

HB

264

HOUSE COMMITTEE REPORT

(7) Date Referred to Committee: April 25, 1997

FURTHER REFERRALS:

Fi

Date of Committee Action: 1/20/98

The STATE AFFAIRS Committee considered:

HI

HOUSE BILL NO. 264

NEGOTIATED REGULATION MAK

"An Act providing for a negotiated regulation making process; and providing for an effective date."

recommends it be replaced with the following committee substitute CS HB 264 (STA) [X] the same title [] a new title

[] additional referral to _____ Committee [] attached amendment(s)

ADOPTS: _____ Letter of Intent

ATTACHES NEW FISCAL NOTE(S): (Dept) APPROVES PREVIOUS: (Dept/Date) [] fiscal note(s) [] fiscal note(s)

[3] zero fiscal note(s) LAW, REV. GOV [] zero fiscal note(s)

Table with 5 columns: SIGNING WITH RECOMMENDATIONS, DP, DNP, NR, AM. Rows include signatures of Jeannette James, K. D. S., Mary H., Fred D., and others.

CHAIR'S SIGNATURE _____

100 S. Hill Street HASTING

Sub Committee

HB 264

Ben Kowitz

~~Dyson~~ Hodgins

James



STATE OF ALASKA

THE ALASKA STATE LEGISLATURE

House of Representatives

Representative Jeannette James

House State Affairs Committee, Chair

Joint Regulation Review Committee, Chair

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INDEX *Teri Banister - Drafter*

HB 264 Negotiated Regulation/rule Making, AKA Neg/Reg.

Sponsor: Rep. Jeannette James

5/8/97

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HOUSE BILL NO. 264

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTIETH LEGISLATURE - FIRST SESSION

BY REPRESENTATIVE JAMES

Introduced: 4/25/97

Referred: State Affairs, Finance

A BILL

FOR AN ACT ENTITLED

1 "An Act providing for a negotiated regulation making process; and providing for
2 an effective date."

3 **BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:**

4 * Section 1. AS 44.62.175(a) is amended to read:

5 (a) The lieutenant governor shall publish or contract for the publication of the
6 Alaska Administrative Journal. The journal shall be published weekly. The journal
7 must include

8 (1) notices of proposed actions given under AS 44.62.190(a);

9 (2) notices of state agency meetings required under AS 44.62.310(e),
10 even if the meeting has been held;

11 (3) notices of solicitations to bid issued under AS 36.30.130;

12 (4) notices of state agency requests for proposals issued under
13 AS 18.55.255, 18.55.320; AS 36.30.210; AS 37.05.316; AS 38.05.120; and
14 AS 43.40.010;

- 1 (5) executive orders and administrative orders issued by the governor;
 2 (6) written delegations of authority made by the governor or the head
 3 of a principal department under AS 44.17.010;
 4 (7) the text or a summary of the text of a regulation or order of repeal
 5 of a regulation for which notice is given under AS 44.62.190(a), including an
 6 emergency regulation or repeal whether or not it has taken effect;
 7 (8) a summary of the text of recently issued formal opinions and
 8 memoranda of advice of the attorney general;
 9 (9) a list of vacancies on boards, commissions, and other bodies whose
 10 members are appointed by the governor; [AND]
 11 (10) in accordance with AS 39.52.240(h), advisory opinions of the
 12 attorney general; and
 13 (11) a notice under AS 44.62.750 and 44.62.760 relating to the
 14 establishment of a negotiated regulation making committee.

15 * Sec. 2. AS 44.62 is amended by adding new sections to read:

16 **Article 10. Negotiated Regulation Making.**

17 **Sec. 44.62.710. Purpose and applicability of AS 44.62.710 - 44.62.830. (a)**

18 The purpose of AS 44.62.710 - 44.62.830 is to establish a framework for the conduct
 19 of negotiated regulation making consistent with AS 44.62.010 - 44.62.320. It is the
 20 intent of the legislature that state agencies, whenever appropriate, use the negotiated
 21 regulation making process to resolve controversial issues before the commencement
 22 of the formal regulation making process under AS 44.62.010 - 44.62.320. Negotiated
 23 regulation making is not a substitute for the requirements of AS 44.62.010 - 44.62.320
 24 but may be used as a supplemental procedure to permit the direct participation of
 25 affected interests in the development of new regulations or the amendment or repeal
 26 of existing regulations. A consensus agreement reached by a negotiated regulation
 27 making committee may be modified by an agency as a result of the subsequent
 28 regulation making process. AS 44.62.710 - 44.62.830 may not be construed as an
 29 attempt to limit innovation and experimentation with the negotiated regulation making
 30 process.

31 (b) The provisions of AS 44.62.710 - 44.62.830 may be used by an agency

1 even if other provisions of this chapter do not apply to that agency.

2 **Sec. 44.62.720. Determination of need for negotiated regulation making**
 3 **committee.** In addition to the regulation adoption requirements under AS 44.62.010 -
 4 44.62.320, an agency may determine that the use of a negotiated regulation making
 5 committee to negotiate and develop a proposed regulation is in the public interest. In
 6 making that determination, the agency director shall consider whether

7 (1) there is a need for a regulation;

8 (2) there are a limited number of identifiable interests that are held by
 9 more than one person and that will be significantly affected by the regulation;

10 (3) there is a reasonable likelihood that a committee can be convened
 11 with a balanced representation of persons who

12 (A) can adequately represent the interests identified under (2)
 13 of this section; and

14 (B) are willing to negotiate in good faith to reach a consensus
 15 on the proposed regulation,

16 (4) there is a reasonable likelihood that a committee will reach a
 17 consensus on the proposed regulation within a fixed period of time;

18 (5) the negotiated regulation making procedure will not unreasonably
 19 delay the adoption of the final regulation;

20 (6) the agency has adequate resources and is willing to commit those
 21 resources, including technical assistance, to the committee; and

22 (7) the agency, to the maximum extent possible consistent with the
 23 legal obligations of the agency, will use the consensus of the committee as the basis
 24 for the regulation proposed by the agency under AS 44.62.010 - 44.62.320.

25 **Sec. 44.62.730. Petition to use negotiated regulation making committee.**

26 (a) Except as provided in (b) of this section, a person may petition an agency to
 27 request the use of a negotiated regulation making committee in the development or
 28 revision of a regulation. Each agency shall prescribe the form of the petition and the
 29 procedure for its submission, consideration, and disposition. Within 60 days after
 30 submission of a petition, the agency shall, if the agency determines under
 31 AS 44.62.720 that using the committee is in the public interest, initiate negotiated

1 regulation making under AS 44.62.750, or, if the agency determines under
2 AS 44.62.720 that using the committee would not be in the public interest, the agency
3 shall deny the petition and send the person a written statement of the reasons for the
4 denial.

5 (b) A prisoner may not petition the Department of Corrections to request the
6 use of a negotiated regulation making committee. In this subsection, "prisoner" has
7 the meaning given in AS 33.30.901.

8 **Sec. 44.62.740. Use of convener.** (a) An agency may use the services of an
9 impartial person as a convener to assist in making the determination of need under
10 AS 44.62.720 and to assist the agency to

11 (1) identify the persons who will be significantly affected by a
12 proposed regulation; and

13 (2) conduct discussions with affected persons on the issues of concern
14 and determine whether the establishment of a negotiated regulation making committee
15 is feasible and appropriate for the particular proposed regulation.

16 (b) The convener shall report findings and make recommendations to the
17 agency. Upon request of the agency, the convener shall ascertain the names of persons
18 who are willing and qualified to represent the interests that are held by more than one
19 person and that will be significantly affected by the proposed regulation. The report
20 and recommendations of the convener shall be made available to the public upon
21 request.

22 **Sec. 44.62.750. Notice of committee formation.** (a) If, after making a
23 determination under AS 44.62.720, an agency decides to establish a negotiated
24 regulation making committee, the agency shall publish in the Alaska Administrative
25 Journal and, as appropriate, in newspapers and other publications a notice that includes

26 (1) an announcement that the agency intends to establish a negotiated
27 regulation making committee to negotiate and develop a proposed regulation;

28 (2) a description of the subject and scope of the regulation to be
29 developed and the issues to be considered;

30 (3) a list of interests that are identified under AS 44.62.720(2);

31 (4) a list of the persons proposed to represent the affected interests and

1 the agency;

2 (5) a proposed schedule for completing the work of the committee;

3 (6) an explanation of how a person may apply for or nominate another
4 person for membership on the committee; and

5 (7) a statement that persons may send comments on the proposed
6 committee to the agency at a specified address.

7 (b) If the agency is proceeding at the same time with the procedures under
8 AS 44.62.010 - 44.62.320, the agency may include the notice required by (a) of this
9 section in the notice given under AS 44.62.190.

10 (c) The lieutenant governor shall establish and maintain a list of persons who
11 wish to receive agency notices regarding establishing negotiated regulation making
12 committees and shall provide the notices to the persons for a reasonable charge.

13 (d) The agency shall provide a period of at least 30 days for the submission
14 of comments and applications for membership on a negotiated regulation making
15 committee.

16 **Sec. 44.62.760. Establishment, support, and termination of committee.** (a)
17 If, after considering comments and applications submitted under AS 44.62.750, the
18 agency still determines under AS 44.62.720 that the use of a negotiated regulation
19 making committee is in the public interest, the agency may proceed to establish the
20 committee.

21 (b) If, after considering comments and applications submitted under
22 AS 44.62.750, the agency decides not to establish a negotiated regulation making
23 committee, the agency shall notify the persons who commented on or applied for
24 membership on the committee of the reasons for the decision. The agency shall also
25 publish a notice of the decision in the Alaska Administrative Journal and, as
26 appropriate, in newspapers and other publications.

27 (c) The agency shall provide appropriate administrative support to the
28 negotiated regulation making committee, including technical support.

29 (d) A negotiated regulation making committee terminates upon adoption under
30 AS 44.62.010 - 44.62.320 of the final regulation under consideration unless the agency,
31 after consulting the committee, or the committee itself specifies an earlier termination

1 date.

2 **Sec. 44.62.770. Expansion of committee membership.** (a) A negotiated
3 regulation making committee may by consensus expand its membership, either by
4 contacting and recruiting persons whose participation the committee believes is
5 essential to the success of the negotiated regulation making process or after reviewing
6 a petition or nomination submitted under (b) of this section.

7 (b) A person who will be significantly affected by a proposed regulation and
8 who believes that the person has an interest that is held by more than one person and
9 that the interest will not be adequately represented by a person on a negotiated
10 regulation making committee may petition to be a member of the committee or
11 nominate another person for membership on the committee. A petition or nomination
12 must be submitted to the negotiated regulation making committee and must include

13 (1) the name of the petitioner or nominee and a description of the
14 interest the person represents;

15 (2) evidence that the petitioner or nominee is authorized to represent
16 parties related to the interest the person proposes to represent;

17 (3) a written commitment that the petitioner or nominee will actively
18 participate in good faith in the development of the regulation under consideration; and

19 (4) a description of the interest affected and an explanation of reasons
20 that a person already on the committee does not adequately represent the interest.

21 (c) Upon receiving a petition or nomination under (b) of this section, a
22 negotiated regulation making committee shall decide by consensus at its next meeting
23 whether or not to expand its membership.

24 **Sec. 44.62.780. Committee duties, procedures, and report.** (a) A negotiated
25 regulation making committee shall consider the matter proposed by the agency for
26 consideration and shall attempt to reach consensus concerning a proposed regulation
27 and any other matter the committee determines is relevant to the proposed regulation.

28 (b) The person representing the agency on a negotiated regulation making
29 committee shall participate in the deliberations of the committee with the same rights
30 and responsibilities of other members of the committee and is authorized to fully
31 represent the agency in the discussions and negotiations of the committee.

1 (c) A negotiated regulation making committee may adopt procedures for the
2 operation of the committee.

3 (d) If a negotiated regulation making committee achieves consensus on a
4 proposed regulation at the conclusion of the negotiations, the committee shall transmit
5 to the agency that established the committee a report containing the proposed
6 regulation.

7 (e) If a negotiated regulation making committee does not reach a consensus
8 on the proposed regulation, the committee shall transmit to the agency a report
9 specifying areas in which the committee reached consensus and the issues that remain
10 unresolved. The committee may include in the report other information,
11 recommendations, or materials that the committee considers appropriate. A member
12 of the committee may include as an addendum to the report additional information,
13 recommendations, or materials.

14 (f) AS 44.62.310 - 44.62.312 apply to meetings of a negotiated regulation
15 making committee.

16 **Sec. 44.62.790. Facilitator selection, duties, and authority.** (a) An agency
17 may nominate an impartial person to serve as a facilitator for the negotiations of a
18 negotiated regulation making committee, subject to the approval of the committee by
19 consensus. If the committee does not approve the agency's nomination for facilitator,
20 the agency shall submit a substitute nomination. If the committee does not approve
21 the substitute nomination of the agency for facilitator, the committee shall select by
22 consensus a person to serve as facilitator. A person designated to represent the agency
23 on substantive issues may not serve as facilitator or presiding officer for the
24 committee.

25 (b) A facilitator approved or selected by a negotiated regulation making
26 committee shall

27 (1) preside at the meetings of the committee in an impartial manner;

28 (2) impartially assist the members of the committee to conduct
29 discussions and negotiations and to achieve consensus; and

30 (3) manage the keeping of minutes and records.

31 (c) A facilitator does not have decision-making authority.

1 **Sec. 44.62.800. Employees, contractors, expenses, and funding.** (a) An
2 agency may employ or enter into a contract for the services of a person to serve as a
3 convener or facilitator for a negotiated regulation making committee or may use the
4 services of a state employee to act as a convener or facilitator for the committee.

5 (b) An agency shall determine whether a person being considered for a
6 position as a convener or facilitator of a negotiated regulation making committee has
7 a financial or other interest that would prevent the person from serving in an impartial
8 and independent manner. A person disqualified under this criterion may not be
9 considered further.

10 (c) Members of a negotiated regulation making committee are responsible for
11 their own expenses of participation. However, an agency may pay for a committee
12 member's reasonable travel expenses as authorized for boards and commissions under
13 AS 39.20.180, other actual and necessary expenses incurred in serving on the
14 committee, and a reasonable daily rate of compensation if

15 (1) the committee member certifies a lack of adequate financial
16 resources to participate in the committee; and

17 (2) the agency determines that the committee member's participation
18 on the committee is necessary to ensure an adequate representation of the interests
19 identified under AS 44.62.720(2) or 44.62.770.

20 (d) An agency may accept grants or gifts from any source to fund the
21 negotiated regulation making process if

22 (1) information on the name of the person giving the grant or gift and
23 on the amount of the grant or gift is available to the public;

24 (2) the grant or gift is given to and accepted by the agency without
25 placing any condition on the membership of a negotiated regulation making committee
26 or the outcome of the negotiated regulation making process; and

27 (3) there is consensus among the members of the negotiated regulation
28 making committee that the acceptance of the grant or gift will not diminish the
29 integrity of the negotiated regulation making process.

30 **Sec. 44.62.810. Judicial review.** An agency action relating to establishing,
31 assisting, or terminating a negotiated regulation making committee under AS 44.62.710

1 - 44.62.830 is not subject to judicial review. Nothing in this section bars judicial
2 review if the judicial review is otherwise provided by law. A regulation that is the
3 product of negotiated regulation making and is later subject to judicial review may not
4 be given greater deference by a court for that reason than a regulation that is not the
5 product of negotiated regulation making.

6 **Sec. 44.62.820. Relationship to other requirements.** The negotiated
7 regulation making authorized by AS 44.62.710 - 44.62.830 is in addition to the
8 procedures required under AS 44.62.010 - 44.62.320 for adopting, amending, or
9 repealing regulations, and, if an agency decides to use negotiated regulation making,
10 the negotiated regulation making shall, where possible, occur before the procedures
11 under AS 44.62.010 - 44.62.320 begin.

12 **Sec. 44.62.830. Definitions.** In AS 44.62.710 - 44.62.830,

13 (1) "agency" means a department, institution, board, commission,
14 division, authority, public corporation, or other administrative unit of the executive
15 branch of state government authorized or required by law to make regulations;

16 (2) "consensus" means unanimous concurrence among the interests
17 represented on a negotiated regulation making committee, unless the committee agrees
18 on another definition;

19 (3) "convener" means a person who performs the services identified
20 under AS 44.62.740 for an agency;

21 (4) "facilitator" means a person who performs the services identified
22 under AS 44.62.790(b) for a negotiated regulation making committee;

23 (5) "negotiated regulation making" means regulation making through
24 the use of a negotiated regulation making committee;

25 (6) "negotiated regulation making committee" means an advisory
26 committee to consider and discuss issues for the purpose of reaching a consensus in
27 the development of a proposed regulation;

28 (7) "person" has the meaning given in AS 01.10.060, and expressly
29 includes a public organization of any character;

30 (8) "regulation" has the meaning given in AS 44.62.640 and includes
31 the amendment or repeal of a regulation.

1 * Sec. 3. This Act takes effect immediately under AS 01.10.070(c).



STATE OF ALASKA

THE ALASKA STATE LEGISLATURE

House of Representatives

Representative Jeannette James

House State Affairs Committee, Chair

Joint Regulation Review Committee, Chair

Capitol Building

Juneau, AK 99801

(907) 465-3743 ph

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TO: House State Affairs Committee

FROM: Rep. Jeannette James

RE: House Bill 264 negotiated regulation/rule making, AKA Neg/Reg.

DATE: 4/25/97

SPONSOR STATEMENT

HB 264 Negotiated Regulation/rule Making

House Bill 264, enables and encourages negotiated regulation/rule making. Currently neg/reg is in use by the Federal government, Montana and Nebraska.

The citizens of Alaska are clamoring for the Legislature to do something about the regulation process, negotiated regulation making addresses the issue on point.

Negotiated regulation making is used only in cases involving very complex or controversial regulations.

Negotiate regulation (Neg/Reg) is a voluntary process for drafting regulations that brings together those parties who would be significantly impacted by a regulation (rule), including the Government, to reach consensus on some or all of its aspects before the rule is formally published as a proposal. An impartial mediator is used to facilitate intensive discussions among the participants, who operate as a committee open to the public.

Regulations drafted using this process tend to be

A M E N D M E N T

OFFERED IN THE HOUSE

BY REPRESENTATIVE JAMES

TO: HB 264

- 1 Page 2, line 26:
- 2 Delete "consensus agreement reached"
- 3 Insert "decision made"

- 4 Page 3, line 14:
- 5 Delete "reach a consensus"
- 6 Insert "make a decision"

- 7 Page 3, lines 16 - 17:
- 8 Delete all material.

- 9 Renumber the following paragraphs accordingly.

- 10 Page 3, line 23:
- 11 Delete "consensus"
- 12 Insert "decision"

- 13 Page 6, line 3:
- 14 Delete "consensus"
- 15 Insert "majority vote"

- 16 Page 6, line 22:
- 17 Delete "consensus"
- 18 Insert "majority vote"

1 Page 6, line 26:

2 Delete "reach consensus"

3 Insert "make a decision"

4 Page 7, line 3:

5 Delete "achieves consensus"

6 Insert "reaches a decision"

7 Page 7, lines 7 - 8:

8 Delete "consensus on"

9 Insert "decision on all of the issues involved in"

10 Page 7, line 9:

11 Delete "consensus"

12 Insert "a decision"

13 Page 7, line 19:

14 Delete "consensus"

15 Insert "majority vote"

16 Page 7, line 22:

17 Delete "consensus"

18 Insert "majority vote"

19 Page 7, line 29:

20 Delete "achieve consensus"

21 Insert "make a decision"

22 Page 8, line 27:

23 Delete "there is consensus among"

24 Page 8, line 28, following "committee":

1 Insert "make a decision"

2 Page 9, lines 16 - 18:

3 Delete all material.

4 Renumber the following paragraphs accordingly.

5 Page 9, following line 20:

6 Insert a new paragraph to read:

7 "(3) "decision" means a decision made by a majority vote;"

8 Renumber the following paragraphs accordingly.

9 Page 9, following line 22:

10 Insert a new paragraph to read:

11 "(5) "majority vote" means a vote that receives the approval of a majority of
12 the interests represented on a negotiated regulation making committee;"

13 Renumber the following paragraphs accordingly.

14 Page 9, line 26:

15 Delete "reaching a consensus"

16 Insert "making a decision"

A M E N D M E N T

OFFERED IN THE HOUSE

BY REPRESENTATIVE JAMES

TO: HB 264

1 Page 7, following line 2:

2 Insert a new subsection to read:

3 "(d) A member of a negotiated regulation making committee who is not the
4 representative of the agency that established the committee and who is unable to
5 attend a meeting of the committee may appoint another person to attend the meeting
6 in place of the member, but the appointed person must be qualified to adequately
7 represent the interests that are represented by the member. If a member appoints
8 another person to attend a meeting under this subsection, the person appointed has the
9 same rights, including the right to vote, and responsibilities of the member when
10 serving on the committee."

11 Reletter the following subsections accordingly.

use commissioners to substitute

A M E N D M E N T

OFFERED IN THE HOUSE

BY REPRESENTATIVE JAMES

TO: HB 264

1 Page 7, following line 15:

2 Insert a new section to read:

3 "Sec. 44.62.785. Immunity. A civil action for damages or costs may not be
4 brought against a negotiated regulation making committee or any of its members for
5 an act or omission occurring within the course and scope of the official duties of the
6 committee under this chapter unless the act or omission constitutes gross negligence
7 or reckless or intentional misconduct.

8

9

A M E N D M E N T

OFFERED IN THE HOUSE

BY REPRESENTATIVE JAMES

TO: HB 264

1 Page 3, line 24, following "AS 44.62.010 - 44.62.320":

2 Insert ", except to the extent not possible when the negotiated regulation making
3 occurs simultaneously with the procedures under AS 44.62.010 - 44.62.320"

4 Page 5, lines 7 - 9:

5 Delete all material.

6 Reletter the following subsections accordingly.

7 Page 5, line 13:

8 Delete "30"

9 Insert "15"

10 Page 9, line 10:

11 Delete "shall, where possible, occur before"

12 Insert "may, to the extent possible, occur simultaneously with"

13 Page 9, line 11:

14 Delete "begin"

15 Insert ". If the agency is proceeding at the same time with the procedures under
16 AS 44.62.010 - 44.62.320, the agency may include the notice required by AS 44.62.750(a)
17 in the notice given under AS 44.62.190"

A M E N D M E N T

OFFERED IN THE HOUSE

BY REPRESENTATIVE JAMES

TO: HB 264

1 Page 8, following line 29:

2 Insert a new section to read:

3 "Sec. 44.62.805. Confidentiality of certain records and documents.
4 Notwithstanding AS 09.25.100 - 09.25.220, records from private persons that are
5 requested or used by a negotiated regulation making committee and working
6 documents prepared by the committee that analyze or incorporate information from
7 the records shall be kept confidential if the records or working documents contain
8 proprietary information and the owner of the records requests that the records or
9 working documents be kept confidential."

