondent does not testify in his own behalf he may be called and examined as if under cross-examination.

(d) The hearing need not be conducted according to technical rules relating to evidence and witnesses. Relevant evidence shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of a common law or statutory rule which makes improper the admission of the evidence over objection in a civil action. Hearsay evidence may be used to supplement or explain direct evidence but is not sufficient by itself to support a finding unless it would be admissible over objection in a civil action. The rules of privilege are effective to the same extent that they are recognized in a civil action. Irrelevant and unduly repetitious evidence shall be excluded.

(e) Nothing in this chapter may be construed to alter the ordinary rules of burden of proof of judicial proceedings in the state. (§ 14 (ch 2) ch 143 SLA 1959; am § 8 ch 5 SLA 1966)

(1) Proposed Section:

Sec. 44.62.590, Official notice

In reaching a decision official notice may be taken, either before or after submission of the case for decision, of a generally accepted technical or scientific matter within the agency's special field, and of a fact which may be judicially noticed by the courts of the state. Parties present at the hearing shall be informed of the matters to be noticed, and those matters shall be noted in the record, referred to in the record, or appended to it. A party present at the hearing shall, upon request, be given a reasonable opportunity to refute the officially noticed matters by evidence or by written or oral presentation of authority. The agency shall determine the manner of this refutation by appropriate rule.

(2) Current Section:

(Attached at end of this draft section)

(3) Comments:

(4) Source:

AS 44.62.480

Sec. 44.62.480. Official notice. In reaching a decision official notice may be taken, either before or after submission of the case for decision, of a generally accepted tech .cal or scientific matter within the agency's special field, and of a fact which is judicially noticed by the courts of the state. Parties present at the hearing shall be informed of the matters to be noticed, and those matters shall be noted in the record, referred to in the record, or appended to it. A party present at the hearing shall, upon request, be given a reasonable opportunity to refute the officially noticed matters by evidence or by written or oral presentation of authority. The agency shall determine the manner of this refutation. (§ 16 (ch 2) ch 143 SLA 1959)

(1) Proposed Section:

Sec. 44.62.600, Discovery rights and procedure

(a) After initiation of a proceeding in which a respondent or other party is entitled to a hearing on the merits, a party, upon written request made to another party, before the hearing and within 30 days after service by the agency of the initial pleading or within 15 days after service of an additional pleading, is entitled to:

(1) obtain the names and addresses of witnesses to the extent known to the other party, including but not limited to those intended to be called to testify at the hearing; and

(2) inspect and make a copy of any of the following in the possession or custody or under the control of the other party:

(i) a statement of a person, other than the respondent, named in the initial administrative pleading, or in any additional pleading, when it is claimed that the act or omission of the respondent as to that person is the basis for the administrative proceeding;

(ii) a statement pertaining to the subject matter of the proceeding made by any party to another party or person;

(iii) statements of witnesses then proposed to be called by the party and of other persons having personal knowledge of the acts, omissions, or events which are the basis for the proceeding, not included in (A) or (B) of this paragraph;

(iv) all writings, including but not limited to reports of mental, physical and blood examinations and things which the party then proposes to offer in evidence;

(v) any other writing or thing which is relevant and which would be admissible in evidence in [illegible] proceeding;

(vi) investigative reports made by or on behalf of the agency or other party pertaining to the subject matter of the proceeding, to the extent that the reports

(A) contain the names and addresses of witnesses or of persons having personal knowledge of the acts, omissions or events which are the basis for the proceeding, or

(B) reflect matters noted by the investigator in the course of his investigation, or

(C) contain or include by attachment any statement or writing described in (i) - (v).

(b) For the purpose of this section, "statement" includes written statements by the person, signed or otherwise authenticated by him, stenographic, mechanical, electrical or other records, or transcripts of oral statements by the person, and written reports or summaries of those oral statements.

(c) Nothing in this section authorizes the inspection or copying of any writing or thing which is privileged from disclosure by statute or court rule or otherwise made confidential or protected as the attorney's work product.

(d) In his discretion, the presiding officer may order additional discovery, including but not limited to the following: interrogatories, requests for admissions and depositions.

(2) Current Section:

(None)

(3) Comments:

(4) Source:

Administrative Law Committee Draft (July 1981)

Civil Rule 26

(1) Proposed Section:

Sec. 44.62.610, Depositions

(a) On petition of a party, an agency may order that the testimony of a material witness residing inside or outside the state be taken by deposition in the manner prescribed by law for depositions in civil actions. The petition shall set out

(1) the nature of the pending proceeding;

(2) the name and address of the witness whose testimony is desired;

(3) a showing of the materiality of his testimony; and

(4) a request for an order requiring the witness to appear and testify before an officer named in the petition for that purpose.