A M E N D M E N T

OFFERED IN THE HOUSE
TO: HB 264

BY REPRESENTATIVE JAMES

- 1 Page 9, line 13:
- 2 Delete "board, commission,"

- 3 Page 9, line 15, following "regulations;":
- 4 Insert "however, "agency" does not include a board or commission;"

Legislative Research Services

Alaska State Legislature
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April 10, 1997

MEMORANDUM

TO: Representative Jeannette James

FROM: Paul Brand 
Legislative Analyst

RE: **Negotiated Rulemaking: Drafting Regulations by Involving Affected Parties**
Research Request 97.080

You asked about negotiated rulemaking--the practice of involving affected parties in regulation drafting prior to the public comment period required under Alaska's Administrative Procedures Act. Specifically, you wanted to know if Alaska law currently permits this practice, and, if so, what methods various departments use to involve affected groups. You also wanted to know about similar practices used in other states and by the federal government. After a brief summary, this memorandum provides an overview of the negotiated rulemaking process, reviews Alaska's regulation drafting policies, and examines the negotiated rulemaking efforts in other states and by the federal government.

Summary

Negotiated rulemaking is a voluntary process for drafting regulations that brings together those parties affected by a rule for the purpose of reaching consensus on all or a portion of a proposed regulation before formally soliciting public comment.¹ Alaska's laws do not currently require or encourage the use of negotiated rulemaking, but some state agencies already use the process. Department of Environmental Conservation officials used negotiated rulemaking committees to help draft highly technical and contentious air and water quality regulations prior to completing the formal requirements of Alaska's Administrative Procedures Act. Department officials selected committee members and conducted meetings following the requirements of Alaska's Open Meeting and Public Records Acts. While many states informally solicit the ideas of affected

¹The content of negotiated rulemaking committee discussions as well as all documents used by its members become public records. This presents some limitations on the process because business and industry officials may be reluctant to divulge sensitive information during work group meetings because this material would be available to their competitors.

Representative James
April 10, 1997
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parties when drafting regulations, the use of formal negotiated rulemaking is a relatively new practice. Congress formally recognized negotiated rulemaking by passing the Negotiated Rulemaking Act of 1990. Since 1990, lawmakers in two states, Montana and Nebraska, have incorporated negotiated rulemaking acts into their statutes, encouraging agencies to use the practice whenever appropriate. According to federal and state officials with whom we spoke, negotiated rulemaking is appropriate for highly contentious regulations that affect a limited number of parties. To be successful, a negotiated rulemaking committee must be small enough to give its members an opportunity to communicate their concerns; committee size usually does not exceed 25 members. The goal of the committee is to reach consensus on all or a portion of a proposed regulation. Once the committee reaches consensus, the formal regulation adoption process often proceeds quickly as little public comment is received. Federal and state officials from agencies currently using negotiated rulemaking speak favorably of the process. The U.S. Environmental Protection Agency and the U.S. Department of Labor, the agencies with the most experience in negotiated rulemaking, report reduced litigation costs and enhanced relations with industry officials, environmental advocates, and labor relations groups.

Overview of Negotiated Rulemaking

Negotiated rulemaking is a technique for drafting regulations that brings together those parties directly affected by a proposed rule, in a committee, to resolve particularly contentious or controversial issues prior to the formal regulation adoption process. After identifying a particularly contentious regulation that affects a limited number of parties, agency officials publish notice of their intent to form a negotiated rulemaking committee. The agency director selects the committee members from responses to the public notice and appoints a neutral mediator to oversee the committee's meetings.² The committee's goal is to reach a consensus decision on a proposed regulation.³ Once the committee reaches consensus, the agency uses the committee's proposals when completing the formal regulation drafting requirements.

It is important to note that the agency first completes the negotiated rulemaking process and then begins the formal regulation drafting process. In doing so, negotiated rulemaking does not conflict with the formal regulation drafting practices used by most states and the federal government. Negotiated rulemaking is a preparatory process used to resolve controversial issues prior to the commencement of formal rulemaking.

²The committee's meetings are open to the public and all records, reports, and research used by the committee are made available for public review.

³If the committee cannot reach consensus on the entirety of a rule, they prepare a report for the agency detailing areas of agreement and dispute. Agency officials then would be responsible for drafting the final regulation.

Representative James
April 10, 1997
Page 3

During the formal regulation adoption process, the agency may change the committee's proposed regulation based on public comment. This requirement preserves the rights of private citizens to testify on proposed regulations. One of the advantages of negotiated rulemaking is that the public comment period normally proceeds smoothly because the committee has already resolved many potentially sensitive issues. Additionally, negotiated rulemaking may reduce the cost of litigation by resolving the concerns of industry and other parties without the need for judicial review.

Some federal and state agencies have criticized negotiated rulemaking because the process requires additional agency resources for the regulation drafting process. Hiring a neutral mediator and devoting agency resources to the committee process are costs not generally associated with regulation drafting.⁴ Officials of federal agencies that regularly use negotiated rulemaking committees defend these added costs by comparing the cost of negotiated rulemaking committees to that of litigation.

Alaska's Regulation Drafting Practices and Negotiated Rulemaking

The Alaska Department of Law publishes a manual for drafting administrative regulations which thoroughly describes the regulation adoption process required under Alaska's Administrative Procedures Act (APA).⁵ According to Deborah Behr, Assistant Attorney General, Alaska's APA does not specifically address the issue of negotiated rulemaking because this method of developing regulations has only recently become popular. While negotiated rulemaking is not formally identified in the APA, Ms. Behr indicated that some state departments have used similar techniques when developing regulations.⁶

According to John Stone, Environmental Conservation Manager for the Department of Environmental Conservation's Division of Air and Water Quality, the department has used

⁴The expenses of committee members, other than agency personnel, are not generally paid by the state. Members are responsible for their own travel and lodging costs when attending committee meetings. All the negotiated rulemaking acts we reviewed, however, allow the state to pay travel and per diem expenses for committee members if they are unable to afford the cost and their presence is vital to the committee's success.

⁵Alaska Department of Law, "Drafting Manual for Administrative Regulations," October 1995, p.8. Attachment A is a copy of a flow chart that describes the steps followed by department officials when they prepare regulations.

⁶Ms. Behr stated that negotiated rulemaking committees, under current state law, must develop regulation proposals prior to the formal notice-and-comment period required under the Alaska's APA. Additionally, the committees must follow the provisions of Alaska's Open Meetings and Public Records Acts (AS 44.62.310 and AS 9.25.110).

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negotiated rulemaking to draft air and water quality regulations. These regulations are often highly technical and involve numerous interest groups. Because of the technical nature of many regulations, Mr. Stone feels that the use of negotiated rulemaking not only results in a consensus decision with affected parties, but also allows department officials to thoroughly explain the complexity of many regulations. Mr. Stone stressed that a consensus does not always result in the complete satisfaction of committee members, but generally the final regulations are responsive to their concerns.

Negotiated Rulemaking in Other States

According to Brenda Erickson, regulation specialist with the National Conference of State Legislatures (NCSL), many states informally solicit information from affected groups when drafting regulations, but the use of formal negotiated rulemaking committees is a relatively new practice. Based on the results of a Westlaw search and discussions with regulation specialists from NCSL, we identified two states, Montana and Nebraska, that have incorporated negotiated rulemaking acts into their state statutes.⁷ The Negotiated Rulemaking Acts of both states are similar to each other and provide a means of resolving potentially controversial issues prior to formal rulemaking procedures.⁸

The statutes of both states clearly recognize that the use of negotiated rulemaking committees are appropriate only in certain circumstances; consequently, both states' statutes contain nearly identical lists of criteria that agency directors must consider when determining if negotiated rulemaking is appropriate. Among those criteria, the agency directors must consider if:

- There are a limited number of identifiable interests that will be significantly affected by the rule;
- There is a reasonable likelihood that the agency can convene a committee that provides balanced representation of the affected parties;
- There is a reasonable likelihood that the committee will reach consensus on the proposed regulation; and

⁷Attachments B and C are copies of the Negotiated Rulemaking Acts of Montana and Nebraska, respectively.

⁸Nebraska's Negotiated Rulemaking Act differs from Montana's in that it specifically prohibits individuals incarcerated in correctional institutions from requesting the use of negotiated rulemaking.

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- The agency has adequate resources and is willing to commit those resources to the negotiated rulemaking committee.

According to Annette Covar of Nebraska's Department of Environmental Quality (DEQ), the department has used negotiated rulemaking techniques in drafting several environmental regulations. She indicated that the expense of a mediator makes negotiated rulemaking impractical in many situations, but for complex regulations the practice has proven valuable. She also stated that DEQ used informal negotiated rulemaking techniques prior to Nebraska's law and they continue to do so for many regulations. Ms. Covar views negotiated rulemaking techniques as valuable whether or not the agency establishes a formal committee.

In Montana, lawmakers are encouraging the use of negotiated rulemaking by all departments. According to Todd McMaster of Montana's Office of Legislative Research, negotiated rulemaking has been used successfully by several departments. Mr. McMaster stated that the Montana Consensus Council, located in the governor's office, provides mediators for negotiated rulemaking committees and training to state agencies that are developing negotiated rulemaking procedures.

We asked the Montana Consensus Council to send us information on their agency education initiatives. We will review and forward this information to you as soon as it is available.

Negotiated Rulemaking in Federal Agencies

Federal agencies began experimenting with negotiated rulemaking in the early 1980s, but it was not until federal lawmakers passed the Negotiated Rulemaking Act of 1990 that agencies used the practice with frequency (Attachment D).⁹ The number of regulations drafted using negotiated rulemaking is increasing, but many agency officials continue to show reluctance. A comprehensive review of negotiated rulemaking by the John F. Kennedy School of Government at Harvard University attributes this reluctance to the recency of the new legislation and the limited number of regulations for which negotiated rulemaking is appropriate.¹⁰

Among those federal agencies that routinely use negotiated rulemaking, the Environmental Protection Agency and the Department of Labor have done so most frequently. Based on agency

⁹Attachment D contains a copy of the Negotiated Rulemaking Act of 1990 (5 USC § 561 through § 570).

¹⁰Coglianes, Cary (no date), *Assessing Consensus: The Promise and Performance of Negotiated Rulemaking*[Online]. Available on the World Wide Web at internet address <http://www.ksg.harvard.edu/prg/coglianes/rulemake.htm> [accessed April 9, 1997].

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Page 6

reports, these departments have had successful negotiated rulemaking experiences.¹¹ The agencies report reduced litigation costs, increased industry compliance with regulations, and enhanced working relationships with industry officials, environmental advocates, and labor relations groups.

Currently, we are in the process of obtaining additional information on federal negotiated rulemaking practices, including a negotiated rulemaking handbook from the U.S. Department of Labor. We will forward this information to you once it arrives.

I hope this information is useful for your purposes. Please do not hesitate to contact me if you have additional questions.

Attachments

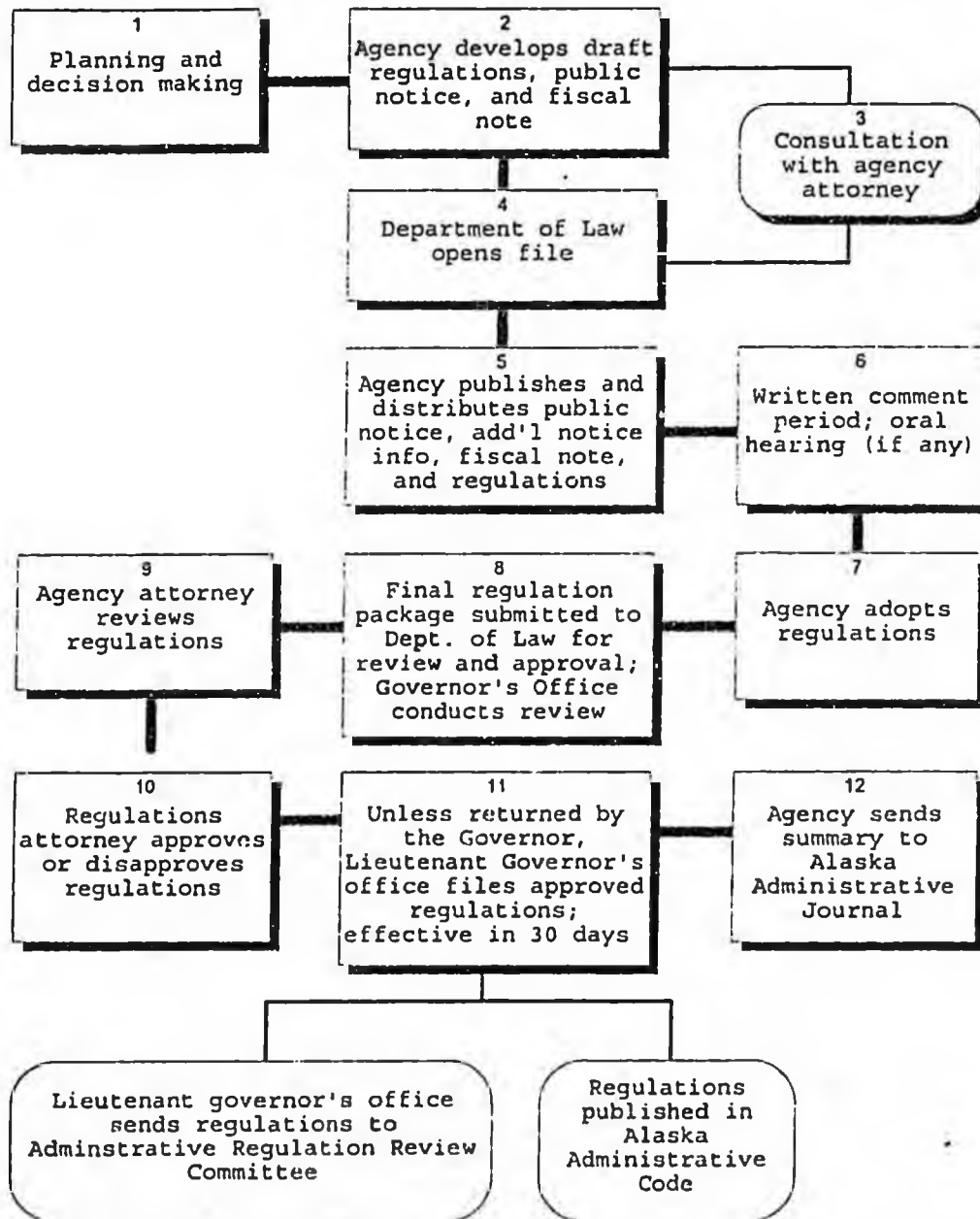
¹¹United States Department of Labor, June 27, 1996, *OSHA Chief Lauds "Negotiated Rulemaking" As a Way to Cut Red Tape and Bureaucracy* [Online]. Available on the World Wide Web at <http://www.osha.gov/media/oshnews/june96/osha96-253.html> [accessed April 2, 1997].

Page for notes

ATTACHMENT A

**Alaska's Regulation Adoption Process
Alaska Department of Law, "Drafting Manual for Administrative Regulations," 1995.**

Steps in the Regulations Process



ATTACHMENT B

**Montana's Negotiated Rulemaking Act
(Montana Statutes 2-5-101 through 2-5-110)**

Part 1 General Provisions

2-5-101. Short title. This part may be cited as the "Montana Negotiated Rulemaking Act".

History: En. Sec. 1, Ch. 400, L. 1993.

2-5-102. Purpose. The purpose of this part is to establish a framework for the conduct of negotiated rulemaking consistent with the Montana Administrative Procedure Act and the constitutional right of Montanans to participate in the operation of governmental agencies and to encourage agencies to use negotiated rulemaking when it enhances the rulemaking process. As authorized by 2-4-304, it is the intent of the legislature that state agencies, whenever appropriate, use the negotiated rulemaking process to resolve controversial issues prior to the commencement of the formal rulemaking process. However, negotiated rulemaking is not a substitute for the public notification and participation requirements of the Montana Administrative Procedure Act, and a consensus agreement by a negotiated rulemaking committee may be modified by an agency as a result of the subsequent rulemaking process. This part may not be construed as an attempt to limit innovation and experimentation with the negotiated rulemaking process.

History: En. Sec. 2, Ch. 400, L. 1993.

Cross-References

Informal conferences and committees, 2-4-304.

2-5-103. Definitions. As used in this part, the following definitions apply:

(1) "Agency" means any board, bureau, commission, department, authority, or officer of the executive branch of state government authorized or required by law to make rules.

(2) "Consensus" means unanimous concurrence among the interests represented on a negotiated rulemaking committee established under 2-5-106, unless the committee agrees upon another specified definition.

(3) "Convener" means a person who impartially assists an agency in determining whether establishment of a negotiated rulemaking committee is feasible and appropriate for a particular rulemaking procedure.

(4) "Facilitator" means a person who impartially aids in the discussions and negotiations among the members of a negotiated rulemaking committee to develop a proposed rule. A facilitator does not have decisionmaking authority.

(5) "Interest" means, with respect to an issue or matter, multiple parties that have a similar point of view or that are likely to be affected in a similar manner.

(6) "Negotiated rulemaking" means rulemaking through the use of a negotiated rulemaking committee.

(7) "Negotiated rulemaking committee" or "committee" means an advisory committee established under 2-5-106 and authorized under 2-4-304 to consider and discuss issues for the purpose of reaching a consensus in the development of a proposed rule.

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(8) "Person" means an individual, partnership, corporation, association, governmental subdivision, agency, or public or private organization of any character.

(9) "Rule" means an agency regulation, standard, or statement of general applicability that implements, interprets, or prescribes law or policy or describes the organization, procedures, or practice requirements of an agency. The term includes the amendment or repeal of a prior rule but does not include:

(a) statements concerning only the internal management of an agency and not affecting private rights or procedures available to the public;

(b) formal opinions of the attorney general and declaratory rulings issued pursuant to 2-4-501;

(c) rules relating to the use of public works, facilities, streets, and highways when the substance of the rules is indicated to the public by means of signs or signals;

(d) rules implementing the state personnel classification plan, the state wage and salary plan, or the statewide budgeting and accounting system;

(e) uniform rules adopted pursuant to interstate compact, except that the rules must be filed in accordance with 2-4-306 and must be published in the Administrative Rules of Montana.

History: En. Sec. 3, Ch. 400, L. 1993.

Cross-References

Informal conferences and committees, 2-4-304.

Declaratory rulings by agencies, 2-4-501.

2-5-104. Determination of need for negotiated rulemaking committee. (1) An agency may establish a negotiated rulemaking committee to negotiate and develop a proposed rule if the agency director determines that the use of the negotiated rulemaking procedure is in the public interest. In making that determination, the agency director shall consider whether:

(a) there is a need for a rule;

(b) there are a limited number of identifiable interests that will be significantly affected by the rule;

(c) there is a reasonable likelihood that a committee can be convened with a balanced representation of persons who:

(i) can adequately represent the interests identified under subsection (1)(b); and

(ii) are willing to negotiate in good faith to reach a consensus on the proposed rule;

(d) there is a reasonable likelihood that a committee will reach a consensus on the proposed rule within a fixed period of time;

(e) the negotiated rulemaking procedure will not unreasonably delay the notice of proposed rulemaking and the issuance of the final rule;

(f) the agency has adequate resources and is willing to commit those resources, including technical assistance, to the committee; and

(g) the agency, to the maximum extent possible consistent with the legal obligations of the agency, will use the consensus of the committee as the basis for the rule proposed by the agency.

(2) An agency may use the services of a convener to assist in making the determination of need pursuant to subsection (1) and to assist the agency in:

(3) The agency shall provide appropriate administrative support to the negotiated rulemaking committee, including technical support.

(4) A negotiated rulemaking committee terminates upon adoption of the final rule under consideration, unless the agency, after consulting the committee, or the committee itself specifies an earlier termination date.

History: En. Sec. 6, Ch. 400, L. 1993.

2-5-107. Expansion of committee membership. (1) A negotiated rulemaking committee may by consensus expand its membership, either by contacting and recruiting persons whose participation the committee believes is essential to the success of the negotiated rulemaking process or upon reviewing a petition submitted pursuant to subsection (2).

(2) Persons who will be significantly affected by a proposed rule and who believe that their interests will not be adequately represented by any person on a negotiated rulemaking committee may petition for or nominate another person for membership on the negotiated rulemaking committee. Each petition or nomination must be submitted to the negotiated rulemaking committee and must include:

(a) the name of the petitioner or nominee and a description of the interests the person represents;

(b) evidence that the petitioner or nominee is authorized to represent parties related to the interests the person proposes to represent;

(c) a written commitment that the petitioner or nominee will actively participate in good faith in the development of the rule under consideration; and

(d) an explanation of reasons that the persons already on the negotiated rulemaking committee do not adequately represent the interests of the person submitting the petition or nomination.

(3) Upon receiving a petition pursuant to subsection (2), a negotiated rulemaking committee shall decide by consensus at its next meeting whether or not to expand its membership.

History: En. Sec. 7, Ch. 400, L. 1993.

2-5-108. Committee — duties — procedures — report. (1) A negotiated rulemaking committee shall consider the matter proposed by the agency for consideration and shall attempt to reach consensus concerning a proposed rule and any other matter the committee determines is relevant to the proposed rule.

(2) The person representing the agency on a negotiated rulemaking committee shall participate in the deliberations of the committee with the same rights and responsibilities of other members of the committee and is authorized to fully represent the agency in the discussions and negotiations of the committee.

(3) A negotiated rulemaking committee may adopt procedures or ground rules for the operation of the committee.

(4) If a negotiated rulemaking committee achieves consensus on a proposed rule, at the conclusion of the negotiations, the committee shall transmit to the agency that established the committee a report containing the proposed rule.

(5) If a negotiated rulemaking committee does not reach a consensus on the proposed rule, the committee shall transmit to the agency a report specifying areas in which the committee reached consensus and the issues that remain unresolved. The committee may include in the report any other information, recommendations, or materials that the committee considers appropriate. Any member of the committee may include as an addendum to the report additional information, recommendations, or materials.

(6) Title 2, chapter 3, part 2, applies to meetings of a negotiated rulemaking committee.

History: En. Sec. 8, Ch. 400, L. 1993.