(b) If the witness resides outside the state and if the agency orders the taking of his testimony by deposition, the party shall obtain an order of court to that effect by filing a petition for the taking of the deposition in the superior court. The proceedings on the order shall be in accordance with provisions governing the taking of depositions in the superior court in a civil action.

(2) Current Section:

(Attached at end of this draft section)

(3) Comments:

(4) Source:

AS 44.62.440

Sec. 44.62.440. Depositions. (a) On verified petition of a party, an agency may order that the testimony of a material witness residing inside or outside the state be taken by deposition in the manner prescribed by law for depositions in civil actions. The petition shall set out (1) the nature of the pending proceeding; (2) the name and address of the witness whose testimony is desired; (3) a showing of the materiality of his testimony; (4) a showing that the witness will be unable or cannot be compelled to attend; and (5) a request for an order requiring the witness to appear and testify before an officer named in the petition for that purpose.

(b) If the witness resides outside the state and if the agency orders the taking of his testimony by deposition, the agency shall obtain an order of court to that effect by filing a petition for the taking of the deposition in the superior court nearest to the principal office of the agency. The proceedings on this order shall be in accordance with provisions governing the taking of depositions in the superior court in a civil action. (§ 12 (ch 2) ch 143 SLA 1959)

(1) Proposed Section:

Sec. 44.62.620, Subpoena

(a) At the request of a party, subpoenas may be issued by (1) the agency before whom a hearing is or will be held, or its designee, or (2) a presiding officer before whom a hearing is or will be held, if one has been appointed.

(b) A subpoena issued under (a) of this section extends to all parts of the state and shall be served by the party or his designee in accordance with the rules of civil procedure. No witness is obliged to attend a place out of the election district in which he resides if the distance is more than 100 miles from his place of residence, except that the agency, upon affidavit of a party showing that the testimony of a witness is material and necessary, may endorse on the subpoena an order requiring the attendance of the witness.

(c) A witness who is not a party and who appears under a subpoena is entitled to receive fees and mileage in the same amount and under the same circumstances as prescribed by court rule for a witness in a civil action in a superior court.

(d) Fees, mileage and expenses of subsistence shall be paid by the party at whose request the witness is subpoenaed.

(e) A person served with a subpoena shall comply with the terms of the subpoena unless he timely files a motion to quash before the agency or the presiding officer. A person who

refuses to respond to a subpoena may be found in contempt upon certification in accordance with section 730 of this chapter.

(2) Current Section:

(Attached at end of this draft section)

(3) Comments:

(4) Source:

AS 44.62.430

Sec. 44.62.430. Subpoena. (a) Before the hearing begins the agency shall issue subpoenas and subpoenas duces tecum at the request of a party in accordance with the rules of civil procedure. After the hearing begins the agency hearing a case or a hearing officer sitting alone may issue subpoenas and subpoenas duces tecum.

(b) A subpoena issued under (a) of this section extends to all parts of the state and shall be served in accordance with the rules of civil procedure. No witness is obliged to attend at a place out of the election district in which he resides unless the distance is less than 100 miles from his place of residence, except that the agency, upon affidavit of a party showing that the testimony of the witness is material and necessary, may endorse on the subpoena an order requiring the attendance of the witness.

(c) A witness who is not a party and who appears under a subpoena is entitled to receive

(1) fees, except a witness who is an officer or employee of the state or a political subdivision of the state;

(2) mileage in the same amount and under the same circumstances as prescribed by law for a witness in a civil action in a superior court;

(3) an additional fee and mileage to a per diem compensation of $15 for expenses of subsistence for each day of actual attendance and for each day necessarily occupied in traveling to and from the hearing, if the witness attends a hearing at a point so far removed from his residence as to prohibit return to his residence from day to day.

(d) Fees, mileage, and expenses of subsistence shall be paid by the party at whose request the witness is subpoenaed. (§ 11 (ch 2) ch 143 SLA 1959)

(1) Proposed Section:

Sec. 44.62.630, Decisions and Orders

(a) Every agency decision in an adjudicative proceeding governed by this chapter must be reduced to a written order.

(b) In a case heard before an agency where a hearing officer presided at the hearing, that hearing officer shall be present during the consideration of the case and, if requested, shall assist and advise the agency. A member of the agency who has not heard the evidence may not vote on the decision.

(c) If a case is heard by a hearing officer alone he shall prepare a proposed order in a form which may be adopted as the decision in the case. A copy o. [illegible] oposed order shall be filed by the agency as a public record with the Lieutenant Governor and a copy of the proposed order shall be served by the agency on each party in the case and his attorney. The agency itself may adopt the proposed order in its entirety, or may reduce the proposed penalty and adopt the balance of the proposed order.

(c) If the porposed order is not adopted as provided in (b) of this section the agency may decide the case upon the record, including the transcript, with or without taking additional evidence, or may refer the case to the same or another presiding officer to take additional evidence. If the case is so assigned to a presiding officer he shall prepare a proposed order as provided in (b) of this section upon the additional evidence and the transcript and other papers which are part of the record of the earlier hearing. A copy of the proposed order shall be furnished to each party and his attorney as prescribed by (b) of this section. The agency may not decide a case provided for in this subsection without giving the parties the opportunity to present either oral or written argument before the agency. If additional oral evidence is introduced before the agency, no agency member may vote unless he has heard the additional oral evidence.

(2) Current Section:

(Attached at end of this draft section)

(3) Comments:

(4) Source:

AS 44.62.500

Sec. 44.62.500. Decision in a contested case. (a) If a contested case is heard before an agency (1) the hearing officer who presided at the hearing shall be present during the consideration of the case and, if requested, shall assist and advise the agency; and (2) a member of the agency who has not heard the evidence may not vote on the decision.

(b) If a contested case is heard by a hearing officer alone, he shall prepare a proposed decision in a form which may be adopted as the decision in the case. A copy of the proposed decision shall be filed by the agency as a public record with the lieutenant governor and a copy of the proposed decision shall be served by the agency on each party in the case and his attorney. The agency itself may adopt the proposed decision in its entirety, or may reduce the proposed penalty and adopt the balance of the proposed decision.

(c) If the proposed decision is not adopted as provided in (b) of this section the agency may decide the case upon the record, including the transcript, with or without taking additional evidence, or may refer the case to the same or another hearing officer to take additional evidence. If the case is so assigned to a hearing officer he shall prepare a proposed decision as provided in (b) of this section upon the additional evidence and the transcript and other papers which are part of the record of the earlier hearing. A copy of the proposed decision shall be furnished to each party and his attorney as prescribed by (b) of this section. The agency may not decide a case provided for in this subsection without giving the parties the opportunity to present either oral or written argument before the agency. If additional oral evidence is introduced before the agency, no agency member may vote unless he has heard the additional oral evidence. (§ 18 (ch 2) ch 143 SLA 1959)

Sec. 44.62.500. Decision in a contested case. (a) If a contested case is heard before an agency (1) the hearing officer who presided at the hearing shall be present during the consideration of the case and, if requested, shall assist and advise the agency; and (2) a member of the agency who has not heard the evidence may not vote on the decision.

(b) If a contested case is heard by a hearing officer alone, he shall prepare a proposed decision in a form which may be adopted as the decision in the case. A copy of the proposed decision shall be filed by the agency as a public record with the lieutenant governor and a copy of the proposed decision shall be served by the agency on each party in the case and his attorney. The agency itself may adopt the proposed decision in its entirety, or may reduce the proposed penalty and adopt the balance of the proposed decision.

(c) If the proposed decision is not adopted as provided in (b) of this section the agency may decide the case upon the record, including the transcript, with or without taking additional evidence, or may refer the case to the same or another hearing officer to take additional evidence. If the case is so assigned to a hearing officer he shall prepare a proposed decision as provided in (b) of this section upon the additional evidence and the transcript and other papers which are part of the record of the earlier hearing. A copy of the proposed decision shall be furnished to each party and his attorney as prescribed by (b) of this section. The agency may not decide a case provided for in this subsection without giving the parties the opportunity to present either oral or written argument before the agency. If additional oral evidence is introduced before the agency, no agency member may vote unless he has heard the additional oral evidence. (§ 18 (ch 2) ch 143 SLA 1959)

(c) The presiding officer may allow the parties a designated amount of time after conclusion of the hearing for the submission of proposed findings.

(d) A final order pursuant to this section shall be rendered in writing within 90 days after conclusion of the hearing or after submission of proposed findings in accordance with subsection (c), unless this period is waived or extended with the written consent of all parties or for good cause shown.

(e) The presiding officer shall cause copies of the final order or initial order to be handed or mailed to each party and to the agency head.

(2) Current Section:

(Attached at end of this draft section)

(3) Comments:

This section sets forth specific requirements for the material to be contained in the final orders issued by agencies following hearing. By means of such specificity, inadvertent agency omissions and insufficiencies in such orders can be avoided, thus reducing sources of potential litigation over technical, as opposed to substantive, issues.

(4) Source:

Revised Model APA, §4-215

Sec. 44.62.510. Form and effect of decision. (a) A decision shall be written and shall contain findings of fact, a determination of the issues presented and the penalty, if any. The findings may be stated in the language of the pleadings or by reference to them. Copies of the decision shall be delivered to the parties personally or sent to them by registered mail.