2-5-109. Facilitator — selection and duties. (1) An agency may nominate a person to serve as a facilitator for the negotiations of the committee, subject to the approval of the committee by consensus. If the committee does not approve the agency's nomination for facilitator, the agency shall submit a substitute nomination. If a committee does not approve the substitute nomination of the agency for facilitator, the committee shall select by consensus a person to serve as facilitator. A person designated to represent the agency in substantive issues may not serve as facilitator or presiding officer for the committee.

(2) A facilitator approved or selected by a committee shall:

- (a) preside at the meetings of the committee in an impartial manner;
- (b) impartially assist the members of the committee in conducting discussions and negotiations and achieving consensus; and
- (c) manage the keeping of minutes and records.

History: En. Sec. 9, Ch. 400, L. 1993.

2-5-110. Expenses — convener — facilitator — committee members. (1) An agency may employ or enter into a contract for the services of an organization or individual to serve as a convener or facilitator for a negotiated rulemaking committee or may use the services of a government employee to act as a convener or facilitator for a committee.

(2) An agency shall determine whether a person under consideration as a convener or facilitator of a negotiated rulemaking committee has any financial or other interest that would preclude the person from serving in an impartial and independent manner. A person disqualified under this criterion must be dropped from further consideration.

(3) Members of a negotiated rulemaking committee are responsible for their own expenses of participation. However, an agency may pay for a committee member's reasonable travel and per diem expenses, expenses to obtain technical assistance, and a reasonable rate of compensation if:

- (a) the committee member certifies a lack of adequate financial resources to participate in the committee; and
- (b) the agency determines that the committee member's participation in the committee is necessary to ensure an adequate representation of the interests of the members.

(4) An agency may accept grants or gifts from any source to fund the negotiated rulemaking process, provided that:

- (a) information on the name of the person giving the grant or gift and the amount of the grant or gift is available to the public;

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- 2-6-105. Removal of p
- 2-6-106. Possession o
- 2-6-107. Proceedings
- 2-6-108. Attachment
- 2-6-109. Prohibition t
- 2-6-110. Electronic in
- 2-6-111. Custody and

- 2-6-201. Purpose.
- 2-6-202. Definitions.
- 2-6-203. Secretary of
- 2-6-204. State record:
- 2-6-205. Preservation
- 2-6-206. Protection o
- 2-6-207. Certified cop
- 2-6-208 through 2-6-211.
- 2-6-211. Transfer of p
- 2-6-212. Disposal of p
- 2-6-213. Agency respo
- 2-6-214. Department

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- 2-6-301. Definitions.
- 2-6-302. Official reco
- 2-6-303. Ownership o
- 2-6-304. Outgoing off
- 2-6-305. Renumberec
- 2-6-306. Renumberec
- 2-6-307. Certified cop

- 2-6-401. Definitions.
- 2-6-402. Local govern
- 2-6-403. Duties and r
- 2-6-404. Rulemaking

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b) the grant or gift is given to and accepted by the agency without placing condition on the membership of a negotiated rulemaking committee or the outcome of the negotiated rulemaking process; and
 c) there is consensus among the members of the negotiated rulemaking committee established pursuant to 2-5-106 that the acceptance of the grant or will not diminish the integrity of the negotiated rulemaking process.

History: En. Sec. 10, Ch. 400, L. 1993.

CHAPTER 6 PUBLIC RECORDS

Part 1 — Public Records Generally

- 101. Definitions.
- 102. Citizens entitled to inspect and copy public writings.
- 103. Filing and copying fees.
- 104. Records of officers open to public inspection.
- 105. Removal of public records.
- 106. Possession of records.
- 107. Proceedings to compel delivery of records.
- 108. Attachment and warrant to enforce.
- 109. Prohibition on distribution or sale of mailing lists — exceptions — penalty.
- 110. Electronic information — public access — fees.
- 111. Custody and reproduction of records by secretary of state.

Part 2 — Public Records Management

- 101. Purpose.
- 102. Definitions.
- 103. Secretary of state's powers and duties.
- 104. State records committee approval.
- 105. Preservation of public records.
- 106. Protection of essential records.
- 107. Certified copies of public records.
- 108 through 2-6-210 reserved.
- 111. Transfer of public records.
- 112. Disposal of public records.
- 113. Agency responsibilities and transfer schedules.
- 114. Department of administration — powers and duties.

Part 3 — Records of Elected Executive Branch Officers

- 101. Definitions.
- 102. Official records management — powers and duties.
- 103. Ownership of records — transfer.
- 104. Outgoing officials — records management duties.
- 105. Renumbered 2-6-107 by Code Commissioner, 1979.
- 106. Renumbered 2-6-108 by Code Commissioner, 1979.
- 107. Certified copies of official records.

Part 4 — Local Government Records

- 101. Definitions.
- 102. Local government records committee — creation.
- 103. Duties and responsibilities.
- 104. Rulemaking authority.

ATTACHMENT C

**Nebraska's Negotiated Rulemaking Act
(Nebraska Statutes 84-919.01 through 84-932)**

The appropriate standard of review for the Supreme Court in an appeal from an administrative agency's decision is found in this section, which prescribes a review of an agency's decision de novo on the record without the limitation imposed on the district court under former section 84-917(6)(e) and (6)(f). *Golden Five v. Department of Soc. Serv.*, 229 Neb. 148, 425 N.W.2d 865 (1988).

In conducting its de novo review under the provisions of this section, the Nebraska Supreme Court is required to make independent findings of fact without reference to those made by the tribunal from which the appeal was taken. *Meier v. State*, 227 Neb. 376, 417 N.W.2d 771 (1988).

Supreme Court reviews de novo on the record an appeal from the district court's review of a decision of the Nebraska Equal Opportunity Commission. *Father Flanagan's Boys' Home v. Goerke*, 224 Neb. 731, 401 N.W.2d 461 (1987).

The Supreme Court's review of an administrative agency's decision is de novo on the record; as such, the court makes independent findings of fact without reference to those made by the agency whose action is being reviewed. *Department of Health v. Grand Island Health Care*, 223 Neb. 587, 391 N.W.2d 582 (1986); *Dieter v. State*, 228 Neb. 368, 422 N.W.2d 560 (1988).

The Supreme Court reviews an administrative agency's decision de novo on the record. *City of*

Omaha v. Omaha Police Union Local 101, 222 Neb. 197, 382 N.W.2d 613 (1986); *Department of Health v. Lutheran Hosp. & Homes Inc.*, 227 Neb. 116, 416 N.W.2d 222 (1987); *Zybach v. State*, 226 Neb. 396, 411 N.W.2d 627 (1987).

The Supreme Court's review of an agency's decision under the Administrative Procedures Act is de novo on the record. *Haefner v. State*, 220 Neb. 560, 371 N.W.2d 658 (1985).

On appeal of review by the district court of an order of the Nebraska Equal Opportunity Commission, the Supreme Court will not disturb the district court's findings if they are supported by substantial evidence. *Zalkins Peerless Co. v. Nebraska Equal Opp. Comm.*, 217 Neb. 289, 348 N.W.2d 846 (1984).

In appeal from the Liquor Control Commission, the Supreme Court determines only whether findings of the commission are supported by substantial evidence and whether district court applied the proper statutory criteria. *The 20's, Inc. v. Nebraska Liquor Control Commission*, 190 Neb. 761, 212 N.W.2d 344.

Where district court had only cold record before it, the rule pertaining to Supreme Court's consideration of the opportunity of the trial court in equity to observe the witnesses is inapplicable. *C & L Co. v. Nebraska Liquor Control Commission*, 190 Neb. 91, 206 N.W.2d 49.

84-919. Act; exclusive means of judicial review. Except as otherwise provided by law, the Administrative Procedure Act establishes the exclusive means of judicial review of a final decision of any agency in a contested case.

Source: Laws 1963, c. 531, § 3, p. 1666; Laws 1987, LB 253, § 21; Laws 1988, LB 352, § 187.

84-919.01. Negotiated Rulemaking Act; use by agency. Prior to the formal rulemaking procedure of section 84-907, agencies may use the procedures of the Negotiated Rulemaking Act to permit the direct participation of affected persons in the development of proposed rules and regulations. Negotiated rulemaking may be used to resolve controversial issues prior to the formal rulemaking of the Administrative Procedure Act. To be effective, such proposed rules and regulations shall be adopted pursuant to the Administrative Procedure Act in the form proposed by the negotiated rulemaking committee or as amended by the agency.

Source: Laws 1994, LB 446, § 37.
Operative date August 1, 1994.

Cross Reference
Negotiated Rulemaking Act, see section 84-921.

84-920. Act, how cited. Sections 84-901 to 84-920 shall be known and may be cited as the Administrative Procedure Act.

Source: Laws 1987, LB 253, § 22; Laws 1994, LB 446, § 38.
Operative date August 1, 1994.

(b) NEGOTIATED RULEMAKING ACT

84-921. Act, how cited. Sections 84-921 to 84-932 shall be known and may be cited as the Negotiated Rulemaking Act.

Source: Laws 1994, LB 446, § 1.
Operative date August 1, 1994.

84-922. Purpose of act. The purpose of the Negotiated Rulemaking Act is to establish a framework for the conduct of negotiated rulemaking consistent with the Administrative Procedure Act. It is the intent of the Legislature that state agencies, whenever appropriate, use the negotiated rulemaking process to resolve controversial issues prior to the commencement of the formal rulemaking process of the Administrative Procedure Act. Negotiated rulemaking is not a substitute for the requirements of the Administrative Procedure Act but may be used as a supplemental procedure to permit the direct participation of affected interests in the development of new rules or the amendment or repeal of existing rules. A consensus agreement on a proposed rule reached by a negotiated rulemaking committee may be modified by an agency as a result of the subsequent formal rulemaking process. This section shall not be construed as an attempt to limit innovation and experimentation with the negotiated rulemaking process.

Source: Laws 1994, LB 446, § 2.
Operative date August 1, 1994.

Cross Reference
Administrative Procedure Act, see section 84-920.

84-923. Terms, defined. For purposes of the Negotiated Rulemaking Act:

- (1) Agency shall have the same meaning as in section 84-901;
- (2) Consensus shall mean unanimous concurrence among the interests represented on a negotiated rulemaking committee unless the committee agrees upon another specified definition;
- (3) Convenor shall mean a person who impartially assists an agency in determining whether establishment of a negotiated rulemaking committee is feasible and appropriate for a particular rulemaking procedure;
- (4) Facilitator shall mean a person who impartially aids in the discussions and negotiations among the members of a negotiated rulemaking committee to develop a proposed rule. A facilitator shall not have decisionmaking authority;
- (5) Interest shall mean, with respect to an issue or matter, multiple parties that have a similar point of view or that are likely to be affected in a similar manner;

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(6) Negotiated rulemaking shall mean rulemaking through the use of a negotiated rulemaking committee;

(7) Negotiated rulemaking committee or committee shall mean an advisory committee established to consider and discuss issues for the purpose of reaching a consensus in the development of a proposed rule;

(8) Person shall mean an individual, partnership, limited liability company, corporation, association, governmental subdivision, agency, or public or private organization of any character; and

(9) Rule shall mean rule or regulation as defined in section 84-901.

Source: Laws 1994, LB 446, § 3.

Operative date August 1, 1994.

84-924. Negotiated rulemaking committee; establishment; agency director; use of negotiated rulemaking procedure; determination; considerations; convenor; duties. (1) An agency may establish a negotiated rulemaking committee to negotiate and develop a proposed rule if the agency director determines that the use of the negotiated rulemaking procedure is in the public interest. In making that determination, the agency director shall consider whether:

(a) There is a need for a rule;

(b) There are a limited number of identifiable interests that will be significantly affected by the rule;

(c) There is a reasonable likelihood that a committee can be convened with a balanced representation of persons who:

(i) Can adequately represent the interests identified; and

(ii) Are willing to negotiate in good faith to reach a consensus on the proposed rule;

(d) There is a reasonable likelihood that a committee will reach a consensus on the proposed rule within a fixed period of time;

(e) The negotiated rulemaking procedure will not unreasonably delay the notice of proposed formal rulemaking and the issuance of the final rule pursuant to the Administrative Procedure Act;

(f) The agency has adequate resources and is willing to commit those resources, including technical assistance, to the committee; and

(g) The agency, to the maximum extent possible consistent with the legal obligations of the agency, will use the consensus of the committee as the basis for the rule proposed by the agency in the formal rulemaking process of the Administrative Procedure Act.

(2) An agency may use the services of a convenor to assist in making the determination of need pursuant to subsection (1) of this section and to assist the agency in:

(a) Identifying persons who will be significantly affected by a proposed rule; and

(b) Conducting discussions with affected persons on the issues of concern and ascertaining whether the establishment of a negotiated rulemaking committee is feasible and appropriate for the particular rulemaking.

(3) The convenor shall report findings and make recommendations to the agency. Upon request of the agency, the convenor shall ascertain the names of persons who are willing and qualified to represent the interests that will be significantly affected by the proposed rule. The report and any recommendations of the convenor shall be made available to the public upon request.

Source: Laws 1994, LB 446, § 4.
Operative date August 1, 1994.

Cross Reference
Administrative Procedure Act. *see* section 84-920.

84-925. Petition to use negotiated rulemaking committee; procedure; exception. (1) Except as provided in subsection (2) of this section, any person may petition an agency to request the use of a negotiated rulemaking committee in the development or revision of a rule. Each agency shall prescribe the form of the petition and the procedure for its submission, consideration, and disposition. Within sixty days after submission of a petition, the agency shall (a) deny the petition in writing stating its reasons therefor or (b) initiate the negotiated rulemaking procedure.

(2) A person committed to or otherwise incarcerated in a Department of Correctional Services facility may not petition the Department of Correctional Services to request the use of a negotiated rulemaking committee.

Source: Laws 1994, LB 446, § 5.
Operative date August 1, 1994.

84-926. Negotiated rulemaking committee established; agency; duties; Secretary of State; duties. (1) If an agency decides to establish a negotiated rulemaking committee, the agency shall:

- (a) Give notice to the Secretary of State; and
 - (b) Publish the notice in a newspaper having general circulation in the state and, as appropriate, in other newspapers and publications.
- (2) The notice shall include:
- (a) An announcement that the agency intends to establish a negotiated rulemaking committee to negotiate and develop a proposed rule;
 - (b) A description of the subject and scope of the rule to be developed and the issues to be considered;
 - (c) A list of interests likely to be significantly affected by the proposed rule;
 - (d) A list of the persons proposed to represent the affected interests and the agency;
 - (e) A proposed schedule for completing the work of the committee; and

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(f) An explanation of how a person may apply for or nominate another person for membership on the committee.

(3) The Secretary of State shall establish and maintain a list of subscribers who wish to receive notice of an agency's intent to establish a negotiated rulemaking committee and shall provide such notice to such subscribers at a cost to be assessed against each subscriber. The Secretary of State shall collect payments and make disbursements of such funds as may be necessary to carry out the notification required by this subsection.

(4) The agency shall provide a period of at least thirty days for the submission of comments upon and applications for membership on a negotiated rulemaking committee.

Source: Laws 1994, LB 446, § 6.

Operative date August 1, 1994.

84-927. Negotiated rulemaking committee; establishment; notice of decision; agency support; termination. (1) If, after considering comments and applications for membership on the negotiated rulemaking committee submitted pursuant to section 84-926, the agency determines that a negotiated rulemaking committee can adequately represent the interests of the persons that will be significantly affected by a proposed rule and that it is feasible and appropriate in the particular rulemaking, the agency may establish a negotiated rulemaking committee.

(2) If, after considering comments and applications submitted pursuant to section 84-926, the agency decides not to establish a negotiated rulemaking committee, the agency shall notify the persons who commented on or applied for membership on the negotiated rulemaking committee of the reasons for the decision. The agency shall also publish a notice of the decision not to establish a negotiated rulemaking committee in a newspaper having general circulation in the state and, as appropriate, in other newspapers and publications.

(3) The agency shall provide appropriate administrative support to the negotiated rulemaking committee, including technical assistance and support.

(4) A negotiated rulemaking committee shall terminate upon the adoption of the final rule under consideration by the agency pursuant to the Administrative Procedure Act unless the agency, after consulting the committee, or the committee itself specifies an earlier termination date.

Source: Laws 1994, LB 446, § 7.

Operative date August 1, 1994.

Cross Reference

Administrative Procedure Act, see section 84-920.

84-928. Negotiated rulemaking committee; membership; procedure.

(1) A negotiated rulemaking committee may by consensus expand its mem-

bership, either by contacting and recruiting persons whose participation the committee believes is essential to the success of the negotiated rulemaking process or upon reviewing a petition submitted pursuant to subsection (2) of this section.

(2) Persons who will be significantly affected by a proposed rule and who believe that their interests will not be adequately represented by any person on a negotiated rulemaking committee may petition for or nominate another person for membership on the negotiated rulemaking committee. Each petition or nomination shall be submitted to the negotiated rulemaking committee and shall include:

(a) The name of the petitioner or nominee and a description of the interests the person represents;

(b) Evidence that the petitioner or nominee is authorized to represent parties related to the interests the person proposes to represent;

(c) A written commitment that the petitioner or nominee will actively participate in good faith in the development of the rule under consideration; and

(d) An explanation of reasons that the persons already on the negotiated rulemaking committee do not adequately represent the interests of the person submitting the petition or nomination.

(3) Upon receiving a petition, a negotiated rulemaking committee shall decide by consensus at its next meeting whether or not to expand its membership.

Source: Laws 1994, LB 446, § 8.
Operative date August 1, 1994.

84-929. Negotiated rulemaking committee; powers and duties; consensus; procedure; report; contents. (1) A negotiated rulemaking committee shall consider the matter proposed by the agency for consideration and shall attempt to reach consensus concerning a proposed rule and any other matter the committee determines is relevant to the proposed rule.

(2) The person representing the agency on a negotiated rulemaking committee shall participate in the deliberations of the committee with the same rights and responsibilities of other members of the committee and shall be authorized to fully represent the agency in the discussions and negotiations of the committee.

(3) A negotiated rulemaking committee may adopt procedures or ground rules for the operation of the committee.

(4) If a negotiated rulemaking committee achieves consensus on a proposed rule at the conclusion of the negotiations, the committee shall transmit to the agency that established the committee a report containing the proposed rule.

(5) If a negotiated rulemaking committee does not reach a consensus on the proposed rule, the committee shall transmit to the agency a report specifying areas in which the committee reached consensus and the issues that

remain unresolved. The committee may include in the report any other information, recommendations, or materials that the committee considers appropriate. Any member of the committee may include as an addendum to the report additional information, recommendations, or materials.

Source: Laws 1994, LB 446, § 9.

Operative date August 1, 1994.

84-930. Facilitator; selection; duties. (1) An agency may nominate a person to serve as a facilitator for the negotiations of the negotiated rulemaking committee, subject to the approval of the committee by consensus. If the committee does not approve the agency's nomination for facilitator, the agency shall submit a substitute nomination. If the committee does not approve the substitute nomination of the agency for facilitator, the committee shall select by consensus a person to serve as facilitator. A person designated to represent the agency in substantive issues may not serve as facilitator or presiding officer for the committee.

(2) A facilitator approved or selected by a negotiated rulemaking committee shall:

- (a) Preside at the meetings of the committee in an impartial manner;
- (b) Impartially assist the members of the committee in conducting discussions and negotiations and achieving consensus; and
- (c) Manage the keeping of minutes and records.

Source: Laws 1994, LB 446, § 10.

Operative date August 1, 1994.

84-931. Convenor or facilitator; contract authorized; state employee; disqualification; members of negotiated rulemaking committee; expenses; per diem; grants or gifts. (1) An agency may employ or enter into a contract for the services of an organization or individual to serve as a convenor or facilitator for a negotiated rulemaking committee or may use the services of a state employee to act as a convenor or facilitator for a committee.

(2) An agency shall determine whether a person under consideration as a convenor or facilitator of a negotiated rulemaking committee has any financial or other interest that would preclude the person from serving in an impartial and independent manner. A person disqualified under this criterion shall be dropped from further consideration.

(3) Members of a negotiated rulemaking committee shall be responsible for their own expenses of participation. However, an agency may pay for a committee member's actual and necessary expenses incurred in serving on the committee as provided in sections 81-1174 to 81-1177 and a reasonable per diem rate of compensation if:

- (a) The committee member certifies a lack of adequate financial resources to participate in the committee; and

(b) The agency determines that the committee member's participation in the committee is necessary to ensure an adequate representation of the interests of the members.

(4) An agency may accept grants or gifts from any source to fund the negotiated rulemaking process if:

(a) Information on the name of the person giving the grant or gift and the amount of the grant or gift is available to the public;

(b) The grant or gift is given to and accepted by the agency without placing any condition on the membership of a negotiated rulemaking committee or the outcome of the negotiated rulemaking process; and

(c) There is consensus among the members of the negotiated rulemaking committee that the acceptance of the grant or gift will not diminish the integrity of the negotiated rulemaking process.

Source: Laws 1994, LB 446, § 11.

Operative date August 1, 1994.

84-932. Agency action; judicial review; limitation; negotiated rule; judicial review; treatment. Any agency action relating to establishing, assisting, or terminating a negotiated rulemaking committee under the Negotiated Rulemaking Act shall not be subject to judicial review. Nothing in this section shall bar judicial review if such judicial review is otherwise provided by law. A rule which is the product of negotiated rulemaking prior to formal adoption pursuant to the Administrative Procedure Act and is later subject to judicial review shall not be accorded greater deference by a court than a rule which is the product of the rulemaking procedure of the Administrative Procedure Act alone.

Source: Laws 1994, LB 446, § 12.

Operative date August 1, 1994.

Cross Reference

Administrative Procedure Act, see section 84-920.

ARTICLE 10

BASIC WORKWEEK

Section.

- 84-1001. Basic workweek; state officers, departments; hours required, exceptions; holidays; payment; rules and regulations.
- 84-1002. Basic workweek; state institutions; hours required.
- 84-1003. Basic workweek; staggering of hours.
- 84-1004. Basic workweek; authority of Governor; time when effective.
- 84-1005. Basic workweek; persons is excepted.

84-1001. Basic workweek; state officers; departments; hours required; exceptions; holidays; payment; rules and regulations. (1) All state officers and heads of departments and their deputies, assistants, and employees.