(b) A decision in a primarily judicial proceeding has retroactive effect in the same manner as a decision of a state court. (§ 19 (ch 2) ch 143 SLA 1959)

(1) Proposed Section:

Sec. 44.62.660, Default

If the respondent does not file a notice of defense or does not appear at the hearing, the agency may take action based upon the respondent's express admissions or upon other evidence, and affidavits may be used as evidence without notice to the respondent. If the burden of proof is on the respondent to establish that he is entitled to the agency action sought, the agency may act without taking evidence. Nothing in this chapter may be construed to deprive the respondent of the right to make a showing by way of mitigation.

(2) Current Section:

(Attached at end of this draft section)

(3) Comments:

(4) Source:

AS 44.62.530

Sec. 44.62.530. Default. If the respondent does not file a notice of defense or does not appear at the hearing, the agency may take action based upon the respondent's express admissions or upon other evidence, and affidavits may be used as evidence without notice to the respondent. If the burden of proof is on the respondent to establish that he is entitled to the agency action sought, the agency may act without taking evidence. Nothing in this chapter may be construed to deprive the respondent of the right to make a showing by way of mitigation. (§ 21 (ch 2) ch 143 SLA 1959)

(1) Proposed Section:

Sec. 44.62.670, Mail vote

A member of an agency qualified to vote on a question may vote by mail.

(2) Current Section:

(Attached at end of this draft section)

(3) Comments:

(4) Source:

AS 44.62.600

Sec. 44.62.600. Mail vote. A member of an agency qualified to vote on a question may vote by mail. (§ 23 (ch 2) ch 143 SLA 1959)

(1) Proposed Section:

Sec. 44.62.680, Reconsideration

(a) The agency may order a reconsideration of all or part of the case on its own motion or on petition of a party. A petition for reconsideration must be filed with the agency within ten (10) days after the decision has been rendered and shall state specific grounds upon which relief is requested. The power to order a reconsideration expires thirty (30) days after the issuance of the decision. If no action is taken on a petition within the time allowed for ordering reconsideration, the petition is considered denied. The filing of such a petition is not a prerequisite for seeking administrative or judicial review.

(b) The case shall be reconsidered by the agency on all pertinent parts of the record and any additional evidence and argument that are authorized by the agency. The case may be assigned to a presiding officer. A reconsideration assigned to a presiding officer is subject to the procedure provided in AS 44.62.560, et seq. No agency member may take part in the final decision following reconsideration, unless he has participated in the original decision and has heard the additional evidence presented.

(2) Current Section:

(Attached at end of this draft section)

(3) Comments:

(4) Source:

AS 44.62.540

Sec. 44.62.540. Reconsideration. (a) The agency may order a reconsideration of all or part of the case on its own motion or on petition of a party. The power to order a reconsideration expires 30 days after the delivery or mailing of a decision to the respondent. If no action is taken on a petition within the time allowed for ordering reconsideration, the petition is considered denied.

(b) The case may be reconsidered by the agency on all the pertinent parts of the record and the additional evidence and argument that are permitted, or may be assigned to a hearing officer. A reconsideration assigned to a hearing officer is subject to the procedure provided in AS 44.62.500. If oral evidence is introduced before the agency, no agency member may vote unless he has heard the evidence. (§ 22 (ch 2) ch 143 SLA 1959)

(1) Proposed Section:

Sec. 44.62.690, Petition for reinstatement or reduction of penalty

A person whose license is revoked or suspended may petition the agency for reinstatement or reduction of penalty after one year from the effective date of the decision or from the date of the denial of a similar petition. The agency shall give notice to the attorney general of the filing of the petition, and the attorney general and the petitioner shall be given an opportunity to present either oral or written argument before the agency. The agency shall decide the petition, and the decision shall include the reasons for the decision. This section does not apply if the statutes dealing with the particular agency contain different provisions for reinstatement or reduction of penalty.

(2) Current Section:

(Attached at end of this draft section)

(3) Comments:

(4) Source:

AS 44.62.550

Sec. 44.62.550. Petition for reinstatement or reduction of penalty. A person whose license is revoked or suspended may petition the agency for reinstatement or reduction of penalty after one year from the effective date of the decision or from the date of the denial of a similar petition. The agency shall give notice to the attorney general of the filing of the petition, and the attorney general and the petitioner shall be given an opportunity to present either oral or written argument before the agency. The agency shall decide the petition, and the decision shall include the reasons for the decision. This section does not apply if the statutes dealing with the particular agency contain different provisions for reinstatement or reduction of penalty. (§ 23 (ch 2) ch 143 SLA 1959)

(1) Proposed Section:

AS 44.62.700, Judicial Review

Judicial review by the superior court of a final administrative order may be had by filing a Notice of Appeal in accordance with the applicable Rules of Court governing appeals in civil matters.