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ATTACHMENT D

**The Federal Negotiated Rulemaking Act of 1990
(5 USC § 561 through § 570)**

RESEARCH GUIDE:

- Federal Procedure L Ed:
 2 Fed Proc L Ed, Administrative Procedure (1994) §§ 2:2, 164, 166, 186, 321.
- Am Jur:
 2 Am Jur 2d, Administrative Law (1994) §§ 16, 330, 332, 352.
- Forms:
 6 Fed Procedural Forms L Ed, Civil Rights § 11:586.
 12 Fed Procedural Forms L Ed, Labor and Labor Relations § 46:4.
 12A Fed Procedural Forms L Ed, Labor and Labor Relations § 46:583.
- Social Security Law and Practice:
 4 Soc. Sec. LP; Administrative Proceedings § 52:59.
 5 Soc. Sec. LP; Medicare § 68:70.
- RIA Coordinators:
 5 Pension Coord, Investigation and Enforcement Proceedings § 175,105.

INTERPRETIVE NOTES AND DECISIONS

4. Subsequent statute modifying Administrative Procedure Act and exclusive procedure for determining deportability of aliens." *Castillo-Villagra v INS* (1992, CA9) 972 F2d 1017, 92 CDOS 6501, 92 Daily Journal DAR 10369.
- Immigration and Naturalization Act displaces APA where it states explicitly that it shall be "sole

SUBCHAPTER III. NEGOTIATED RULEMAKING PROCEDURE

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Prospective amendments:

Repeal of 5 USCS §§ 561 et seq.; savings provision. Act Nov. 29, 1990, P. L. 101-648; § 5, 104 Stat. 4976, which appears as 5 USCS § 561 note, provides that this subchapter [5 USCS §§ 561 et seq.] is repealed, effective 6 years after enactment, but shall continue to apply after repeal as provided by such note.

Amendments:

1992, Act Aug. 26, 1992, P. L. 102-354, § 3(a)(1), 106 Stat. 944, redesignated this subchapter (5 USCS §§ 561 et seq.), enacted as Subchapter IV of Chapter 5 of Title 5 (former 5 USCS §§ 581, et seq.), as Subchapter III. of such chapter, and inserted such subchapter after Subchapter II.

§ 561. Purpose [Caution: For sunset and savings provisions, see note to this section] The purpose of this subchapter [5 USCS §§ 561 et seq.] is to establish a framework for the conduct of negotiated rulemaking, consistent with section 553 of this title, to encourage agencies to use the process when it enhances the informal rulemaking process. Nothing in this subchapter [5 USCS §§ 561 et seq.] should be construed as an attempt to limit innovation and experimentation with the negotiated rulemaking process or with other innovative rulemaking procedures otherwise authorized by law.

(Added Nov. 29, 1990, P. L. 101-648, § 3(a), 104 Stat. 4969; Aug. 26, 1992, P. L. 102-354, § 3(a)(2), 106 Stat. 944.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Explanatory notes:

This section formerly appeared as 5 USCS § 581.

Prospective amendments:

Repeal of section; savings provision. For repeal of this section, effective 6 years after enactment and for continuation, see Act Nov. 29, 1990, P. L. 101-648, § 5, 104 Stat. 4976, which appears as a note to this section.

Amendments:

1992, Act Aug. 26, 1992 redesignated this section, enacted as 5 USCS § 581, as 5 USCS § 561.

Short title:

Act Nov. 29, 1990, P. L. 101-648, § 1, 104 Stat. 4969, provides: "This Act may be cited as the 'Negotiated Rulemaking Act of 1990'." For full classification of such Act, consult USCS Tables volumes.

Act Aug. 26, 1992, P. L. 102-354, § 1, 106 Stat. 944, provides: "This Act may be cited as the 'Administrative Procedure Technical Amendments Act of 1991'." For full classification of such Act, consult USCS Tables volumes.

Other provisions:

Congressional findings. Act Nov. 29, 1990, P. L. 101-648, § 2, 104 Stat. 4969, provides:

166, 186, 321.

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04 Stat. 4969, provides

"The Congress makes the following findings:

"(1) Government regulation has increased substantially since the enactment of the Administrative Procedure Act. [Act June 11, 1946, ch 324, 60 Stat. 237; repealed by Act Sept. 6, 1966].

"(2) Agencies currently use rulemaking procedures that may discourage the affected parties from meeting and communicating with each other, and may cause parties with different interests to assume conflicting and antagonistic positions and to engage in expensive and time-consuming litigation over agency rules.

"(3) Adversarial rulemaking deprives the affected parties and the public of the benefits of face-to-face negotiations and cooperation in developing and reaching agreement on a rule. It also deprives them of the benefits of shared information, knowledge, expertise, and technical abilities possessed by the affected parties.

"(4) Negotiated rulemaking, in which the parties who will be significantly affected by a rule participate in the development of the rule, can provide significant advantages over adversarial rulemaking.

"(5) Negotiated rulemaking can increase the acceptability and improve the substance of rules, making it less likely that the affected parties will resist enforcement or challenge such rules in court. It may also shorten the amount of time needed to issue final rules.

"(6) Agencies have the authority to establish negotiated rulemaking committees under the laws establishing such agencies and their activities and under the Federal Advisory Committee Act (5 U.S.C. App.). Several agencies have successfully used negotiated rulemaking. The process has not been widely used by other agencies, however, in part because such agencies are unfamiliar with the process or uncertain as to the authority for such rulemaking."

Authorization of appropriations. Act Nov. 29, 1990, P. L. 101-648, § 4, 104 Stat. 4976; Aug. 26, 1992, P. L. 102-354, § 5(a)(1), 106 Stat. 945, provides:

"In order to carry out this Act and the amendments made by this Act [enacting 5 USCS §§ 561 et seq.], there are authorized to be appropriated to the Administrative Conference of the United States, in addition to amounts authorized by section 396 of title 5, United States Code, not in excess of \$500,000 for each of the fiscal years 1991, 1992, and 1993."

Sunset and savings provisions relating to 5 USCS §§ 561 et seq. Act Nov. 29, 1990, P. L. 101-648, § 5, 104 Stat. 4976; Aug. 26, 1992, P. L. 102-354, § 5(a)(2), 106 Stat. 945, provides:

" Subchapter III of title 5, United States Code [5 USCS §§ 561 et seq.] (enacted as subchapter IV of chapter 5 of title 5, United States Code, by section 3 of this Act and redesignated as subchapter III of such chapter 5 by section (3)(a) of the Administrative Procedure Technical Amendments Act of 1991) and that portion of the table of sections at the beginning of chapter 5 of title 5, United States Code, relating to subchapter III [5 USCS §§ 561 et seq.], are repealed, effective 6 years after the date of the enactment of this Act, except that the provisions of such subchapter shall continue to apply after the date of the repeal with respect to then pending negotiated rulemaking proceedings initiated before the date of repeal which, in the judgment of the agencies which are convening or have convened such proceedings, require such continuation, until such negotiated rulemaking proceedings terminate pursuant to such subchapter."

RESEARCH GUIDE

Am Jur:

2 Am Jur 2d, Administrative Law (1994) § 179.

§ 562. Definitions [Caution: For sunset and savings provisions, see 5 USCS § 561 note]

For the purposes of this subchapter [5 USCS §§ 561 et seq.], the term—

- (1) "agency" has the same meaning as in section 551(1) of this title;
- (2) "consensus" means unanimous concurrence among the interests represented on a negotiated rulemaking committee established under this subchapter [5 USCS §§ 561 et seq.], unless such committee—
 - (A) agrees to define such term to mean a general but not unanimous concurrence; or
 - (B) agrees upon another specified definition;
- (3) "convener" means a person who impartially assists an agency in determining whether establishment of a negotiated rulemaking committee is feasible and appropriate in a particular rulemaking;
- (4) "facilitator" means a person who impartially aids in the discussions and negotiations among the members of a negotiated rulemaking committee to develop a proposed rule;
- (5) "interest" means, with respect to an issue or matter, multiple parties which have a similar point of view or which are likely to be affected in a similar manner;
- (6) "negotiated rulemaking" means rulemaking through the use of a negotiated rulemaking committee;
- (7) "negotiated rulemaking committee" or "committee" means an advisory committee established by an agency in accordance with this Subchapter [5 USCS §§ 561 et seq.] and

the Federal Advisory Committee Act [5 USCS Appx.] to consider and discuss issues for the purpose of reaching a consensus in the development of a proposed rule;

- (8) "party" has the same meaning as in section 551(3) of this title;
- (9) "person" has the same meaning as in section 551(2) of this title;
- (10) "rule" has the same meaning as in section 551(4) of this title; and
- (11) "rulemaking" means "rule making" as that term is defined in section 551(5) of this title.

(Added Nov. 29, 1990, P. L. 101-648, § 3(a), 104 Stat. 4970; Aug. 26, 1992, P. L. 102-354, § 3(a)(2), 106 Stat. 944.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Prospective amendments:

Repeal of section; savings provision. Act Nov. 29, 1990, P. L. 101-648, § 5, 104 Stat. 4976, which appears as 5 USCS § 561 note, provides that this section is repealed, effective 6 years after enactment, but shall continue to apply after repeal as provided by such note.

Amendments:

1992. Act Aug. 26, 1992 redesignated this section, enacted as 5 USCS § 582, as 5 USCS § 562.

RESEARCH GUIDE

Federal Procedure L Ed:

2 Fed Proc L Ed, Administrative Procedure (1994) §§ 2:96, 97.

Am Jur:

2 Am Jur 2d, Administrative Law (1994) §§ 179, 180.

§ 563. Determination of need for negotiated rulemaking committee [Caution: For sunset and savings provisions, see 5 USCS § 561 note]

(a) Determination of need by the agency. An agency may establish a negotiated rulemaking committee to negotiate and develop a proposed rule, if the head of the agency determines that the use of the negotiated rulemaking procedure is in the public interest. In making such a determination, the head of the agency shall consider whether—

- (1) there is a need for a rule;
- (2) there are a limited number of identifiable interests that will be significantly affected by the rule;
- (3) there is a reasonable likelihood that a committee can be convened with a balanced representation of persons who—
 - (A) can adequately represent the interests identified under paragraph (2); and
 - (B) are willing to negotiate in good faith to reach a consensus on the proposed rule;
- (4) there is a reasonable likelihood that a committee will reach a consensus on the proposed rule within a fixed period of time;
- (5) the negotiated rulemaking procedure will not unreasonably delay the notice of proposed rulemaking and the issuance of the final rule;
- (6) the agency has adequate resources and is willing to commit such resources, including technical assistance, to the committee; and
- (7) the agency, to the maximum extent possible consistent with the legal obligations of the agency, will use the consensus of the committee with respect to the proposed rule as the basis for the rule proposed by the agency for notice and comment.

(b) Use of conveners. (1) Purposes of conveners. An agency may use the services of a convener to assist the agency in—

- (A) identifying persons who will be significantly affected by a proposed rule, including residents of rural areas; and
- (B) conducting discussions with such persons to identify the issues of concern to such persons, and to ascertain whether the establishment of a negotiated rulemaking committee is feasible and appropriate in the particular rulemaking.

(2) Duties of conveners. The convener shall report findings and may make recommendations to the agency. Upon request of the agency, the convener shall ascertain the names of persons who are willing and qualified to represent interests that will be significantly affected by the proposed rule, including residents of rural areas. The report and any recommendations of the convener shall be made available to the public upon request.

(Added Nov. 29, 1990, P. L. 101-648, § 3(a), 104 Stat. 4970; Aug. 26, 1992, P. L. 102-354, § 3(a)(2), 106 Stat. 944.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Prospective amendments:

Repeal of section; savings provision. Act Nov. 29, 1990, P. L. 101-648, § 5, 104 Stat. 4976,

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which appears as 5 USCS § 561 note, provides that this section is repealed, effective 6 years after enactment, but shall continue to apply after repeal as provided by such note.

Amendments:

1992. Act Aug. 26, 1992 redesignated this section, enacted as 5 USCS § 583, as 5 USCS § 563.

RESEARCH GUIDE

Federal Procedure L Ed:

2 Fed Proc L Ed, Administrative Procedure (1974) § 2:97.

Am Jur.

2 Am Jur 2d, Administrative Law (1994) § 180.

§ 564. Publication of notice; applications for membership on committees [Caution: For sunset and savings provisions, see 5 USCS § 561 note]

(a) Publication of notice. If, after considering the report of a convener or conducting its own assessment, an agency decides to establish a negotiated rulemaking committee, the agency shall publish in the Federal Register and, as appropriate, in trade or other specialized publications, a notice which shall include—

(1) an announcement that the agency intends to establish a negotiated rulemaking committee to negotiate and develop a proposed rule;

(2) a description of the subject and scope of the rule to be developed, and the issues to be considered;

(3) a list of the interests which are likely to be significantly affected by the rule;

(4) a list of the persons proposed to represent such interests and the person or persons proposed to represent the agency;

(5) a proposed agenda and schedule for completing the work of the committee, including a target date for publication by the agency of a proposed rule for notice and comment;

(6) a description of administrative support for the committee to be provided by the agency, including technical assistance;

(7) a solicitation for comments on the proposal to establish the committee, and the proposed membership of the negotiated rulemaking committee; and

(8) an explanation of how a person may apply or nominate another person for membership on the committee, as provided under subsection (b).

(b) Applications for membership or committee. Persons who will be significantly affected by a proposed rule and who believe that their interests will not be adequately represented by any person specified in a notice under subsection (a)(4) may apply for, or nominate another person for, membership on the negotiated rulemaking committee to represent such interests with respect to the proposed rule. Each application or nomination shall include—

(1) the name of the applicant or nominee and a description of the interests such person shall represent;

(2) evidence that the applicant or nominee is authorized to represent parties related to the interests the person proposes to represent;

(3) a written commitment that the applicant or nominee shall actively participate in good faith in the development of the rule under consideration; and

(4) the reasons that the persons specified in the notice under subsection (a)(4) do not adequately represent the interests of the person submitting the application or nomination.

(c) Period for submission of comments and applications. The agency shall provide for a period of at least 30 calendar days for the submission of comments and applications under this section.

(Added Nov. 29, 1990, P. L. 101-648, § 3(a), 104 Stat. 4971; Aug. 26, 1992, P. L. 102-354, § 3(a)(2), 106 Stat. 944.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Prospective amendments:

Repeal of section; savings provision. Act Nov. 29, 1990, P. L. 101-648, § 5; 104 Stat. 4976, which appears as 5 USCS § 561 note, provides that this section is repealed, effective 6 years after enactment, but shall continue to apply after repeal as provided by such note.

Amendments:

1992. Act Aug. 26, 1992 redesignated this section, enacted as 5 USCS § 584, as 5 USCS § 564.

RESEARCH GUIDE

Federal Procedure L Ed:

2 Fed Proc L Ed, Administrative Procedure (1994) § 2:97.

Am Jur:
 2 Am Jur 2d, Administrative Law (1994) § 180.
 37A Am Jur 2d, Freedom of Information Act (1994) § 126.

§ 565. Establishment of committee [Caution: For sunset and saving provisions, see 5 USCS § 561 note]

(a) Establishment. (1) Determination to establish committee. If after considering comments and applications submitted under section 564, the agency determines that a negotiated rulemaking committee can adequately represent the interests that will be significantly affected by a proposed rule and that it is feasible and appropriate in the particular rulemaking, the agency may establish a negotiated rulemaking committee. In establishing and administering such a committee, the agency shall comply with the Federal Advisory Committee Act [5 USCS Appx.] with respect to such committee, except as otherwise provided in this subchapter, [5 USCS §§ 561 et seq.].

(2) Determination not to establish committee. If after considering such comments and applications, the agency decides not to establish a negotiated rulemaking committee, the agency shall promptly publish notice of such decision and the reasons therefor in the Federal Register and, as appropriate, in trade or other specialized publications, a copy of which shall be sent to any person who applied for, or nominated another person for membership on the negotiating rulemaking committee to represent such interests with respect to the proposed rule.

(b) Membership. The agency shall limit membership on a negotiated rulemaking committee to 25 members, unless the agency head determines that a greater number of members is necessary for the functioning of the committee or to achieve balanced membership. Each committee shall include at least one person representing the agency.

(c) Administrative support. The agency shall provide appropriate administrative support to the negotiated rulemaking committee, including technical assistance.

(Added Nov. 29, 1990, P. L. 101-648, § 3(a), 104 Stat. 4972; Aug. 26, 1992, P. L. 102-354, § 3(a)(2), (3), 106 Stat. 944.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Prospective amendments:

Repeal of section; savings provision. Act Nov. 29, 1990, P. L. 101-648, § 5, 104 Stat. 4976, which appears as 5 USCS § 561 note, provides that this section is repealed, effective 6 years after enactment, but shall continue to apply after repeal as provided by such note.

Amendments:

1992. Act Aug. 26, 1992 redesignated this section, enacted as 5 USCS § 585, as 5 USCS § 565; and, in subsec. (a)(1), substituted "564" for "584".

RESEARCH GUIDE

Federal Procedure L Ed:

2 Fed Proc L Ed, Administrative Procedure (1994) § 2:97.

Am Jur:

2 Am Jur 2d, Administrative Law (1994) § 180.

§ 566. Conduct of committee activity [Caution: For sunset and savings provisions, see 5 USCS § 561 note]

(a) Duties of committee. Each negotiated rulemaking committee established under this subchapter [5 USCS §§ 561 et seq.] shall consider the matter proposed by the agency for consideration and shall attempt to reach a consensus concerning a proposed rule with respect to such matter and any other matter the committee determines is relevant to the proposed rule.

(b) Representatives of agency on committee. The person or persons representing the agency on a negotiated rulemaking committee shall participate in the deliberations and activities of the committee with the same rights and responsibilities as other members of the committee, and shall be authorized to fully represent the agency in the discussions and negotiations of the committee.

(c) Selecting facilitator. Notwithstanding section 10(e) of the Federal Advisory Committee Act [5 USCS Appx. § 10(e)], an agency may nominate either a person from the Federal Government or a person from outside the Federal Government to serve as a facilitator for the negotiations of the committee, subject to the approval of the committee by consensus. If the committee does not approve the nominee of the agency for facilitator, the agency shall submit a substitute nomination. If a committee does not approve any nominee of the agency for facilitator, the committee shall select by consensus a person to serve as facilitator. A person designated

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to represent the agency in substantive issues may not serve as facilitator or otherwise chair the committee.

(d) Duties of facilitator. A facilitator approved or selected by a negotiated rulemaking committee shall—

- (1) chair the meetings of the committee in an impartial manner;
- (2) impartially assist the members of the committee in conducting discussions and negotiations; and
- (3) manage the keeping of minutes and records as required under section 10(b) and (c) of the Federal Advisory Committee Act [5 USCS Appx. § 10(b), (c)]; except that any personal notes and materials of the facilitator or of the members of a committee shall not be subject to section 552 of this title.

(e) Committee procedures. A negotiated rulemaking committee established under this subchapter [5 USCS §§ 561 et seq.] may adopt procedures for the operation of the committee. No provision of section 553 of this title shall apply to the procedures of a negotiated rulemaking committee.

(f) Report of committee. If a committee reaches a consensus on a proposed rule, at the conclusion of negotiations the committee shall transmit to the agency that established the committee a report containing the proposed rule. If the committee does not reach a consensus on a proposed rule, the committee may transmit to the agency a report specifying any areas in which the committee reached a consensus. The committee may include in a report any other information, recommendations, or materials that the committee considers appropriate. Any committee member may include as an addendum to the report additional information, recommendations, or materials.

(g) Records of committee. In addition to the report required by subsection (f), a committee shall submit to the agency the records required under section 10(b) and (c) of the Federal Advisory Committee Act [5 USCS Appx. § 10(b), (c)].

(Added Nov. 29, 1990, P. L. 101-648, § 3(a), 104 Stat. 4973; Aug. 26, 1992, P. L. 102-354, § 3(a)(2), 106 Stat. 944.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Prospective amendments:

Repeal of section; savings provision. Act Nov. 29, 1990, P. L. 101-648, § 5, 104 Stat. 4976, which appears as 5 USCS § 561 note, provides that this section is repealed, effective 6 years after enactment, but shall continue to apply after repeal as provided by such note.

Amendments:

1992. Act Aug. 26, 1992 redesignated this section, enacted as 5 USCS § 586, as 5 USCS § 566.

RESEARCH GUIDE

Federal Procedure L Ed:

2 Fed Proc L Ed, Administrative Procedure (1994) §§ 2:98, 117.

Am Jur:

2 Am Jur 2d, Administrative Law (1994) §§ 179, 181, 250.

§ 567. Termination of committee [Caution: For sunset and savings provisions, see 5 USCS § 561 note]

A negotiated rulemaking committee shall terminate upon promulgation of the final rule under consideration, unless the committee's charter contains an earlier termination date or the agency, after consulting the committee, or the committee itself specifies an earlier termination date.

(Added Nov. 29, 1990, P. L. 101-648, § 3(a); 104 Stat. 4974; Aug. 26, 1992; P. L. 102-354, § 3(a)(2), 106 Stat. 944.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Prospective amendments:

Repeal of section; savings provision. Act Nov. 29, 1990, P. L. 101-648, § 5, 104 Stat. 4976, which appears as 5 USCS § 561 note, provides that this section is repealed, effective 6 years after enactment, but shall continue to apply after repeal as provided by such note.

Amendments:

1992. Act Aug. 26, 1992 redesignated this section, enacted as 5 USCS § 587, as 5 USCS § 567.

RESEARCH GUIDE

Federal Procedure L Ed:

2 Fed Proc L Ed, Administrative Procedure (1994) § 2:99:

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Am Jur:

2. Am Jur 2d, Administrative Law (1994) § 182.

§ 568. Services, facilities, and payment of committee member expenses [Caution: For sunset and savings provisions, see 5 USCS § 561, note]

(a) Services of conveners and facilitators. (1) In general. An agency may employ or enter into contracts for the services of an individual or organization to serve as a convener or facilitator for a negotiated rulemaking committee under this subchapter [5 USCS §§ 561 et seq.], or may use the services of a Government employee to act as a convener or a facilitator for such a committee.

(2) Determination of conflicting interests. An agency shall determine whether a person, under consideration to serve as convener or facilitator of a committee under paragraph (1), has any financial or other interest that would preclude such person from serving in an impartial and independent manner.

(b) Services and facilities of other entities. For purposes of this subchapter [5 USCS §§ 561 et seq.], an agency may use the services and facilities of other Federal agencies and public and private agencies and instrumentalities with the consent of such agencies and instrumentalities, and with or without reimbursement to such agencies and instrumentalities, and may accept voluntary and uncompensated services without regard to the provisions of section 1342 of title 31. The Federal Mediation and Conciliation Service may provide services and facilities, with or without reimbursement, to assist agencies under this subchapter [5 USCS §§ 561 et seq.], including furnishing conveners, facilitators, and training in negotiated rulemaking.