(2) Current Section:

(Attached at end of this draft section)

(3) Comments:

This section codifies the effects of the decisions of the Supreme Court of Alaska in Owsichek v. State [No. 2328 - April 24, 1981] and Wise Mechanical Contractors, et al. v. Bignell [No. 2329 - April 24, 1981] and avoids potentially misleading inconsistencies between statutory provisions which may be subsequently supreceded by controlling changes in court rules.

(4) Source:

Administrative Law Committee Draft (July 1981)

Sec. 44.62.560. Judicial review. (a) Judicial review by the superior court of a final administrative order may be had by filing a notice of appeal in accordance with the applicable rules of court governing appeals in civil matters. Except as otherwise provided in this section, the notice of appeal shall be filed within 30 days after the last day on which reconsideration can be ordered, and served on each party to the proceeding. The right to appeal is not affected by the failure to seek reconsideration before the agency.

(b) The complete record of the proceedings, or the parts of it which the appellant designates, shall be prepared by the agency. A copy shall be delivered to all parties participating in the appeal. The original shall be filed in the superior court within 30 days after the appellant pays the estimated cost of preparing the complete or designated record or files a corporate surety bond equal to the estimated cost.

(c) The complete record includes (1) the pleadings, (2) all notices and orders issued by the agency, (3) the proposed decision by a hearing officer, (4) the final decision, (5) a transcript of all testimony and proceedings, (6) the exhibits admitted or rejected, (7) the written evidence, and (8) all other documents in the case.

(d) Upon order of the superior court, appeals may be taken on the original record or parts of it. The record may be typewritten or duplicated by any standard process. Analogous rules of court governing appeals in civil matters shall be followed where this chapter is silent, and when not in conflict with this chapter.

(e) The superior court may enjoin agency action in excess of constitutional or statutory authority at any stage of an agency proceeding. If agency action is unlawfully withheld or unreasonably withheld, the superior court may compel the agency to initiate action. (§ 24 (ch 2) ch 143 SLA 1959)

(1) Proposed Section:

Sec. 44.62.720, Scope of review

(a) An appeal shall be heard by the superior court sitting without a jury.

(b) Inquiry in an appeal extends to the following questions: (1) whether the agency has proceeded without, or in excess of jurisdiction; (2) whether there was a fair hearing; and (3) whether there was a prejudicial abuse of discretion. Abuse of discretion is established if the agency has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence.

(c) The court may exercise its independent judgment on the evidence. If it is claimed that the findings are not supported by the evidence, abuse of discretion is established if the court determines that the findings are not supported by (1) the weight of the evidence, or (2) substantial evidence in the light of the whole record.

(2) Current Section:

(Attached at end of this draft section)

(3) Comments:

(4) Source:

AS 44.62.570

Sec. 44.62.570. Scope of review. (a) An appeal shall be heard by the superior court sitting without a jury.

(b) Inquiry in an appeal extends to the following questions: (1) whether the agency has proceeded without, or in excess of jurisdiction; (2) whether there was a fair hearing; and (3) whether there was a prejudicial abuse of discretion. Abuse of discretion is established if the agency has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence.

(c) The court may exercise its independent judgment on the evidence. If it is claimed that the findings are not supported by the evidence, abuse of discretion is established if the court determines that the findings are not supported by (1) the weight of the evidence, or (2) substantial evidence in the light of the whole record.

(d) The court may augment the agency record in whole or in part, or hold a hearing de novo. If the court finds that there is relevant evidence which, in the exercise of reasonable diligence, could not have been produced or which was improperly excluded at the hearing, the court may (1) enter judgment as provided in (e) of this section and remand the case to be reconsidered in the light of that evidence; or (2) admit the evidence at the appellate hearing without remanding the case.

(e) The court shall enter judgment setting aside, modifying, remanding, or affirming the order or decision, without limiting or controlling in any way the discretion legally vested in the agency.

(f) The court in which proceedings under this section are started may stay the operation of the administrative order or decision until (1) the court enters judgment, (2) a notice of further appeal from the judgment is filed, or (3) the time for filing the notice of appeal expires.

(g) No stay may be imposed or continued if the court is satisfied that it is against the public interest.

(h) If further appeal is taken, the supreme court may, in its discretion, stay the superior court judgment or agency order.