(c) Expenses of committee members. Members of a negotiated rulemaking committee shall be responsible for their own expenses of participation in such committee, except that an agency may, in accordance with section 7(a) of the Federal Advisory Committee Act [5 USCS Appx. § 7(d)], pay for a member's reasonable travel and per diem expenses, expenses to obtain technical assistance, and a reasonable rate of compensation, if—

(1) such member certifies a lack of adequate financial resources to participate in the committee; and

(2) the agency determines that such member's participation in the committee is necessary to assure an adequate representation of the member's interest.

(d) Status of member as Federal employee. A member's receipt of funds under this section or section 569 shall not conclusively determine for purposes of sections 202 through 209 of title 18 whether that member is an employee of the United States Government.

(Added Nov. 29, 1990, P. L. 101-648, § 3(a), 104 Stat. 4974; Aug. 26, 1992, P. L. 102-354, § 3(a)(2), (4), 106 Stat. 944.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Prospective amendments:

Repeal of section; savings provision. Act Nov. 29, 1990, P. L. 101-648, § 5, 104 Stat. 4976, which appears as 5 USCS § 561 note, provides that this section is repealed, effective 6 years after enactment, but shall continue to apply after repeal as provided by such note.

Amendments:

1992. Act Aug. 26, 1992 redesignated this section, enacted as 5 USCS § 588, as 5 USCS § 568; and, in subsec. (d), substituted "569" for "589".

§ 569. Role of the Administrative Conference of the United States and other entities [Caution: For sunset and savings provisions, see 5 USCS § 561 note]

(a) Consultation by agencies. An agency may consult with the Administrative Conference of the United States or other public or private individuals or organizations for information and assistance in forming a negotiated rulemaking committee and conducting negotiations on a proposed rule.

(b) Roster of potential conveners and facilitators. The Administrative Conference of the United States, in consultation with the Federal Mediation and Conciliation Service, shall maintain a roster of individuals who have acted as or are interested in serving as conveners or facilitators in negotiated rulemaking proceedings. The roster shall include individuals from government agencies and private groups, and shall be made available upon request. Agencies may also use rosters maintained by other public or private individuals or organizations.

(c) Procedures to obtain conveners and facilitators. (1) Procedures. The Administrative Conference of the United States shall develop procedures which permit agencies to obtain the services of conveners and facilitators on an expedited basis.

(2) Payment for services. Payment for the services of conveners or facilitators shall be made by the agency using the services, unless the Chairman of the Administrative Conference agrees to pay for such services under subsection (f).

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- (d) Compilation of data on negotiated rulemaking; report to Congress. (1) Compilation of data. The Administrative Conference of the United States shall compile and maintain data related to negotiated rulemaking and shall act as a clearinghouse to assist agencies and parties participating in negotiated rulemaking proceedings.
- (2) Submission of information by agencies. Each agency engaged in negotiated rulemaking shall provide to the Administrative Conference of the United States a copy of any reports submitted to the agency by negotiated rulemaking committees under section 566 and such additional information as necessary to enable the Administrative Conference of the United States to comply with this subsection.
- (3) Reports to Congress: The Administrative Conference of the United States shall review and analyze the reports and information received under this subsection and shall transmit a biennial report to the Committee on Governmental Affairs of the Senate and the appropriate committees of the House of Representatives that—
 - (A) provides recommendations for effective use by agencies of negotiated rulemaking; and
 - (B) describes the nature and amounts of expenditures made by the Administrative Conference of the United States to accomplish the purposes of this subchapter [5 USCS §§ 561 et seq.].
- (e) Training in negotiated rulemaking. The Administrative Conference of the United States is authorized to provide training in negotiated rulemaking techniques and procedures for personnel of the Federal Government either on a reimbursable or nonreimbursable basis. Such training may be extended to private individuals on a reimbursable basis.
- (f) Payment of expenses of agencies. The Chairman of the Administrative Conference of the United States is authorized to pay, upon request of an agency, all or part of the expenses of establishing a negotiated rulemaking committee and conducting a negotiated rulemaking. Such expenses may include, but are not limited to—
 - (1) the costs of conveners and facilitators;
 - (2) the expenses of committee members determined by the agency to be eligible for assistance under section 568(c); and
 - (3) training costs.

Determinations with respect to payments under this section shall be at the discretion of such Chairman in furthering the use by Federal agencies of negotiated rulemaking.

(g) Use of funds of the Conference. The Administrative Conference of the United States may apply funds received under section 595(c)(12) of this title to carry out the purposes of this subchapter [5 USCS §§ 561 et seq.].

(Added Nov. 29, 1990, P. L. 101-648, § 3(a), 104 Stat. 4975; Aug. 26, 1992, P. L. 102-354, § 3(a)(2), (5), 106 Stat. 944.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Prospective amendments:
 Repeat of section; savings provision. Act Nov. 29, 1990, P. L. 101-648, § 5, 104 Stat. 4976, which appears as 5 USCS § 561 note, provides that this section is repealed, effective 6 years after enactment, but shall continue to apply after repeal as provided by such note.

Amendments:
 1992. Act Aug. 26, 1992 redesignated this section, enacted as 5 USCS § 589, as 5 USCS § 569; in subsec. (d)(2), substituted "566" for "586"; in subsec. (f)(2), substituted "568" for "538"; and, in subsec. (g), substituted "595" for "575".

§ 570. Judicial review [Caution: For sunset and savings provisions, see 5 USCS § 561 note] Any agency action relating to establishing, assisting, or terminating a negotiated rulemaking committee under this subchapter [5 USCS §§ 561 et seq.] shall not be subject to judicial review. Nothing in this section shall bar judicial review of a rule if such judicial review is otherwise provided by law. A rule which is the product of negotiated rulemaking and is subject to judicial review shall not be accorded any greater deference by a court than a rule which is the product of other rulemaking procedures.

(Added Nov. 29, 1990, P. L. 101-648, § 3(a), 104 Stat. 4976; Aug. 26, 1992, P. L. 102-354, § 3(a)(2), 106 Stat. 944.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Prospective amendments:
 Repeat of section; savings provision. Act Nov. 29, 1990, P. L. 101-648, § 5, 104 Stat. 4976, which appears as 5 USCS § 561 note, provides that this section is repealed, effective 6 years after enactment, but shall continue to apply after repeal as provided by such note.

Amendments:
 1992. Act Aug. 26, 1992 redesignated this section, enacted as 5 USCS § 590, as 5 USCS § 570.

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RESEARCH GUIDE

Federal Procedure L.Ed:

2 Fed Proc.L Ed, Administrative Procedure (1994) § 2:100.

Am Jur:

2 Am Jur 2d, Administrative Law (1994) § 183.

SUBCHAPTER IV. ALTERNATIVE MEANS OF DISPUTE RESOLUTION IN THE ADMINISTRATIVE PROCESS

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Prospective amendments:

Termination of 5 USCS §§ 571 et seq. Act Nov. 15, 1990; P. L. 101-552, § 11, 104 Stat. 2747, which appears as 5 USCS § 571 note, provides for termination of 5 USCS §§ 571-583 on Oct. 1, 1995, subject to certain savings provisions:

Amendments:

1992, Act Aug. 26, 1992, P. L. 102-354, § 3(b)(1), 106 Stat. 944, inserted this subchapter (5 USCS §§ 571 et seq. (formerly §§ 581 et seq.)) after Subchapter III as redesignated (5 USCS §§ 561 et seq.).

§ 571. Definitions [Caution: For termination on October 1, 1995 of agencies' authority to use dispute resolution proceedings under 5 USCS §§ 571 et seq., see § 11 of Act Nov. 15, 1990, P. L. 101-552, which appears as a note to this section.]

For the purposes of this subchapter [5 USCS §§ 571 et seq.], the term—

- (1) "agency" has the same meaning as in section 551(1) of this title;
- (2) "administrative program" includes a Federal function which involves protection of the public interest and the determination of rights, privileges, and obligations of private persons through rule making, adjudication, licensing, or investigation, as those terms are used in subchapter II of this chapter [5 USCS §§ 551 et seq.];
- (3) "alternative means of dispute resolution" means any procedure that is used, in lieu of an adjudication as defined in section 551(7) of this title, to resolve issues in controversy, including, but not limited to, settlement negotiations, conciliation, facilitation, mediation, factfinding, minitrials, and arbitration, or any combination thereof;
- (4) "award" means any decision by an arbitrator resolving the issues in controversy;
- (5) "dispute resolution communication" means any oral or written communication prepared for the purposes of a dispute resolution proceeding, including any memoranda, notes or work product of the neutral, parties or nonparty participant; except that a written agreement to enter into a dispute resolution proceeding, or final written agreement or arbitral award reached as a result of a dispute resolution proceeding, is not a dispute resolution communication;
- (6) "dispute resolution proceeding" means any process in which an alternative means of dispute resolution is used to resolve an issue in controversy in which a neutral is appointed and specified parties participate;
- (7) "in confidence" means, with respect to information, that the information is provided—
 - (A) with the expressed intent of the source that it not be disclosed; or
 - (B) under circumstances that would create the reasonable expectation on behalf of the source that the information will not be disclosed;
- (8) "issue in controversy" means an issue which is material to a decision concerning an administrative program of an agency, and with which there is disagreement—
 - (A) between an agency and persons who would be substantially affected by the decision; or
 - (B) between persons who would be substantially affected by the decision,
 except that such term shall not include any matter specified under section 2302 or 7121(c) of this title;
- (9) "neutral" means an individual who, with respect to an issue in controversy, functions specifically to aid the parties in resolving the controversy;
- (10) "party" means—
 - (A) for a proceeding with named parties, the same as in section 551(3) of this title; and
 - (B) for a proceeding without named parties, a person who will be significantly affected by the decision in the proceeding and who participates in the proceeding;
- (11) "person" has the same meaning as in section 551(2) of this title; and

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TITLE 261, NEBRASKA ADMINISTRATIVE CODE NEBRASKA NATURAL RESOURCES COMMISSION

CHAPTER 1

Adopted 12/7/95
NEBRASKA ADMINISTRATIVE CODE

TITLE 261 --- RULES OF AGENCY PROCEDURE CHAPTER 1 --- PROCEDURES FOR NEGOTIATED RULEMAKING

ALPHABETICAL TABLE OF CONTENTS

SUBJECT	STATUTORY AUTHORITY	CODE SECTIONS
Convenors; Selection; Duties	Sections 84-924, 84-931, R.R.S. 1994	004
Definitions	Sections 84-901, 84-923, R.R.S. 1994	002
Establishment Of A Negotiated Rulemaking Committee; Criteria	Section 84-924, R.R.S. 1994	003
Establishment Of A Negotiated Rulemaking Committee; Procedure	Section 84-927, R.R.S. 1994	007
Facilitators; Selection; Duties	Section 84-930, R.R.S. 1994	010
Grants Or Gifts	Section 84-931, R.R.S. 1994	012
Negotiated Rulemaking; Generally	Section 84-922, R.R.S. 1994	001

Negotiated Rulemaking Committee; Expenses	Section 84-931, R.R.S. 1994	011
Negotiated Rulemaking Committee; Judicial Review	Section 84-932, R.R.S. 1994	014
Negotiated Rulemaking Committee; Membership	Sections 84-924, 84-928, R.R.S. 1943	008
Negotiated Rulemaking Committee; Operation	Section 84-929, R.R.S. 1994	009
Negotiated Rulemaking Committee; Termination	Section 84-927, R.R.S. 1994	013
Notice of Negotiated Rulemaking Committee; Comment; Applications For Membership	Section 84-926, R.R.S. 1994	006
Petitions For Use Of Negotiated Rulemaking Committee	Section 84-925, R.R.S. 1994	005

NEBRASKA ADMINISTRATIVE CODE

TITLE 261 --- RULES OF AGENCY PROCEDURE

CHAPTER 1 --- PROCEDURES FOR NEGOTIATED RULEMAKING

NUMERICAL TABLE OF CONTENTS

SUBJECT	STATUTORY AUTHORITY	CODE SECTIONS
Negotiated Rulemaking; Generally	Section 84-922, R.R.S. 1994	001
Definitions	Section 84-923, R.R.S.	002

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Establishment Of A Negotiated Rulemaking Committee; Criteria	Section 84-924, R.R.S. 1994	003
Convenors; Selection; Duties	Sections 84-924, 84-931, R.R.S. 1994	004
Petitions For Use Of Negotiated Rulemaking Committee	Section 84-925, R.R.S. 1994	005
Notice of Negotiated Rulemaking Committee; Comment; Applications For Membership	Section 84-926, R.R.S. 1994	006
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Negotiated Rulemaking Committee; Operation	Section 84-929, R.R.S. 1994	009
Facilitators; Selection; Duties	Section 84-930, R.R.S. 1994	010
Negotiated Rulemaking Committee; Expenses	Section 84-931, R.R.S. 1994	011
Grants Or Gifts	Section 84-931, R.R.S. 1994	012
Negotiated Rulemaking Committee; Termination	Section 84-927, R.R.S. 1994	013
Negotiated Rulemaking Committee; Judicial Review	Section 84-932, R.R.S. 1994	014

NEBRASKA ADMINISTRATIVE CODE

TITLE 261 -- RULES OF AGENCY PROCEDURE

CHAPTER 1 -- PROCEDURES FOR NEGOTIATED RULEMAKING

001 Negotiated rulemaking generally. The purpose of these regulations is to establish a framework for the conduct of negotiated rulemaking consistent with the Administrative Procedure Act and the Negotiated Rulemaking Act, sections 84-921 through 84-932, R.R.S. 1994. The negotiated rulemaking process can be used by state agencies, whenever appropriate, to resolve controversial issues prior to the commencement of formal rulemaking. Negotiated rulemaking is not a substitute for the requirements of the Administrative Procedure Act, but may be used as a supplemental procedure to permit the direct participation of affected interests in the development of new rules or the amendment or repeal of existing rules. The negotiated rulemaking process also does not preclude other agency efforts or processes designed to reach consensus with affected or interested persons concerning the content of rules or regulations. A consensus agreement on a proposed rule reached by a negotiated rulemaking committee may be modified by the agency as a result of a subsequent formal rulemaking process.

002 Definitions. For purposes of this Chapter of these procedural rules:

002.01 APA shall mean the Administrative Procedure Act, sections 84-901 through 84-920, R.R.S. 1994.

002.02 Agency shall mean the Nebraska Natural Resources Commission, the agency created in section 2-1504, R.R.S. 1943.

002.03 Agency Director shall mean the person holding the position of Director of Natural Resources created by section 2-1504.03, R.R.S. 1943.

002.04 Consensus shall mean unanimous concurrence among
the interests represented on a negotiated rulemaking committee
unless the committee agrees upon another specified definition.

002.05 Convenor shall mean a person who impartially assists
the agency in determining whether establishment of a
negotiated rulemaking committee is feasible and appropriate
for a particular rulemaking procedure.

002.06 Facilitator shall mean a person who impartially aids
in the discussion and negotiations among the members of a
negotiated rulemaking committee to develop a proposed rule.
A facilitator shall not have decisionmaking authority.

002.07 Interest shall mean, with respect to an issue or
matter, multiple parties that have a similar point of view or
that are likely to be affected in a similar manner.

002.08 Negotiated rulemaking shall mean rulemaking through
the use of a negotiated rulemaking committee.

002.09 Negotiated rulemaking committee or committee shall
mean an advisory committee established to consider and discuss
issues for the purpose of reaching a consensus in the
development of a proposed rule.

002.10 Person shall mean an individual, partnership,
limited liability company, corporation, association,
governmental subdivision, agency, or public or private
organization of any character.

002.11 Rule or regulation shall mean any rule, regulation,
or standard issued by the agency, including the amendment or
repeal thereof whether with or without prior hearing and
designed to implement, interpret, or make specific the law
enforced or administered by it or governing its organization
or procedure, but not including rules and regulations
concerning the internal management of the agency not affecting
private rights, private interests, or procedures available to
the public and not including permits, certificates of public
convenience and necessity, franchises, rate orders and rate
tariffs, and any rules of interpretation thereof, and for the

purpose of the APA, every rule and regulation which shall prescribe a penalty shall be presumed to have general applicability or to affect private rights and interests.

003 Establishment of a Negotiated Rulemaking Committee; criteria. The agency may establish a negotiated rulemaking committee to negotiate and develop a proposed rule if the agency director determines that the use of the negotiated rulemaking procedure is in the public interest. In making that determination, the agency director shall consider whether:

003.01 There is a need for the rule.

003.02 There are a limited number of identifiable interests that will be significantly affected by the rule.

003.03 There is a reasonable likelihood that a committee can be convened with a balanced representation of persons who:

003.03A Can adequately represent the interests identified; and

003.03B Are willing to negotiate in good faith to reach a consensus on the proposed rule.

003.04 There is a reasonable likelihood that a committee will reach a consensus on the proposed rule within a fixed period of time.

003.05 The negotiated rulemaking procedure will not unreasonably delay the notice of proposed formal rulemaking and the issuance of the final rule pursuant to the APA.

003.06 The agency has adequate resources and is willing to commit those resources, including technical assistance, to the committee.

003.07 The agency, to the maximum extent possible consistent with the legal obligations of the agency, will use the consensus of the committee as the basis of the rule proposed by the agency in the formal rulemaking process of the APA.

004 Convenors; selection; duties. The agency, at the discretion of the agency director, may use the services of a convenor.

004.01 The agency may employ or contract for an organization or an individual to serve as a convenor, or may use the services of a state employee to act as a convenor. A convenor shall not have a financial or other interest that would preclude him or her from serving in an impartial and independent manner. The agency shall determine whether a person under consideration as a convenor has such an interest. A person disqualified under this criterion shall be dropped from further consideration.

004.02 The convenor may assist the agency in making the determination of need for a negotiated rulemaking process discussed in section 003 above. The convenor may also assist the agency in:

004.02A Identifying persons who will be significantly affected by a proposed rule.

004.02B Conducting discussions with affected persons on the issues of concern and ascertaining whether the establishment of a negotiated rulemaking committee is feasible and appropriate for the particular rulemaking.

004.03 The convenor shall report findings and make recommendations to the agency. Upon request of the agency, the convenor shall ascertain the names of persons who are willing and qualified to represent the interests that will be significantly affected by the proposed rule. That report by the convenor and any recommendations of the convenor shall be public records and made available to the public for review upon request.

005 Petitions for the use of a negotiated rulemaking committee. Any person may petition the agency to request the use of a negotiated rulemaking committee in the development or revision of a rule, as provided below.

005.01 A negotiated rulemaking process may be requested on any topic appropriate for a rule or regulation by the agency.

005.01A A negotiated rulemaking process may be requested only to develop or revise rules which carry out statutes that are within the authority of the agency to implement.

005.01B A negotiated rulemaking process may not be requested to develop a rule or regulation to vary or change the specific terms of a statute.

005.01C A negotiated rulemaking process may not be requested to negotiate a rule on a matter which is not within the definition of a rule or regulation as set forth in subsection 002.11 above.

005.02 A request for the use of a negotiated rulemaking procedure shall be made by a petition that meets the requirements of form set out in this subsection. In the event that it does not, the agency may refuse to accept it.

005.02A A petition may be in the form of a pleading that contains a caption, heading, and name as set forth on Attachment 1, which is attached to these rules and made a part of them by reference.

005.02B A petition may also be made in the form of a letter so long as the letter contains all of the information required by these regulations and is clearly delineated as a petition for negotiated rulemaking.

005.02C All petitions must be on white, letter sized paper (8 1/2 by 11) of standard weight.

005.02D Petitions must be legible, and may be typewritten, photostatically reproduced, printed, or handwritten. If handwritten, petitions must be in ink. Only one side of a page of a petition shall contain any writing.

005.02E Any documents that are intended to accompany a petition shall be securely fastened, clearly marked as attachments to the petition, and meet the other requirements of this section as to size, print and

legibility.

005.03 A petition for a negotiated rulemaking procedure shall meet the following requirements for content and substance. In the event that it does not, the agency may refuse to accept it.

005.03A The petition must identify the general subject matter about which the negotiated rulemaking procedure is requested, including the statutes or legislative bill(s) which provide authority for the desired regulation, and, if amendments to existing regulations are sought, identification of the regulations by title, chapter and name.

005.03B The petition must identify the specific issue(s) proposed for inclusion in the negotiated rulemaking process.

005.03C The petition must discuss the facts surrounding each problem or issue proposed for inclusion in the negotiated rulemaking process.

005.03D The petition must discuss why a negotiated rulemaking process is in the public interest, including information on each of the criteria set out in subsections 004.01 through 004.05 above. The petition may also include information on the criteria included in subsections 004.06 and 004.07 above, to the extent such information is available to the petitioner. The petitioner may also submit such other information as may assist the agency in making a decision.

005.03E The petition must identify persons who will be significantly affected by any rule which might result from the proposed negotiated rulemaking process, to the extent known by the petitioner. The petitioner may also suggest the names of persons who are willing and qualified to represent the interests that will be significantly affected by the negotiated rulemaking process and the proposed rule.

005.04 A petition for a negotiated rulemaking process shall

be filed with the agency director. Filing may be made by personal delivery during regular agency office hours or by mail.

005.05 Upon the filing of a petition for a negotiated rulemaking procedure, the agency director may designate an agency employee or use the services of a convenor to recommend to the agency director whether a negotiated rulemaking process should be initiated.

005.06 Within sixty (60) days after submission of a petition for a negotiated rulemaking procedure, the agency shall:

005.06A Deny the petition in writing, stating the reason(s) for denial; or

005.06B Initiate the negotiated rulemaking process as provided in these rules.

005.07 The decision of the agency with respect to a petition for a negotiated rulemaking procedure may be made in the form of a pleading or a letter clearly designated as the decision on the petition. The petitioner shall be served with a copy of the agency's final decision by certified mail, return receipt requested.

005.08 A decision by the agency with respect to a petition for a negotiated rulemaking procedure is not subject to judicial review, although nothing herein shall bar a judicial review if such is otherwise provided by law.

006 Notice of a Negotiated Rulemaking Committee; Comment; Applications for Membership. If the agency decides to go forward with the establishment of a negotiated rulemaking committee, the agency shall proceed with the following process.

006.01 The agency shall give notice to the Secretary of State, publish notice in a newspaper having general circulation in the state, and, as appropriate, publish notice in other newspapers and publications. The notice shall include:

006.01A An announcement that the agency intends to establish a negotiated rulemaking committee to negotiate and develop a proposed rule.

006.01B A description of the subject and scope of the rule to be developed and the issues to be considered.

006.01C A list of interests likely to be significantly affected by the proposed rule.