(i) If a final administrative order or decision is the subject of a proceeding under this section, and the appeal is filed while the penalty imposed is in effect, finishing or complying with the penalty imposed by the administrative agency during the pendency of the proceeding does not make the determination moot. (§ 25 (ch 2) ch 143 SLA 1959)

(1) Proposed Section:

Sec. 44.62.730, Contempt

(a) In a proceeding before an agency, the agency shall certify the facts to the superior court in the judicial district where the proceeding is held if a person in the proceeding

(1) disobeys or resists a lawful order;

(2) refuses to respond to a subpoena;

(3) refuses to take oath or affirmation as a witness;

(4) refuses to be examined; or

(5) is guilty of misconduct at a hearing or so near the hearing as to obstruct the proceeding.

(b) Upon certification under (a) of this section, the court shall issue an order directing the person to appear before the court and show cause why he should not be punished for contempt. The order and a copy of the certified statement shall be served on the person.

(c) After service under (b) of this section, the court has jurisdiction of the matter.

(d) The law applicable to contempt committed by a person in the trial of a civil action before the superior court applies to contempt under this section as to

(1) the proceeding taken;

(2) the penalties imposed; and

(3) the way the person charged may purge himself of the contempt.

(2) Current Section:

(Attached at end of this draft section)

(3) Comments:

(4) Source:

AS 44.62.590

Sec. 44.62.590. Contempt. (a) In a proceeding before an agency, the agency shall certify the facts to the superior court in the judicial district where the proceeding is held if a person in the proceeding

(1) disobeys or resists a lawful order;

(2) refuses to respond to a subpoena;

(3) refuses to take oath or affirmation as a witness;

(4) refuses to be examined; or

(5) is guilty of misconduct at a hearing or so near the hearing as to obstruct the proceeding.

(b) Upon certification under (a) of this section, the court shall issue an order directing the person to appear before the court and show cause why he should not be punished for contempt. The order and a copy of the certified statement shall be served on the person.

(c) After service under (b) of this section, the court has jurisdiction of the matter.

(d) The law applicable to contempt committed by a person in the trial of a civil action before the superior court applies to contempt under this section as to

(1) the proceeding taken;

(2) the penalties imposed; and

(3) the way the person charged may purge himself of the contempt. (§ 27 (ch 2) ch 143 SLA 1959)

(1) Proposed Section:

Sec. 44.62.740, Disqualification

(a) A presiding officer, hearing officer, or agency member shall voluntarily disqualify himself and withdraw from a case in which he cannot accord a fair and impartial hearing or consideration. A party may request the disqualification of a presiding officer, hearing officer, or agency member by filing an affidavit, before the taking of evidence at a hearing, stating with particularity the grounds upon which it is claimed that a fair and impartial hearing cannot be accorded. If the request concerns an agency member the issue shall be determined by the other members of the agency. If the request concerns a presiding officer or a hearing officer, the issue shall be determined by the agency.

(b) If there is no longer a quorum qualified to act in the particular case because of a withdrawal or disqualification, a substitute shall be appointed

(1) by the governor, if the unavailable individual is an elected official or

(2) by the appointing authority, if the unavailable individual is an appointed official.

(c) Any action taken by a properly appointed substitute for an unavailable individual shall be as effective as if taken by the unavailable individual if that person had been available.

(2) Current Section:

(Attached at end of this draft section)

(3) Comments:

See related Drafter's Comments, Revised Model APA

(4) Source:

Administrative Law Committee Draft (July 1981)

Revised Model APA, §4-202

Sec. 44.62.630. Impartiality. The functions of hearing officers and those officers participating in decisions shall be conducted in an impartial manner with due regard for the rights of all parties and the facts and the law, and consistent with the orderly and prompt dispatch of proceedings. These officers, except to the extent required for the disposition of ex parte matters authorized by law, shall not engage in interviews with, or receive evidence or argument from, a party, directly or indirectly, except upon opportunity for all other parties to be present. Copies of all communications with these officers shall be served upon all parties. (§ 31 (ch 2) ch 143 SLA 1959)

(1) Proposed Section:

Sec. 44.62.750, Separation of functions

(a) A person who has served as investigator, prosecutor or advocate in an adjudicative proceeding may not serve as presiding officer or assist or advise a presiding officer in the same adjudicative proceeding.

(b) A person who is subject to the authority, direction or discretion of one who has served as investigator, prosecutor or advocate in an adjudicative proceeding may not serve as presiding officer or assist or advise a presiding officer in the same adjudicative proceeding.

(c) A person who has participated in a determination of probable cause or other equivalent preliminary determination in an adjudicative proceeding may serve as presiding officer or assist or advise a presiding officer in the same adjudicative proceeding, unless a party demonstrates grounds for disqualification.

(d) A person may not serve as presiding officer at successive stages of the same adjudicative proceeding.

(2) Current Section:

(None)

(3) Comments:

See related Drafter's Comments, Revised Model APA

(4) Source:

Revised Model APA, §4-214

(1) Proposed Section:

Sec. 44.62.770, Public inspection and indexing of agency orders

(a) Each agency shall make available for public inspection and copying, and index by name and subject, all written final orders of potential precedential value.

(b) A written final order shall not be relied on as precedent by an agency to the detriment of any person until it has been made available for public inspection and indexed in the manner described in subsection (a). This provision is inapplicable to any person who has actual timely knowledge of the order. The burden of proving that knowledge is on the agency.

(2) Current Section:

(None)

(3) Comments:

(4) Source:

Administrative Law Committee Draft (July 1981)

(1) <u>Proposed Section</u>:

Sec. 44.62.760, <u>Ex parte communications</u>

(a) No party to an adjudication shall engage a presiding officer, presiding officer, member of the agency head, or other person who has, alone or with others, authority to decide the matters undergoing adjudication, in ex parte communications.

(b) Whenever an ex parte communication occurs, the party and the agency official involved shall each immediately cause a copy of such communication to be placed in the public file or record of the proceeding and to be served upon all parties to that proceeding to the extent required generally for other documents in that form of adjudicative proceeding. If the ex parte communication consists of an oral conversation, that conversation shall be reduced to writing and filed and served as provided for in this subsection.

(c) Any person or entity described in (a) of this section who receives an ex parte communication in violation of this section may be excused from the proceeding or may be subjected to a petition for disqualification if necessary to eliminate the effect of the communication.

(d) The agency shall, and any party may, report any willful violation of this section to appropriate authorities

for any disciplinary proceedings provided by law. In addition, each agency may provide by rule for appropriate sanctions, including default, for violations of this section.

(2) Current Section:

(None)

(3) Comments:

(4) Source:

Administrative Law Committee Draft (July 1981)

Revised Draft APA, §4-213(e) and (f)

(1) Proposed Section:

Sec. 44.672.780, Definitions

(a) In subsection .010-.790 of this chapter, unless the context otherwise requires,

(1) "order of repeal" means a resolution, order or other official act of a state agency which expressly repeals a regulation in whole or in part;

(2) "regulation" means every rule, regulation, order, or standard of general application or the amendment, supplement or revision of a rule, regulation, order or standard adopted by a state agency to implement, govern its procedure, except one which relates only to the internal management of a state agency; "regulation"does not include a form prescribed by a state agency or instructions relating to the use of the form, but this provision is not a limitation upon a requirement that a regulation be adopted under this chapter when one is needed to implement the law under which the form is issued; "regulation" includes "manuals," "policies," "instructions," "guides to enforcement," "interpretative bulletins," "interpretations," and the like, which have the effect of rules, orders, regulations or standards of general application, and this and similar phraseology shall

not be used to avoid or circumvent this chapter; whether a regulation, regardless of name, is covered by this chapter depends in part on whether it affects the public or is used by the agency in dealing with the public;

(3) "lieutenant governor" means the office of the lieutenant governor in the executive branch of the state government, or another agency designated by executive order under the constitution;

(4) "state agency" means a department, office, agency, or other organizational unit of the executive branch, except one expressly excluded by law, but does not include an agency in the judicial or legislative branches of the state government.

(b) In subsection 330-790 of this chapter, unless the context otherwise requires,

(1) "agency member" means a person who is a member of an agency and includes a person who himself is an agency;

(2) "ex parte communication" is an undisclosed, informal contact between an agency official and a party or other person respecting the merits of a matter under adjudication before that official or that agency made without notice to and opportunity for all parties to participate in the manner prescribed by this chapter or by the rules of the agency;

(3) "hearing officer" means a hearing officer qualified under section .370 of this chapter;

(4) "party" includes the agency, the respondent, and a person, other than an officer or an employee of the agency in his official capacity, who has been allowed to appear in the proceeding;

(5) "Record" includes the notices of all proceedings, any pre-hearing order, any motions, pleadings, briefs, petitions, requests and intermediate rulings, evidence received or considered, a statement of matters officially noticed, proffers of proof and objections and rulings thereon, proposed findings, requested orders and exceptions, the tape recording or stenographic notes or symbols prepared for the presiding officer at the hearing, together with any transcript of all or part of the hearing considered before final disposition of the proceeding, any final order, initial order, or order on reconsideration, and matters placed on the record after an ex parte communication;

(6) "respondent" means a person against whom an accusation is filed under §.410 of this chapter or against whom a statement of issues is filed under §.420 of this chapter.