006.01D A list of the persons proposed to represent the affected interests and the agency.

006.01E A proposed schedule for completing the work of the committee.

006.01F An explanation of how a person may apply for or nominate another person for membership on the committee.

006.02 Persons interested in making comments upon the formation of a particular proposed negotiated rulemaking committee shall have thirty (30) days from the date of publication of the notice concerning that committee to do so. Such comments shall be in writing, and shall either be personally delivered to the agency or mailed to the agency at its business office.

006.03 Persons interested in applying for membership on a particular proposed negotiated rulemaking committee or in nominating other persons for such membership shall have thirty (30) days from the date of publication of the notice concerning that committee to do so. Persons making application for membership or nominations for membership shall do so on Attachment 2 which is attached to these regulations and made a part of these regulations by reference, and which shall be provided by the agency. Persons making application for membership or nominations for membership may also do so

by

letter, so long as the letter contains all of the information set out in Attachment 2 and is clearly delineated as an

application or nomination for membership on a specific negotiated rulemaking committee.

007 Establishment of a Negotiated Rulemaking Committee; Procedure.

After publication of notice and termination of the comment and membership application period, the agency will consider the comments and membership applications for a particular negotiated rulemaking committee and determine whether such a committee can adequately represent the interests of the persons that will be significantly affected by a proposed rule, and whether such a committee is feasible and appropriate in the particular rulemaking. In making the final determination as to creation of a negotiated rulemaking committee, the agency may use the services of a convenor as set out in Section 005 above. In making the final determination as to creation of a negotiated rulemaking committee, the agency and the agency director will apply the criteria set out in 004 above.

007.01 If, after such a determination, the agency decides that a negotiated rulemaking procedure is feasible, it shall establish a negotiated rulemaking committee as provided in these regulations. The committee will negotiate issues and develop proposed rules for use by the agency in formal rulemaking.

007.02 If, after such a determination, the agency decides not to establish a negotiated rulemaking committee, the agency shall:

007.02A Notify the persons who commented on, applied for membership on or nominated persons for membership on the particular negotiated rulemaking committee of the reasons for the decision not to establish such a committee.

007.02B Publish notice of the decision not to establish the particular negotiated rulemaking committee in a newspaper having general circulation in the state, and, as appropriate, in other newspapers and publications.

008 Negotiated Rulemaking Committee; membership. All members of

a negotiated rulemaking committee s' all participate in the deliberations of the committee with the same rights and responsibilities as other members.

008.01 Members of a negotiated rulemaking committee may include:

008.01A A person designated by the agency to represent the agency. This person shall be authorized to fully represent the agency in the discussions and negotiations of the committee.

008.01B Persons selected by the agency as willing and qualified to represent the interests that will be significantly affected by the proposed rule.

008.01C Persons contacted and recruited by the negotiated rulemaking committee itself by consensus as essential to the success of the negotiated rulemaking process.

008.01D Persons selected by the negotiated rulemaking committee by consensus upon committee review of a petition for membership or nomination as set out in subsection 008.02 below.

008.02 Persons who will be significantly affected by a proposed rule and who believe that their interests will not be adequately represented by any person on a negotiated rulemaking committee may petition for or nominate another person for membership on the negotiated rulemaking committee.

008.02A Each petition or nomination for committee membership shall be in writing and be submitted to the negotiated rulemaking committee by delivering or mailing the same to the agency. All such petitions or nominations shall include:

008.02A1 Identification of the applicable negotiated rulemaking proceeding.

008.02A2 The name of the petitioner or nominee, and a description of the interests the person represents.

008.02A3 Evidence that the petitioner or nominee is authorized to represent parties related to the interests the person proposes to represent.

008.02A4 A written commitment that the petitioner or nominee will actively participate in good faith in the development of the rule under consideration.

008.02A5 An explanation of reasons that the persons already on the negotiated rulemaking committee do not adequately represent the interests of the person submitting the petition or nomination.

008.02B Persons wishing to file such a petition for membership or nomination to a negotiated rulemaking committee may use the form attached hereto as Attachment 3. Attachment 3 is made a part of these regulations by reference. Persons wishing to file such a petition for membership or nomination to a negotiated rulemaking committee may also do so by letter, provided that the letter contains the information set forth above.

008.02C Upon receiving a petition for membership or nomination to a particular negotiated rulemaking committee, the committee in question shall decide, by consensus at its next meeting, whether or not to expand its membership.

009 Negotiated rulemaking committee; operation. A negotiated rulemaking committee established under these rules shall consider the matter proposed by the agency for consideration and shall attempt to reach consensus concerning a proposed rule and any other matter the committee determines is relevant to the proposed rule.

009.01 A negotiated rulemaking committee may adopt procedures or ground rules for the operation of the committee consistent with these rules and the pertinent Nebraska

statutes.

009.02 The agency shall provide appropriate administrative support to a negotiated rulemaking committee including technical assistance and support.

009.03 The person representing the agency on a negotiated rulemaking committee shall participate in the deliberations of the committee with the same rights and responsibilities as other members of the committee and shall be authorized to fully represent the agency in the discussions and negotiations of the committee.

009.04 If a negotiated rulemaking committee achieves consensus on a proposed rule at the conclusion of the negotiations, the committee shall transmit to the agency a report containing the proposed rule.

009.05 If a negotiated rulemaking committee does not reach a consensus on the proposed rule, the committee shall transmit to the agency a report specifying areas in which the committee reached consensus and the issues that remain unresolved. The committee may include in the report any other information, recommendations, or materials that the committee considers appropriate. Any member of the committee may include as an addendum to the report additional information, recommendations or materials.

010 Facilitators; selection; duties. A facilitator shall be selected to assist a negotiated rulemaking committee with its duties.

010.01 The agency may nominate a person to serve as a facilitator for the negotiations of a negotiated rulemaking committee, subject to the approval of the committee by consensus. If the committee does not approve the agency's nomination for facilitator, the agency shall submit a substitute nomination. If the committee does not approve the substitute nomination of the agency for facilitator, the committee shall select, by consensus, a person to serve as facilitator.

010.02 The agency may employ or contract for an

organization or an individual to serve as a facilitator for a negotiated rulemaking committee or the agency may use the services of a state employee to act as a facilitator. A person designated by the agency to represent it on a negotiated rulemaking committee with respect to substantive issues may not serve as the facilitator. A facilitator shall not have a financial or other interest that would preclude him or her from serving in an impartial and independent manner. The agency shall determine whether a person under consideration for facilitator has such an interest. A person disqualified under this criterion shall be dropped from further consideration.

010.03 A facilitator approved or selected by a committee shall:

010.03A Preside at the meetings of the committee in an impartial manner.

010.03B Impartially assist members in conducting discussions and negotiations and achieving consensus.

010.03C Manage the keeping of minutes and records.

011 Negotiated rulemaking committee; expenses. Members of a negotiated rulemaking committee shall be responsible for their own expenses of participation. However, the agency may pay for a committee member's actual and necessary expenses incurred in serving on the committee as provided in sections 81-1174 through 81-1177 and a reasonable per diem rate of compensation if:

011.01 The committee member certifies a lack of adequate financial resources to participate on the committee using the form at Attachment 4 which is attached to these regulations and made a part of them by reference; and,

011.02 The agency determines that the committee member's participation is necessary to assure an adequate representation of the interests of the members.

012 Grants or gifts. The agency may accept grants or gifts from

any source to fund a negotiated rulemaking process if:

012.01 Information on the name of the person giving the grant or gift and the amount of the grant or gift is available to the public.

012.02 The grant or gift is given to and accepted by the agency without placing any condition on the membership of a committee or the outcome of the negotiated rulemaking process.

012.03 There is a consensus among the members of the negotiated rulemaking committee that the acceptance of the grant or gift will not diminish the integrity of the negotiated rulemaking process.013 Negotiated rulemaking committee;
termination. A negotiated rulemaking committee shall terminate upon the adoption of the final rule under consideration by the agency pursuant to the APA, unless the agency, after consulting the committee, or the committee itself specifies an earlier termination date.

014 Negotiated rulemaking procedure; judicial review. Any action of the agency relating to establishing, assisting or terminating a negotiated rulemaking committee under the Negotiated Rulemaking Act shall not be subject to judicial review, except that nothing in this section shall bar judicial review if such judicial review is otherwise provided by law.

261 NAC 1 - ATTACHMENT 1
SAMPLE

BEFORE THE NEBRASKA NATURAL RESOURCES COMMISSION
STATE OF NEBRASKA

In the Matter of [insert statute)
numbers or name] by [insert name) Petition for Negotiated
of Petitioner]) Rulemaking

COMES NOW the petitioner, [insert name of Petitioner],

according to the Nebraska Negotiated Rulemaking Act and according to the Nebraska Natural Resources Commission's rules and regulations for Petitions for Negotiated Rulemaking, and requests that the Nebraska Natural Resources Commission establish a negotiated rulemaking committee as set forth in this Petition.

In support of this request, the Petitioner states as follows:

1. The Nebraska Natural Resources Commission administers the provisions of [insert sections of the statutes or legislative bill numbers for which negotiated rulemaking is sought], and is responsible for development of rules and regulations to implement these statutes.

2. Petitioner seeks a negotiated rulemaking procedure to [check one]:

- develop new rules
 amend existing rules, specifically ____ NAC ____,
entitled _____.
 repeal certain existing rules, specifically ____
NAC ____, entitled _____.

3. A negotiated rulemaking committee should be established to negotiate and develop rules on each of the following issues concerning the statute(s), legislative bill(s) or regulation(s) identified above [identify each issue as to each statute, legislative bill or regulation and the general scope of the rulemaking proposed]:

4. The facts surrounding each of the issues listed in paragraph 3 above are as follows:

5. Establishment of a negotiated rulemaking committee would be in the public interest under each of the following criteria based upon the information the Petitioner hereby submits.

A. There is a need for rulemaking on the issue(s) identified above because:

B. There are a limited number of identifiable interests that will be significantly affected by the rule, including the following interests:

C. There is a reasonable likelihood that a negotiated rulemaking committee can be convened with a balanced representation of people (1) who can adequately represent the interests identified above and (2) are willing to negotiate in good faith to reach a consensus on the proposed rule, as shown by the following:

D. There is a reasonable likelihood that a committee will reach a consensus on the proposed rule within a fixed period of time because:

E. The use of this procedure will not unreasonably delay formal rulemaking and issuance of a final rule because:

F. [Optional for response by Petitioner] The Nebraska Natural Resources Commission should commit its resources, including technical assistance, to such a committee because:

G. [Optional for response by Petitioner] The Nebraska Natural Resources Commission should, to the maximum extent possible consistent with its legal obligations, use a consensus of such a committee as the basis for a rule to be adopted under the Administrative Procedure Act because:

6. The following persons will be significantly affected by any rule which might result from the negotiated rulemaking procedure which is the subject of this Petition [identify such persons by name and address where possible]:

7. The following persons may be willing and qualified to

represent the interests that will be significantly affected by any rule which might result from the negotiated rulemaking procedure which is the subject of this Petition [identify such persons by name and address where possible]:

8. Petitioner offers the following additional information for use by this agency in consideration of this request [if any]:

9. Petitioner has attached the following documents in support of this request [list all documents attached]:

Dated this _____ day of _____, 19 _____ .

Signature of Petitioner

List Petitioner's name [typed or printed]
List Petitioner's full mailing address
List Petitioner's telephone number [including
 area code]

261 NAC 1 - ATTACHMENT 2
SAMPLE

BEFORE THE NEBRASKA NATURAL RESOURCES COMMISSION
STATE OF NEBRASKA

In the Matter of the Negotiated)
Rulemaking Committee for) Application/Nomination
[Insert name of the proposed) for membership
Negotiated Rulemaking Committee],) on the committee.
____ NAC ____)

APPLICATION FOR MEMBERSHIP
(complete if applicable)

20 75

1. The undersigned person (the applicant) hereby applies for membership on the above-referenced negotiated rulemaking committee proposed by this agency.

Name of applicant (typed or printed)

Full address of applicant

Applicant's telephone number
(including area code)

2. The applicant represents the following identifiable interest which will be significantly affected by the proposed administrative rule to be considered by the above-referenced negotiating rulemaking committee:

3. The applicant is authorized to represent parties related to the interest listed above because:

4. The applicant can adequately represent the parties and interest listed above because:

5. In support of his or her application, the applicant has attached the following documents to this petition (list all attachments):

6. By signing this application, the applicant hereby certifies that he or she will represent the interest identified above to the best of his or her ability in the negotiation process, and that he or she is willing to actively negotiate in good faith to reach a consensus on the proposed rule to be considered by the above-referenced negotiated rulemaking committee.

_____ Date

Signature of Applicant

NOMINATION FOR MEMBERSHIP
(complete if applicable)

1. The undersigned person (the nominating party) hereby nominates the following person (the nominee) for membership on the above-referenced negotiated rulemaking committee proposed by this agency.

Name of nominee (typed or printed)

Full address of nominee

Nominee's telephone number
(including area code)

2. The nominee represents the following identifiable interest which will be significantly affected by the proposed administrative rule to be considered by the above-referenced negotiated rulemaking committee:

3. The nominee is authorized to represent parties related to the interest listed above because:

4. The nominee can adequately represent the interest and parties listed above because:

5. In support of the nomination of the nominee, the nominating party has attached the following documents to this petition (list attachments):

6. The nominating party believes that the nominee will represent the interest identified above to the best of his or her ability and that the nominee is willing to negotiate in good faith to reach a consensus on the proposed rule to be considered by the above-referenced negotiated rulemaking committee because:

_____ Date

Signature of Nominating Party

Name of nominating party
(printed or typed)

Full address of nominating party

Telephone number of nominating party
(include area code)

261 NAC 1 - ATTACHMENT 3
SAMPLE

BEFORE THE NEBRASKA NATURAL RESOURCES COMMISSION
STATE OF NEBRASKA

In the Matter of the Negotiated) Application/Nomination
Rulemaking Committee for) for membership
[Insert name of the proposed) on the committee
Negotiated Rulemaking Committee],) (interest inadequately
____ NAC ____ .) represented)

APPLICATION FOR MEMBERSHIP
(complete if applicable)

33 78

1. The undersigned person (the applicant) hereby applies for membership on the above-referenced negotiated rulemaking committee.

Name of applicant (typed or printed)

Full address of applicant

Applicant's telephone number
(including area code)

2. The applicant represents the following identifiable interest which will be significantly affected by the proposed administrative rule being considered by the above-referenced negotiating rulemaking committee:

3. The applicant is authorized to represent parties related to the interest listed above because:

4. The applicant can adequately represent the parties and interest listed above because:

5. Reasons that persons already serving on the above-referenced negotiated rulemaking committee do not adequately represent the interest listed in paragraph 2 above include:

6. In support of his or her application, the applicant has attached the following documents to this petition (list all attachments):

7. By signing this application, the applicant hereby certifies that he or she will represent the interest identified above to the best of his or her ability in the negotiation process, and that he or she is willing to actively negotiate in good faith to reach a consensus on the proposed rule being considered by the

above-referenced negotiated rulemaking committee.

_____ Date

Signature of Applicant

NOMINATION FOR MEMBERSHIP
(complete if applicable)

1. The undersigned person (the nominating party) hereby nominates the following person (the nominee) for membership on the above-referenced negotiated rulemaking committee.

Name of nominee (typed or printed)

Full address of nominee

Nominee's telephone number
(including area code)

2. The nominee represents the following identifiable interest which will be significantly affected by the proposed administrative rule being considered by the above-referenced negotiated rulemaking committee:

3. The nominee is authorized to represent parties related to the interest listed above because:

4. The nominee can adequately represent the interest listed above because:

5. Reasons that persons already serving on the above-referenced negotiated rulemaking committee do not adequately represent the interest listed in paragraph 2 above include:

6. In support of the nomination of the nominee, the nominating party has attached the following documents to this petition (list all attachments):

7. The nominating party believes that the nominee will represent the interest identified above to the best of his or her ability and that the nominee is willing to actively negotiate in good faith to reach a consensus on the proposed rule to be considered by the above-referenced negotiated rulemaking committee because:

_____ Date

Signature of Nominating Party

Name of nominating party
(printed or typed)

Full address of nominating party

Telephone number of nominating party
(include area code)

261 NAC 1 - ATTACHMENT 4
SAMPLE

BEFORE THE NEBRASKA NATURAL RESOURCES COMMISSION
STATE OF NEBRASKA

CHAPTER 2

Petitioning For Rulemaking

Adopted 12/7/95

NEBRASKA ADMINISTRATIVE CODE

TITLE 261 --- RULES OF AGENCY PROCEDURE

CHAPTER 2 --- PETITIONING FOR RULEMAKING

TABLE OF CONTENTS

SUBJECT or TITLE	STATUTORY AUTHORITY	CODE SECTION
Rulemaking	Section 84-907.08, R.R.S. 1994	Ch. 2

NEBRASKA ADMINISTRATIVE CODE

TITLE 261 - RULES OF AGENCY PROCEDURE

CHAPTER 2 - PETITIONING FOR RULEMAKING

001 Rulemaking Petition.

001.01 Petition. Any person may petition the Nebraska Natural Resources Commission requesting the promulgation, amendment, or repeal of a rule or regulation.

001.02 Form. The petition shall:

001.02A. Be clearly designated as a petition for a rules change;

001.02B. In the case of a proposed new rule or amendment of an existing rule, shall set forth the desired rule in its entirety;

001.02C. In the case of a petition for the repeal of an existing rule, such shall be stated and the rule proposed to be repealed shall either be set forth in full or shall be referred to by agency rule number;

001.02D. Describe the reason for the rules change

001.02E. Include an address and telephone where the petitioner can be reached during regular work hours; and

001.02F. Be signed by:

001.02F(1). The petitioner or his or her attorney in which case the attorney shall also state his or her address and telephone number;

001.02F(2). A duly authorized officer of the petitioner, if petitioner is a corporation or other legal entity.

002 Petition Consideration and Disposition.

002.01. Within sixty (60) days after submission of a petition, the agency shall:

002.01A. Deny the petition in writing, stating its reasons therefor;

002.01B. Initiate rulemaking or regulationmaking proceedings in accordance with the Administrative Procedure Act; or

002.01C. If otherwise lawful, adopt a rule or regulation.

NEBRASKA ADMINISTRATIVE CODE

TITLE 261, NEBRASKA ADMINISTRATIVE CODE

NEBRASKA NATURAL RESOURCES COMMISSION

Rules of Agency Procedure

CHAPTER 3

Regulations and Procedures Governing
Agency Declaratory Orders

Adopted 12/7/95

NEBRASKA ADMINISTRATIVE CODE

TITLE 261 --- RULES OF AGENCY PROCEDURE

CHAPTER 3 --- REGULATIONS AND PROCEDURES GOVERNING AGENCY
DECLARATORY ORDERS

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SUBJECT	STATUTORY AUTHORITY	CODE SECTION
Appeal of Declaratory Order	Section 84-912.01, R.R.S. 1994	010
Circumstances Under Which Agency Will Not Issue Declaratory Order	Section 84-912.01, R.R.S. 1994	009
Declaratory Order Proceedings	Section 84-912.01, R.R.S. 1994	007
Definitions	Section 84-901, R.R.S. 1994	002
Disposition of the Petition	Section 84-912.01, R.R.S. 1994	005
General Information	Section 84-912.01, R.R.S. 1994	001
Intervention in	Sections 84-912.01,	

Proceedings	84-912.02, R.R.S. 1994	006
Issuance of Declaratory Order	Section 84-912.01, R.R.S. 1994	008
Petition for Declaratory Order	Section 94-912.01, R.R.S. 1994	003
Submission & Service of Petition	Section 84-912.01, R.R.S. 1994	004

NEBRASKA ADMINISTRATIVE CODE

TITLE 261 --- RULES OF AGENCY PROCEDURE

CHAPTER 3 --- REGULATIONS AND PROCEDURES GOVERNING AGENCY
DECLARATORY ORDERS

NUMERICAL TABLE OF CONTENTS

SUBJECT	STATUTORY AUTHORITY	CODE SECTION
General Information	Section 84-912.01, R.R.S. 1994	001
Definitions	Section 84-901, R.R.S. 1994	002
Petition for Declaratory Order	Section 84-912.01, R.R.S. 1994	003
Submission & Service of Petition	Section 84-912.01, R.R.S. 1994	004
Disposition of the Petition	Section 84-912.01, R.R.S. 1994	005
Intervention in Proceedings	Sections 84-912.01, 84-912.02, R.R.S. 1994	006
Declaratory Order	Section 84-912.01,	007

Proceedings	R.R.S. 1994	
Issuance of Declaratory Order	Section 84-912.01, R.R.S. 1994	008
Circumstances Under Which Agency Will Not Issue Declaratory Order	Section 84-912.01, R.R.S. 1994	009
Appeal of Declaratory Order	Section 84-912.01, R.R.S. 1994	010

NEBRASKA ADMINISTRATIVE CODE

TITLE 261 NAC --- RULES OF AGENCY PROCEDURE

CHAPTER 3 --- REGULATIONS AND PROCEDURES GOVERNING AGENCY
DECLARATORY ORDERS

001 General Information.

001.01 Scope of this Chapter. This chapter pertains solely to the procedures to be used by any person or entity seeking issuance of a declaratory order by the agency.

001.02 Related Regulations. In addition to this Chapter, related regulations pertaining to administrative procedures before this agency are: 261 NAC Chapter 1, Procedures for Negotiated Rulemaking, 261 NAC Chapter 2, Petitioning for Rulemaking, and 261 NAC Chapter 4, Rules of Practice and Procedure for Hearings in Contested Cases Before an Agency.

002 Definitions. As used in this chapter:

002.01 Agency shall mean the Nebraska Natural Resources Commission, the agency created by section 2-1504, R.R.S. 1943.

- 002.02 Agency director shall mean the person holding the position of Director of Natural Resources created by section 2-1504.03, R.R.S. 1943.
- 002.03 Argument shall mean the oral statement of the petitioner or any other party which explains his or her view of the facts and issue to be decided, the law applicable to the question presented, and the reasoning that connects the facts and law.
- 002.04 Contested case shall mean a proceeding before the agency in which the legal rights, duties, or privileges of specific parties are required by law or constitutional right to be determined after hearing before the agency.
- 002.05 Declaratory order proceeding shall mean a proceeding initiated by a petitioner seeking issuance of a binding order by the agency as to the applicability of specified circumstances to a statute, rule, regulation, or order within the primary jurisdiction of the agency.
- 002.06 Hearing officer shall mean the person or persons conducting a declaratory order proceeding pursuant to the Administrative Procedure Act, whether designated as the presiding officer, administrative law judge, or some other title.
- 002.07 Intervenor(s) shall mean persons, political subdivisions, corporations, organizations, or other entities who have or claim to have any interest, legal right, duty, privilege, or immunity, which would be directly affected by the agency's issuance of a binding declaratory order.
- 002.08 Necessary party shall mean a person who or an entity which has a specific interest in the applicability of the statute, rule,

regulation, or order, as distinguished from a general interest such as may be the concern of the public at large. A necessary party is one which is or would be adversely affected in a legally cognizable way by the uncertainty sought to be resolved.