(2) Current Section:

(Attached at end of this draft section)

(3) Comments:

(4) Source:

Administrative law Committee Draft (July 1981)

AS 44.62.640

Sec. 44.62.640. Definitions. (a) In AS 44.62.010 — 44.62.320, unless the context otherwise requires,

(1) "order of repeal" means a resolution, order or other official act of a state agency which expressly repeals a regulation in whole or in part;

(2) "regulation" means every rule, regulation, order, or standard of general application or the amendment, supplement or revision of a rule, regulation, order or standard adopted by a state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure, except one which relates only to the internal management of a state agency; "regulation" does not include a form prescribed by a state agency or instructions relating to the use of the form, but this provision is not a limitation upon a requirement that a regulation be adopted under this chapter when one is needed to implement the law under which the form is issued; "regulation" includes "manuals," "policies," "instructions," "guides to enforcement," "interpretative bulletins," "interpretations," and the like, which have the effect of rules, orders, regulations or standards of general application, and this and similar phraseology shall not be used to avoid or circumvent this chapter; whether a regulation, regardless of name, is covered by this chapter depends in part on whether it affects the public or is used by the agency in dealing with the public;

(3) "lieutenant governor" means the office of the lieutenant governor in the executive branch of the state government, or another agency designated by executive order under the constitution;

(4) "state agency" means a department, office, agency, or other organizational unit of the executive branch, except one expressly excluded by law, but does not include an agency in the judicial or legislative branches of the state government.

(b) In AS 44.62.330 — 44.62.630, unless the context otherwise requires,

(1) "agency" includes the state boards, commissions and officers listed in AS 44.62.330 and those to which this chapter is made applicable by law or executive order involving reorganization under the constitution;

(2) "agency member" means a person who is a member of an agency to which AS 44.62.330 — 44.62.630 apply, and includes a person who himself is an agency;

(3) "hearing officer" means a hearing officer qualified under AS 44.62.350;

(4) "party" includes the agency, the respondent, and a person, other than an officer or an employee of the agency in his official capacity, who has been allowed to appear in the proceeding;

(5) "respondent" means a person against whom an accusation is filed under AS 44.62.360 or against whom a statement of issues is filed under AS 44.62.370. (§§ 2, 3 art I (ch 1) ch 143 SLA 1959; § 1 (ch 2) ch 143 SLA 1959; am § 78 ch 69 SLA 1970)

(1) Prop sed Section:

Sec. 44.62.790, Short Title

This chapter may be cited as the Administrative Procedure Act.

(2) Current Section:

(Attached at end of this draft section)

(3) Comments:

(4) Source:

AS 44.62.650

Sec. 44.62.650. Short title. This chapter may be cited as the [Adm]inistrative Procedure Act. (§ 1 art I (ch 1) ch 143 SLA 1959)

"CURRENT STATUTORY SECTIONS FOR WHICH
NO DIRECT SUBSTITUTE SECTION IS PROVIDED"

Sec. 44.62.610. Charge. A sum authorized to be spent under AS 44.62.330 — 44.62.630 by an agency is a legal charge against the appropriations of the agency. (§ 29 (ch 2) ch 143 SLA 1959)

Sec. 44.62.580. Continuances. The agency may grant continuances. If a hearing officer is assigned to a hearing, no continuance may be granted except by him for good cause shown. (§ 26 (ch 2) ch 143 SLA 1959)

Sec. 44.62.490. Amendment of accusation after submission. The agency may order amendment of the accusation after submission of the case for decision. Each party shall be given notice of the intended amendment and opportunity to show that he will be prejudiced by it unless the case is reopened to permit the introduction of additional evidence in his behalf. If prejudice is shown, the agency shall reopen the case to permit the introduction of additional evidence. (§ 17 (ch 2) ch 143 SLA 1959)

Sec. 44.62.470. **Evidence by affidavit.** (a) At any time 10 or more days before a hearing or a continued hearing, a party may mail or deliver to the opposing party a copy of an affidavit which he proposes to introduce in evidence, together with a notice as provided in (b) of this section. Unless the opposing party, within seven days after that mailing or delivery, mails or delivers to the proponent a request to cross-examine an affiant, his right to cross-examine the affiant is waived and the affidavit, if introduced in evidence, shall be given the same effect as if the affiant had testified orally. If an opportunity to cross-examine an affiant is not given after request for it is made, the affidavit may be introduced in evidence, but shall be given only the same effect as other hearsay evidence.

(b) The notice referred to in (a) of this section shall be substantially in the following form:

The accompanying affidavit of (here insert name of affiant) will be introduced as evidence at the hearing in (here insert title of proceeding). (Here insert name of affiant) will not be called to testify orally and you may not question him unless you notify (here insert name of proponent or his attorney) at (here insert address) that you wish to cross-examine him. To be effective your request must be mailed or delivered to (here insert name of proponent or his attorney) before (here insert a date eight days after the date of mailing or delivering the affidavit to the opposing party). (§ 15 (ch 2) ch 143 SLA 1959)