002.09 Parties shall mean persons, political subdivisions, corporations, organizations, or other entities subject to the jurisdiction of the agency who are involved in a declaratory order proceeding according to the procedures set forth in this chapter.

002.10 Petition shall mean the document filed in accordance with section 003 of this chapter to initiate a declaratory order proceeding.

002.11 Petitioner(s) shall mean a party or parties who have filed a petition with the agency seeking issuance of a declaratory order.

002.12 Pleading shall mean any written petition, answer, or motion used in any declaratory order proceeding before the agency as set forth in this chapter.

003 Petition for Declaratory Order.

003.01 Generally. A request for a declaratory order must be made by a petition that meets the requirements of section 003.

003.02 Who May File. Any person may petition the agency for issuance of a declaratory order as to the applicability to specified circumstances of a statute, rule, regulation, or order which is within the primary jurisdiction of the agency.

003.03 When Orders Appropriate. A declaratory order may be requested on the applicability of a statute, rule, regulation, or order enforced

by the agency. "Applicability" refers to the appropriateness of the relation of the law to the person, property, or state of facts, or its relevance under the circumstances given.

It may include such questions as whether the law applies at all, to whom it applies, when it applies, how it applies, or which law applies. Considerations as to whether issuance of a declaratory order is appropriate include:

003.03A A declaratory order may be requested only on the applicability of existing statutes and rules and regulations.

003.03B A declaratory order may be requested to obtain a determination of proposed conduct, not to obtain a determination of the effect of conduct that has already occurred.

003.03C A declaratory order is not a mechanism for review or appeal of a decision made by the agency in a contested case.

003.03D A declaratory order may not be requested to obtain a declaration by the agency that a statute or regulation is unconstitutional or that a regulation of the agency is invalid.

003.03E A declaratory order may not be issued by the agency that would substantially prejudice the rights of a person who would be a necessary party and who does not consent in writing to the determination of the matter by a declaratory order proceeding.

003.04 Form of Petition. A petition for declaratory order shall be in the form of either a pleading or letter which shall contain each of the following:

003.04A A caption, which shall include:

003.04A1 The venue: BEFORE THE NEBRASKA
NATURAL RESOURCES COMMISSION,
STATE OF NEBRASKA;

003.04A2 A heading specifying the
subject matter and the name of
the petitioner; and

003.04A3 The name of the pleading:
PETITION FOR DECLARATORY ORDER.

003.04B The statements required in subsection
003.05 of this chapter.

003.04C The signature of the petitioner, or when
represented by an attorney, the signature
of the attorney.

003.04D The name and address of the petitioner,
and when represented by an attorney, the
name, address, telephone number, and bar
number of the attorney.

003.04E Size and Paper. The petition shall be
made on white, letter-sized
(8-1/2" x 11") paper.

003.04F Print. The petition shall be legibly
typewritten, photostatically reproduced,
printed, or handwritten. If handwritten,
the petition must be written in ink.
Only one side of a page shall contain any
writing.

003.04G Attachments. Any documents attached to a
petition shall be securely fastened to
the pleading and shall meet the
requirements of 003.04E and 003.04F and,
when possible, be reproduced on 8-1/2" x
11" paper or placed in an 8-1/2" x 11"

envelope and clearly marked as an attachment to the petition.

- 003.05 Contents of Petition. To be considered, the petition shall include the following:
- 003.05A The name and address of the petitioner;
 - 003.05B The name and address of all persons or entities, known to the petitioner, who may have a specific interest in the applicability of the statute, rule, regulation, or order or who may be adversely affected by the issue sought to be resolved by the petitioner.
 - 003.05C The statute, rule, regulation, or order upon which the petitioner seeks issuance of a declaratory order;
 - 003.05D A detailed statement of all of the material facts and specific circumstances which apply to petitioner's request for issuance of a declaratory order;
 - 003.05E All propositions of law or contentions asserted by the petitioner;
 - 003.05F A demand for the relief to which the petitioner alleges entitlement. The petition shall state the petitioner's position as to how the agency should rule and why the agency should rule in the manner requested; and
 - 003.05G Any documents pertinent to the petition that the petitioner wishes to be considered by the agency.
- 003.06 The petition shall be subscribed and verified by the petitioner. If the petitioner is a corporation, political subdivision, or other entity, then the petition shall be subscribed

and verified by a duly authorized agent of the petitioning entity.

003.07 Sample Petition. The petitioner may use the sample form of a petition which is attached as "Appendix A" and incorporated within this chapter. The petitioner may also prepare a reasonable facsimile of "Appendix A" so long as the requirements of subsections 003.04, 003.05, and 003.06 of this chapter are satisfied.

003.08 Written Consents. The petitioner shall also attach to the petition any written consents obtained from any necessary party that the petition may be determined by use of a declaratory order proceeding.

004 Submission and Service of Declaratory Order Petition.

004.01 The original petition for declaratory order shall be filed with the agency director by mail or in person during the agency's normal business hours.

004.02 The petition shall be deemed as filed when it is actually received by the agency. The agency shall date stamp all petitions upon receipt.

004.03 At the same time the petition is filed with the agency, the petitioner shall serve a copy of the petition, by certified mail, return receipt requested, on all necessary parties, including all persons, political subdivisions, corporations, organizations, or other entities who are known to have or claim any interest, legal right, duty, privilege, or immunity which would be directly affected by issuance of a declaratory order in this matter by the agency.

005 Disposition of the Petition.

005.01 Generally. Upon the filing of a petition, the agency director may consider the petition, or delegate the matter to a designated hearing officer, board, or agency employee to consider the petition and recommend a decision to the agency director. In reviewing the petition, the agency may, in its discretion, do one or more of the following:

005.01A Require that additional information be submitted before the petition will be further considered;

005.01B Require a petitioner to provide notice to persons or entities who may be necessary parties and other persons that a request for a declaratory order has been filed with the agency;

005.01C Schedule a date, time, and location at which the petitioner and any other parties to the proceeding may make an oral presentation on the petition;

005.01D Consider the petition and any attachments without oral presentation.

005.02 Within thirty (30) days after the petition is filed, the agency shall, in writing:

005.02A Issue an order declaring the applicability of the statute, regulation, rule, or order in question to the specified circumstances; or

005.02B Agree to issue an order by a specified time declaring the applicability of the statute, regulation, rule, or order in question to the specified circumstances;

or

005.02C Set the matter for specified proceedings

as set forth in subsection 005.01 of this Chapter; or

005.02D Decline to issue a declaratory ruling, stating the reasons for the agency's decision.

005.03 Notwithstanding section 005.02 of this rule, the agency may determine at any time that it will not issue a declaratory order if issuance of an order under the circumstances would be contrary to any provisions of section 009 of this Chapter. The agency shall notify the petitioner and, if applicable, any intervenor or necessary party in writing when the agency determines not to issue a declaratory order.

006

Intervention in Declaratory Order Proceeding.

006.01 Intervention by any person or entity in a declaratory order proceeding shall be allowed when the following requirements are met:

006.01A. A petition for intervention must be submitted in writing to the agency. Copies must be mailed to all parties to the proceeding.

006.01B. The contents of the petition must be as specified in 006.02.

006.01C. The agency must determine that the interests of justice and the orderly and prompt conduct of the proceedings will not be impaired by allowing the intervention.

006.02 Contents of Petition. The petition for intervention shall be submitted to the agency, in writing, on 8 1/2" x 11" white paper, and shall include each of the following:

006.02A The statute, regulation, rule, or order that may apply to or effect the person, property, entity, or facts at issue in

the matter;

006.02B A statement of facts sufficient to show the intervenor's interest;

006.02C A statement of facts which demonstrate that the intervenor's legal rights, duties, privileges, immunities, or other legal interests may be substantially affected by the proceeding or that the intervenor may intervene pursuant to a provision of law;

006.02D All propositions of law or contentions asserted by the intervenor; and

006.02E A statement of the specific relief requested by the intervenor.

006.03 The agency may, at its discretion, invite any person or entity to file a petition for intervention.

006.04 The agency shall grant a petition for intervention if the requirements of section 006.01 and section 006.02 are satisfied.

006.05 The agency shall deny a petition for intervention upon determining that the interests of justice or the orderly and prompt conduct of the proceedings would be impaired by allowing the intervention.

006.06 The agency's decision to grant or deny a petition for intervention shall be in writing and served upon all parties.

007 Declaratory Order Proceedings.

007.01 Oral Argument, When. Oral argument shall be had only on specific order of the agency. A petitioner, intervenor, necessary party, or

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the agency may submit a motion for oral argument to the agency director. If opportunity for oral argument is granted, then argument shall be scheduled to be conducted not more than forty-five (45) days after filing of the petition. Petitioner and all other parties or, when represented, their attorneys, shall be served by the agency with a notice of the date, time, and location for oral argument. The agency shall provide each of the parties with notice of the proceeding not less than seven (7) days in advance of the scheduled date. Service shall be made by certified mail, return receipt requested.

007.02 Oral Argument, Procedure. Oral argument will be made before a hearing officer or before any representative of the agency who is authorized to render or to recommend a decision to the agency. The hearing officer or agency representative shall be in control of the proceeding and shall:

007.02A Identify the proceeding and introduce himself or herself and identify each party for the record;

007.02B Hear the oral argument of the petitioner, intervenor, or necessary parties;

007.02C Close the proceedings.

007.03 At the declaratory order proceeding, agency staff shall have the right to present oral argument.

007.04 The hearing officer or representative may impose reasonable time limits on the amount of time allocated to each party for oral argument.

007.05 The parties and agency staff may file briefs in support of their respective positions. The

hearing officer may fix the time and order of filing briefs and may direct that briefs be submitted prior to the date of oral argument.

007.06 The oral argument may be conducted either in person or by telephone conference call.

008 Issuance of Declaratory Order.

008.01 The agency shall issue its declaratory order within sixty (60) days of the date on which the petition was filed.

008.02 The declaratory order shall be in writing and shall include the following:

008.02A The names of all parties to the proceeding upon which the order is based;

008.02B The facts upon which the order is based;

008.02C The statute, regulation, rule, or order at issue in the matter;

008.02D The agency's conclusion as to the applicability of the statute, regulation, rule, or order to the facts;

008.02E The agency's conclusion as to the legal effect or result of applying the statute, regulation, rule, or order to the facts;
and

008.02F The reasons relied upon by the agency to support its conclusions.

008.03 A copy of the declaratory order shall be served upon each party by certified mail, return receipt requested.

008.04 Effect of Declaratory Order. A declaratory order shall have the same status and binding effect as any other order issued in a

contested case.

008.05 No Response within 60 Days. If the agency has not issued a declaratory order within sixty (60) days after the petition has been filed, then the petition shall be deemed to have been denied by the agency.

009 Circumstances Under Which Agency will not Issue Declaratory Orders.

009.01 Grounds upon which the agency shall refuse to issue a declaratory order include, but are not limited to, the following:

009.01A The petition requests a declaratory order on a matter that is outside the scope of authority of the agency;

009.01B The petition requests review or appeal of a decision made by the agency in a contested case;

009.01C The petition requests a declaratory order on the effect of past conduct;

009.01D An investigation for purposes of a formal adjudication, a contested case, or a petition to issue, amend, or repeal regulations is pending before the agency involving the petitioner on substantially the same or similar facts or issues raised in the petition;

009.01E The petition seeks a declaration that a statute or rule or regulation is unconstitutional or invalid;

009.01F The issue raised in the petition has been settled by a change in circumstances or other means so as to render moot the need for a declaratory order;

009.01G An order would substantially prejudice

the rights of a person or entity who would be a necessary party and who does not consent in writing to the determination of the matter by a declaratory order proceeding;

009.01H An order would not resolve the controversy or uncertainty; or

009.01I The question posed or facts presented are insufficiently specific, overly broad, or are otherwise inappropriate as a basis upon which to decide the matter.

009.02 Grounds upon which the agency may determine to refuse to issue a declaratory order include, but are not limited to, the following:

009.02A Refusal is necessary to assure adequate allocation of agency resources are available for issuing rulings on petitions raising questions of greater urgency or significance;

009.02B The question presented is of such complexity that the agency has had insufficient opportunity or resources to develop a fully matured ruling;

009.02C The petitioner fails to submit any additional information requested by the agency or submits such information after the date established by the agency;

010 Appeal. A declaratory order is subject to review in the manner provided for review of contested cases by the Administrative Procedure Act, Section 84-901 to 84-920, R.R.S. 1994.

Appendix "A"

BEFORE THE NEBRASKA NATURAL RESOURCES COMMISSION
STATE OF NEBRASKA

In the matter of)
the application of [name]) PETITION FOR
) DECLARATORY ORDER
)

1. Petitioner's name and address;
2. The name and address of all persons who or entities which may have a specific interest in the applicability of the statute, rule, regulation, or order, or who may be adversely affected by the issue sought to be resolved;
3. All material facts and specific circumstances;
4. All rules of law which apply;
5. Petitioner's demand for relief;

DATED on this day of , 199 .

VERIFICATION

STATE OF)
) ss.
COUNTY OF)

[name] , being first duly sworn, states that he/she is the petitioner/petitioner's agent in the above entitled matter; that he/she has read the foregoing Petition For Declaratory Order, and that the allegations of fact therein are true.

[Petitioner's signature]

SUBSCRIBED and sworn to before me on this day of
 , 199 .

NOTARY SEAL

[Notary signature]

NEBRASKA ADMINISTRATIVE CODE

TITLE 261, NEBRASKA ADMINISTRATIVE CODE

NEBRASKA NATURAL RESOURCES COMMISSION

Rules of Agency Procedure

CHAPTER 4

Rules of Practice and Procedure for Hearings
in Contested Cases

Adopted 12/7/95

NEBRASKA ADMINISTRATIVE CODE

TITLE 261 --- RULES OF AGENCY PROCEDURE

CHAPTER 4 --- RULES OF PRACTICE AND PROCEDURE FOR HEARINGS
IN

CONTESTED CASES

ALPHABETICAL TABLE OF CONTENTS

SUBJECT OR TITLE	STATUTORY AUTHORITY	CODE SECTION
Appeal	Section 84-917, R.R.S. 1994	Section 009
Commencement of Contested Case	Section 84-913, R.R.S. 1994	Section 004

Decision and Order 1994	Section 84-915, R.R.S.	Section 008
Definitions 1994	Section 84-901, R.R.S.	Section 001
Ex parte Communications 1994	Section 84-914, R.R.S.	Section 002
Hearing of Contested Case	Sections 84-913, 84-914, R.R.S. 1994	Section 007
Hearing Officer 1994	Section 84-914, R.R.S.	Section 005
Intervention	Section 84-912.02, R.R.S. 1994	Section 003
Prehearing Matters	Sections 84-913, 84-914, R.R.S. 1994	Section 006

NEBRASKA ADMINISTRATIVE CODE

TITLE 261 --- RULES OF AGENCY PROCEDURE

CHAPTER 4 --- RULES OF PRACTICE AND PROCEDURE FOR HEARINGS IN

CONTESTED CASES

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Definitions	Section 84-901, R.R.S. 1994	Section 001
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Intervention	Section 84-912.02, R.R.S. 1994	Section 003

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NEBRASKA ADMINISTRATIVE CODE

TITLE 261 --- NAC RULES OF AGENCY PROCEDURE

Chapter 4 --- RULES OF PRACTICE AND PROCEDURE FOR HEARINGS IN CONTESTED CASES

001 Definitions. The following definitions shall apply as used throughout Chapter 4 of these rules and regulations.

001.01. Agency shall mean the Nebraska Natural Resources Commission, the agency created by section 2-1504, R.R.S. 1943.

001.02. Agency Director shall mean the person holding the position of Director of Natural Resources created by section 2-1504.03, R.R.S. 1943.

001.03. Contested case shall mean a proceeding before the agency in which the legal rights, duties, or privileges of specific parties are required by law or constitutional right to be determined after an agency

hearing.

001.04. Ex parte communication shall mean an oral or written communication which is not on the record in a contested case with respect to which reasonable notice to all parties was not given. Ex parte communication shall not include:

001.04A. Communications which do not pertain to the merits of a contested case;

001.04B. Communications required for the disposition of ex parte matters as authorized by law;

001.04C. Communications in a ratemaking or rulemaking proceeding; and

001.04D. Communications to which all parties have given consent.

001.05. Hearing officer shall mean the person or persons conducting a hearing, contested case, or other proceeding pursuant to the Administrative Procedure Act, whether designated as the presiding officer, administrative law judge, or some other title designation.

001.06. Party means the person by or against whom a contested case is brought or a person allowed to intervene in a contested case.

001.07. Petition means the initial document filed by or with the agency that sets forth a claim and request for agency action.

002 Prohibitions against ex parte communications.

002.01. Prohibitions; when applicable. The prohibitions found in this section shall apply beginning at the time notice for hearing is given.

002.02. Prohibitions; to whom applicable.

002.02A. Parties and public. No party in a contested

case or other person outside the agency having an interest in the contested case shall make or knowingly cause to be made an ex parte communication to the hearing officer or to the agency director or any employee or commission member who is or may reasonably be expected to be involved in the decisionmaking process of the contested case.

002.02B. Persons in decisionmaking roles. No hearing officer or the agency director or any employee or commission member who is or may reasonably be expected to be involved in the decisionmaking process of the contested case shall make or knowingly cause to be made an ex parte communication to any party in a contested case or other person outside the agency having an interest in the contested case.

002.02C. Investigators. The agency director and any employee or commission member engaged in the investigation or enforcement of a contested case shall not make or knowingly cause to be made an ex parte communication to a hearing officer or the agency director or any employee or commission member who is or may reasonably be expected to be involved in the decisionmaking process of the contested case.

002.03. Disclosure of contacts. The hearing officer, the agency director and any employee or commission member who is or may reasonably be expected to be involved in the decisionmaking process of the contested case who receives or who makes or knowingly causes to be made an ex parte communication set forth in subsections 002.02A through 002.02C shall file in the record of the contested case:

002.03A. All such written communications;

002.03B. Memoranda stating the substance of all such oral communications; and

002.03C. All written responses and memoranda stating the substance of all oral responses to all the ex parte communications.

002.03D. The filing shall be made within two working days of the receipt or making of the ex parte communication. Notice of the filing, with an opportunity to respond, shall be given to all parties of record.

002.03E. Filing and notice of filing provided under subsection 002.03D shall not be considered on the record and reasonable notice for purposes of the definition of ex parte communication.

003 Intervention in a contested case.

003.01. Intervention in a contested case shall be allowed when the following requirements are met:

003.01A. A petition for intervention must be submitted in writing to the hearing officer or designee at least five days before the hearing. Copies must be mailed by the petitioner for intervention to all parties named in the hearing officer's notice of the hearing;

003.01B. The petition must state facts demonstrating that the petitioner's legal rights, duties, privileges, immunities, or other legal interests may be substantially affected by the proceeding or that the petitioner qualifies as an intervenor under any provision of law;
and

003.01C. The hearing officer or designee must determine that the interests of justice and the orderly and prompt conduct of the proceedings will not be impaired by allowing the intervention.

003.02. The hearing officer or designee may grant a petition for intervention at any time upon determining that the intervention sought is in the interests of justice and will not impair the orderly and prompt conduct of the proceedings.

003.03. If a petitioner qualifies for intervention, the hearing officer or designee may impose conditions upon the intervenor's participation in the proceedings, either at the time that intervention is granted or at any subsequent time.

Those conditions may include:

003.03A. Limiting the intervenor's participation to designated issues in which the intervenor has a particular interest demonstrated by the petition;

003.03B. Limiting the intervenor's use of discovery, cross-examination, and other procedures so as to promote the orderly and prompt conduct of the proceedings; and

003.03C. Requiring two or more intervenors to combine their presentation of evidence and argument, cross-examination, discovery, and other participation in the proceedings.

003.04. The hearing officer or designee, at least 24 hours before the hearing, shall issue an order granting or denying each pending petition for intervention, specifying any conditions and briefly stating the reasons for the order.

003.04A. The hearing officer or designee may modify the order at any time, stating the reasons for the modification.

003.04B. The hearing officer or designee shall promptly give notice of an order granting, denying, or modifying intervention to the petitioner for intervention and to all parties.

004 Commencement of a contested case.

004.01. The contested case begins with the filing of a petition and request for hearing, if applicable, with the agency. The petition is the initial document filed by or with the agency that sets forth a claim and request for agency action.

004.02. The parties to a contested case shall be the persons by or against whom a contested case is brought and any person allowed to intervene in such case.

004.03. A party may appear on his or her own behalf in a

contested case proceeding or may be represented by an attorney or other representative as permitted by law.

004.04. The pleadings in a contested case may include a petition, answer, reply, notice, motion, stipulation, objection or order or other formal written document filed in a proceeding before the agency. Any pleading filed in a contested case shall meet the following requirements:

004.04A. The pleading shall contain a heading specifying the name of the agency and the title or nature of the pleading, shall state material factual allegations and state concisely the action the agency is being requested to take, shall contain the name and address of the petitioner, and shall be signed by the party filing the pleading, or when represented by an attorney, the signature of that attorney.

004.04A1. Attorneys shall also include their address, telephone number and bar number.

004.04A2. The initial petition shall also contain the name and address of the respondent.

004.04B. All pleadings shall be made on white, letter-sized (8 $\frac{1}{2}$ x 11) paper and shall be legibly typewritten, photostatically reproduced, printed or handwritten. If handwritten, a pleading must be written in ink.

004.05. All pleadings shall be filed with the agency at its official office. Filing may be accomplished by personal delivery or mail and will be received during regular office hours of the agency.

004.06. The petitioner shall serve a copy of the petition on each respondent listed in the petition personally or by first-class or certified mail. Written proof of such service shall be filed with the agency. Each respondent who chooses to file a responsive pleading must do so within 20 days from the date of personal service or the date of agency mailing of the petition.

004.07. All pleadings subsequent to the initial petition

shall be served by the party filing such pleading upon all attorneys of record or other representatives of record and upon all unrepresented parties. Service shall be made personally or by first-class or certified mail. Written proof of such service shall be filed with the agency.

004.08. Unless state law provides that a hearing is not required, a hearing date shall be set by the agency in accordance with statutory requirements. A written notice of the time and place of hearing and the name of the hearing officer, if known, shall be served by the agency upon all attorneys of record or other representatives of record and upon all unrepresented parties. The notice must include a proof of such service and will be filed with the agency.

004.09. In computing time prescribed or allowed by chapter 4 of these rules and regulations or by any applicable statute in which the method of computing time is not specifically provided, days will be computed by excluding the day of the act or event and including the last day of the period. If the last day of the period falls on a Saturday, Sunday, or state holiday, the period shall include the next working day.

005 Hearing officer; criteria.

005.01. The agency may delegate to a hearing officer the functions of conducting a prehearing conference and/or a hearing and submitting a recommended decision to the agency.

005.02. A person who has served as investigator, prosecutor, or advocate in a contested case or in its prehearing stage may not serve as hearing officer or assist or advise a hearing officer in the same proceeding except as provided in subsection 005.04.

005.03. A person who is subject to the authority, direction, or discretion of one who has served as investigator, prosecutor, or advocate in a contested case or in its prehearing stage may not serve as hearing officer or advise a hearing officer in the same proceeding except as provided in subsection 005.04.

005.04. If all parties consent, a person who has served as, or who is subject to the authority, direction, or discretion of one who has served as investigator, prosecutor, or advocate in a contested case or in its prehearing stage may assist a hearing officer in the preparation of orders.

005.05. A person who has participated in a determination of probable cause or other equivalent preliminary determination in a contested case may serve as hearing officer or assist or advise a hearing officer in the same proceeding.

005.06. A person may serve as hearing officer at successive stages of the same contested case.

006 Prehearing Procedures.

006.01. Prehearing conferences and orders. A hearing officer designated to conduct a hearing may determine, subject to the agency's rules and regulations, whether a prehearing conference will be conducted. If a prehearing conference is not held, a hearing officer for the hearing may issue a prehearing order, based on the pleadings, to regulate the conduct of the proceedings.

006.01A. If a prehearing conference is conducted:

006.01A1. The hearing officer shall promptly notify the agency of the determination that a prehearing conference will be conducted. The agency may assign another hearing officer for the prehearing conference; and

006.01A2. The hearing officer for the prehearing conference shall set the time and place of the conference and give reasonable written notice to all parties and to all persons who have filed written petitions to intervene in the matter. The agency shall give notice to other persons entitled to notice.

006.01A3. The notice referred to in subsection 006.01A2 shall include the following:

006.01A3(a). The names and mailing addresses of all parties and other persons to whom notice is being given by the hearing officer;

006.01A3(b). The name, official title, mailing address, and telephone number of any counsel or employee who has been designated to appear for the agency;

006.01A3(c). The official file or other reference number, the name of the proceeding, and a general description of the subject matter;

006.01A3(d). A statement of the time, place, and nature of the prehearing conference;

006.01A3(e). A statement of the legal authority and jurisdiction under which the prehearing conference and the hearing are to be held;

006.01A3(f). The name, official title, mailing address, and telephone number of the hearing officer for the prehearing conference;

006.01A3(g). A statement that a party who fails to attend or participate in a prehearing conference, hearing, or other stage of a contested case or who fails to make a good faith effort to comply with a prehearing order may be held in default under the Administrative Procedure Act; and

006.01A3(h). Any other matters that the hearing officer considers desirable to expedite the proceedings.

006.01B. The hearing officer shall conduct a prehearing conference, as may be appropriate, to deal with such matters as exploration of settlement possibilities, preparation of stipulations, clarification 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 such other matters as will promote the orderly and prompt conduct of the hearing. The hearing officer shall issue a prehearing order incorporating the matters determined at the prehearing conference.

006.01C. The hearing officer may conduct all or part of the prehearing conference by telephone, television, or other electronic means if each participant in the conference has an opportunity to participate in, to hear, and, if technically feasible, to see the entire proceeding while it is taking place.

006.02. Discovery in contested cases.

006.02A. The hearing officer or a designee, at the request of any party or upon the hearing officer's own motion, may issue subpoenas, discovery orders, and protective orders in accordance with the rules of civil procedure except as may otherwise be prescribed by law. Subpoenas and orders issued under this subsection may be enforced by the district court.

006.02B. Any prehearing motion to compel discovery, motion to quash, motion for protective order or other discovery-related motion shall:

006.02B1. Quote the interrogatory, request, question, or subpoena at issue, or be accompanied by a copy of the interrogatory, request, subpoena or excerpt of a deposition;

006.02B2. State the reasons supporting the motion;

006.02B3. Be accompanied by a statement setting forth the steps or efforts made by the moving party or his or her counsel to resolve by agreement the

issues raised and that agreement has not been achieved; and

006.02B4. Be filed with the agency. The moving party must serve copies of all such motions to all parties to the contested case.

006.02C. Other than is provided in subsection 006.02B4 above, discovery materials need not be filed with the agency.

006.03. Continuances. The hearing officer may, in his or her discretion, grant extensions of time or continuances of hearings upon the hearing officer's own motion or at the timely request of any party for good cause shown. A party must file a written motion for continuance which states in detail the reasons why a continuance is necessary and serve a copy of the motion on all other parties.

006.03A. Good cause. Good cause for an extension of time or continuance may include, but is not limited to, the following:

006.03A1. Illness of the party, legal counsel or witness;

006.03A2. A change in legal representation; or

006.03A3. Settlement negotiations are underway.

006.04. Amendments.

006.04A. A petition may be amended at any time before an answer is filed or is due if notice is given to the respondent or his or her attorney. In all other cases, a petitioner must request permission to amend from the hearing officer.

006.04B. A hearing officer may also allow, in his or her discretion, the filing of supplemental pleadings alleging facts material to the case occurring after the original pleadings were filed. A hearing officer may also permit amendment of pleadings where a mistake appears or where

amendment does not materially change a claim or defense.

006.05. Informal Disposition. Unless otherwise precluded by law, informal disposition may be made of any contested case by stipulation, agreed settlement, consent order, or default.

007 Conducting a contested case hearing.

007.01. Order. At the discretion of the hearing officer, the hearing may be conducted in the following order:

007.01A. The hearing is called to order by the hearing officer. Any preliminary motions, stipulations or agreed orders are entertained.

007.01B. Each party may be permitted to make an opening statement. Opening statements take place in the same order as the presentation of evidence.

007.01C. Presentation of evidence.

007.01C1. Evidence will be received in the following order:

007.01C1(a). Evidence is presented by the petitioner;

007.01C1(b). Evidence is presented by the respondent;

007.01C1(c). Rebuttal evidence is presented by the petitioner; and

007.01C1(d). Surrebuttal evidence is presented by the respondent.

007.01C2. With regard to each witness who testifies, the following examination may be conducted:

007.01C2(a). Direct examination conducted by the party who calls the witness;

007.01C2(b). Cross-examination by the opposing party;

007.01C2(c). Redirect examination by the party who called the witness; and

007.01C2(d). Recross-examination by the opposing party.

007.01D. After the evidence is presented, each party may have opportunity to make a closing argument. Closing arguments shall be made in the same order as the presentation of evidence. The hearing officer may request that the parties submit briefs in lieu of closing arguments.

007.02. Evidence.

007.02A. In contested cases an agency or hearing officer may admit and give probative effect to evidence which possesses probative value commonly accepted by reasonably prudent persons in the conduct of their affairs and may exclude incompetent, irrelevant, immaterial and unduly repetitious evidence.

007.02B. Any party to a formal hearing before the agency, from which a decision may be appealed to the courts of this state, may request that the agency be bound by the rules of evidence applicable in district court by delivering to the agency at least three days prior to the holding of the hearing a written request therefore. Such request shall include the requesting party's agreement to be liable for the payment of costs incurred thereby and upon any appeal or review thereof, including the cost of court reporting services which the requesting party shall procure for the hearing.

007.02C. Documentary evidence may be received in the form of copies or excerpts or incorporated by reference.

007.02D. All evidence including records and documents in the possession of the agency of which it desires to avail

itself shall be offered and made a part of the record in the case. No factual information or evidence other than the record shall be considered in the determination of the case.

007.02E. A hearing officer or designee may administer oaths and issue subpoenas in accordance with the rules of civil procedure except as may otherwise be prescribed by law. Subpoenas and orders issued under this subsection may be enforced by the district court.

007.02F. The agency shall give effect to the rules of privilege recognized by law.

007.02G. The agency may take official notice of cognizable facts and in addition may take official notice of general, technical, or scientific facts within its specialized knowledge and the rules and regulations adopted and promulgated by it.

007.02G1. Parties shall be notified either before or during the hearing or by reference in preliminary reports or otherwise of materials so noticed.

007.02G2. Parties shall be afforded an opportunity to contest facts so noticed.

007.02G3. The record shall contain a written record of everything officially noticed.

007.02H. The agency may utilize its experience, technical competence and specialized knowledge in the evaluation of the evidence presented to it.

007.03. Conducting the hearing by electronic means. The hearing officer may conduct all or part of the hearing by telephone, television, or other electronic means if each participant in the hearing has an opportunity to participate in, to hear, and, if technically feasible, to see the entire proceeding while it is taking place.

007.04. Official record.

007.04A. The agency shall prepare an official record, which shall include testimony and exhibits, in each contested case, but it shall not be necessary to transcribe the record of the proceedings unless requested for purpose of rehearing or appeal, in which event the transcript and record shall be furnished by the agency upon request and tender of the cost of preparation.

007.04B. The agency shall maintain an official record of each contested case under the Administrative Procedure Act for at least four years following the date of the final order.

007.04C. The agency record shall consist only of the following:

007.04C1. Notices of all proceedings;

007.04C2. Any pleadings, motions, requests, preliminary or intermediate rulings and orders, and similar correspondence to or from the agency pertaining to the contested case;

007.04C3. The record of the hearing before the agency, including all exhibits and evidence introduced during such hearing, a statement of matters officially noticed by the agency during the proceeding, and all proffers of proof and objections and rulings thereon; and

007.04C4. The final order.

007.04D. As provided in 261 NAC 4 Section 002.03 the hearing officer or the agency director or any employee or commission member who is or may reasonably be expected to be involved in the decision making process of the contested case who receives or who makes or knowingly causes to be made an ex parte communication as set forth in that subsection shall make the appropriate filings which shall be included in the official record of the contested case.

007.04E. Except to the extent that the Administrative Procedure Act or another statute provides otherwise, the agency record shall constitute the exclusive basis for agency action in contested cases under the act and for judicial review thereof.

007.05. Costs. All costs of a formal hearing shall be paid by the party or parties against whom a final decision is rendered.

008 Decision and order in a contested case.

008.01. Every decision and order adverse to a party to the proceeding, rendered by the agency in a contested case, shall be in writing or stated in the record and shall be accompanied by findings of fact and conclusions of law.

008.02. The decision and order should include:

008.02A. The name of the agency and name of the proceeding;

008.02B. The time and place of the hearing;

008.02C. The names of all parties or their attorneys who entered an appearance at the hearing;

008.02D. The findings of fact consisting of a concise statement of the conclusions upon each contested issue of fact;

008.02E. The conclusions of law consisting of the applications of the controlling law to the facts found and the legal results arising therefrom; and

008.02F. The order consisting of the action taken by the agency as a result of the facts found and the legal conclusions arising therefrom.

008.03. Parties to the proceeding shall be notified of the decision and order in person or by mail. A copy of the decision and order and accompanying findings and conclusions shall be delivered or mailed upon request to each party or his

or her attorney of record.

009 Appeals.

009.01. Any person aggrieved by a final decision in a contested case is entitled to judicial review under the Administrative Procedure Act or to resort to such other means of review as may be provided by law.

009.02. Parties desiring to appeal an agency decision must file a petition for review in the district court of the county where the agency action is taken within thirty days after the service of the final decision by the agency. The thirty day period for appeal commences to run from the date of mailing of the notice of order and decision to the parties or their attorneys of record. Service of the petition and summons must be made in accordance with Nebraska law.

009.03. Unless otherwise provided by statute, the procedures of section 84-917, R.R.S. 1994, govern the procedure for taking an appeal.

FISCAL NOTE

STATE OF ALASKA
1997 LEGISLATIVE SESSION

BILL NO. HB 264

Revision Date: _____ Dept. Affected: Department of Law
 Title: "An Act providing for a negotiated
regulation making process; and providing for an effective date." BRU: Criminal Division/Civil Division
 Sponsor: Representative James Component: All (except Administration & Support)
 Requester: House State Affairs Committee COMPONENT SERIAL NO. 2085/2087-89/2091-2

Expenditures/Revenues (Thousands of Dollars)

OPERATING EXPENDITURES	FY 98	FY 99	FY 00	FY 01	FY 02	FY 03
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	*****	*****	*****	*****	*****	*****

CAPITAL EXPENDITURES						
----------------------	--	--	--	--	--	--

CHANGE IN REVENUES ()						
------------------------	--	--	--	--	--	--

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1006 GF/MHTIA						
Other						
TOTAL	*****	*****	*****	*****	*****	*****

Estimate of any current year (FY97) cost: \$ 0.0

POSITIONS

FULL-TIME	0.0	0.0	0.0	0.0	0.0	0.0
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary)

HB 264 establishes a negotiated regulation making process, in addition to the provisions of the Administrative Procedure Act, to encourage the resolution of controversial issues before commencement of the formal regulations making process. Negotiated rulemaking is intended to be used as a supplemental process to permit the direct participation of affected interests in the development of new regulations or the amendment and repeal of existing regulations.

The regulations attorney of the Department of Law is charged under AS 44.62.125 with assisting agencies with the functions related to administrative regulations. What is unclear at this time is how many agencies would use the optional process outlined in HB 264. The department would assist those agencies to the best extent our resources would allow, but without additional information, we cannot quantify what level of resources would likely be required.

Prepared by: Joan M. Kasson Phone: 465-5370
 Division: Administrative Services Division Date: 5/5/97
 Approved by Commissioner: Bruce M. Botelho, Attorney General Date: 5/5/97
 Agency: Department of Law

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 For further distribution information, call the Governor's Legislative Office

Revision Date: _____ Dept. Affected: Revenue
 Title: Negotiated Regulation Making BRU: Revenue Operations
 Component: Income and Excise Audit
 Sponsor: Representative James
 Requestor: (H) STA COMPONENT SERIAL NO. 113

Expenditures/Revenues: (Thousands of Dollars)

OPERATING EXPENDITURES	FY 98	FY 99	FY 00	FY 01	FY 02	FY 03
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	****	****	****	****	****	****
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ()						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF	0.0	0.0	0.0	0.0	0.0	0.0
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY97) cost \$ 0.0

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary)

**** (See Attached Analysis)

Prepared by: Robert Bartholomew Phone: 465-4773
 Division: Income and Excise Audit Date: May 5, 1997
 Approved by Commissioner: Wilson L. Condon Date: May 5, 1997
 Agency: Revenue

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HB 264
Negotiated Regulation Making
May 5, 1997
Page 2

HB 264 would establish a set of procedures that an administrative agency may use as a part of the regulation adoption process. These procedures would establish a committee to resolve controversial issues before the formal regulation adoption process under AS 44.62 begins. The committee would review and negotiate the issues, and make a recommendation to the agency. The agency would then presumably propose that regulation under the existing requirements of AS 44.62.

The Department of Revenue has successfully used a process similar to the negotiated regulation process. We believe that most of what the bill would provide is currently permissible under existing statute. There is a great deal of merit to an open exchange of ideas before an agency commits itself in writing to what it believes is the best solution to an issue. But because of several important differences between our procedures and the ones authorized by HB 264, the Department of Revenue would not use these procedures, and therefore the fiscal impact of the bill would be minimal.

We have used a "working group" approach in several regulations projects. Some of the differences between our procedures and the ones in HB 264 follow. First, we do not use the term "negotiated." To the extent that the concept implies a compromise between positions, it is inappropriate for our programs. Our aim in tax regulations is simplicity, clarity, equity and faithfulness to statutory language; we don't adopt regulations to "raise revenue." But the duty to administer the tax laws belongs with the department. By the same token, both CSED and PFD affect far too many people for it to be appropriate to "negotiate" between the agency and a small group.

Second, we don't identify specific members of a committee, and would not pay their travel to meetings. The meetings are open to the public. It would be too cumbersome to deal with a set membership. Finally, our system is far less formalized than that envisioned by HB 264.

FISCAL NOTE

STATE OF ALASKA
1997 LEGISLATIVE SESSION

BILL NO. HB 264

Revision Date: _____ Dept. Affected: All departments except Revenue
 Title: An Act providing for a negotiated rulemaking BRU: _____
 process: _____ Component: _____
 Sponsor: Rep. James
 Requester: House State Affairs Committee COMPONENT SERIAL NO. _____

Expenditures/Revenues

(Thousands of Dollars)

OPERATING EXPENDITURES	FY 98	FY 99	FY 00	FY 01	FY 02	FY 03
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	***	***	***	***	***	***

CAPITAL EXPENDITURES						
----------------------	--	--	--	--	--	--

CHANGE IN REVENUES ()						
------------------------	--	--	--	--	--	--

FUND SOURCE

(Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other						
TOTAL	***	***	***	***	***	***

Estimate of any current year (FY97) cost: \$ 0.0

POSITIONS

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary)

This bill would authorize state agencies to use a negotiated rulemaking process. Use of this process would not be mandatory, and would depend on a determination by agencies that such a process would be in the public interest, based on several factors listed in the bill.

The asterisks on this fiscal note indicate that the fiscal impact of the bill is indeterminate. Further analysis and clarification of the scope of the bill is necessary to determine the extent to which negotiated rulemaking would be used and the cost of the process.

Prepared by: Annalae McConnell
 Division: Office of Management and Budget
 Approved by Commissioner: Jim Ayers, Chief of Staff
 Agency: Office of the Governor

Phone: 465-4660
 Date: 5/5/97
 Date: 5/5/97

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May 5, 1997

Sectional Analysis of HB 264
("Negotiated Regulation Making Process")

Section 1 of the bill adds a new requirement that notices relating to the establishment of a negotiated regulation making committee be published in the Alaska Administrative Journal.

Section 2 of the bill sets out a new article in the Administrative Procedure Act (APA) to establish procedures for negotiated regulation making. The sections are explained as follows:

AS 44.62.710 sets out the purpose and applicability of negotiated rulemaking. It explains that

(1) negotiated regulation making should be used, whenever appropriate, to resolve controversial issues before the formal regulation making process is begun;

(2) negotiated regulation making is supplemental to the "regular" regulation process and maybe used to develop conclusions;

(3) a state agency may modify the consensus as a result of the subsequent regulation making process;

(4) innovation and experimentation in negotiation regulation making process is not limited by the bill;

(5) other state agencies that are not subject to APA may use the process.

AS 44.62.720 sets out the standards for determination of the need for negotiated regulation making. The state agency may use it when it is "the public interest." This section sets out at list of factors for state agency to consider in determining the public interest.

AS 44.62.730 sets out the process by which a person petitions for the use of a negotiated regulation making committee. The bill requires each state agency to prescribe form and procedure. The state agency has 60 days to grant during the petition. The section precludes a prisoner from petitioning to the Department of Corrections for negotiated regulation making committee.

AS 44.62.740 sets out the standard for the use of a convener to assist in the making the determination of need.

AS 44.62.750(a) requires the agency to publish notice of a committee formation in the Alaska Administrative Journal and, as appropriate, in newspapers and other publications. Subsection (b) allows the agency at the same time to start the formal regulations process. Subsection (c) requires the lieutenant governor to establish and maintain a list of persons who wish to receive notices regarding negotiated committees. Subsection (d) requires the agency to provide a period of at least 30 days for the submission of comments on committee formulation.

AS 44.62.760 sets out the standards for establishment, support, and termination of the committee. The section requires the agency to notify person who commented on or applied for memberships; if the agency denies the petition to form a committee, it must provide notice in the Alaska Administrative Journal and, as appropriate, in newspapers and other publications. Subsection (e) requires the agency to provide appropriate administrative technical support to the committee. Subsection (d) terminates the committee upon adoption of the regulation or at earlier date.

AS 44.62.770 allows the committee to expand its own membership. The request may be made by a petition from a person whose interest will not be adequately represented by the existing committee make-up.

AS 44.62.780 sets out the committee duties, procedure, and report. Subsection (d) allows the committee to transmit a report, if it reaches consensus. Subsection (e) allows the committee, if it does not reach consensus to transmit a report specifying areas on which consensus was reached and unresolved issues. Subsection (f) requires the committee to comply with the Open Meetings Act requirements.

AS 44.62.790 sets out standards for facilitator selection, duties, and authority. Subsection (a) allows the agency to nominate a facilitator, subject to the approval of the committee. If the committee does not approve the committee is authorized to select a facilitator. Subsection (b) requires the facilitator to preside at meetings and manage the keeping of minutes and records. Subsection (c) provides that facilitator does not have decision-making authority.

AS 44.62.800 sets out the standards for employees, contractors, expenses, and funding relating to the committee. Subsection (a) allows the agency to employ or contract for services for a person to serve as a convener or facilitator or use the services of a state employee for those purposes. Subsection (b) precludes consideration of a person as a convener or facilitator if the person has a financial or other interest that would prevent the person from serving in an impartial and independent manner. Subsection (c) requires committee members to pay for their own expenses of participation, except that agency may pay for travel and other expenses and a reasonable daily rate of compensation in appropriate circumstances. Subsection (d) allows

the agency to accept gifts to fund the process if the information on the gift is public, no condition is placed on the donation to the agency, and there is consensus that committee to accept it.

AS 44.62.810 precludes judicial review of an agency decision to establish, assist, or terminate regulation making committee.

AS 44.62.820 requires negotiated regulation making to be an additional process to APA rulemaking. This section requires that negotiation "shall, where possible, occur" before formal regulation process begins.

AS 44.62.830 sets out definitions.

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Alaska Conservation Voice
Speaking Out for Alaska's Future

Juneau
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Testimony of the Alaska Conservation Voice on CS HB 264

Thank you for the opportunity to comment on this bill.

Although we are in agreement with its general intent, we are not entirely persuaded that the bill, as drafted, will fulfill the sponsor's hopes.

While we withhold final judgement on HB 264, we welcome the opportunity to offer several additional suggestions that would improve its administration and make it more responsive to the public interest.

1. Our greatest concerns are that
 - the method for selecting participants is too discretionary, lacking a methodology that would insure proper representation, and that
 - the bill fails to guarantee participation of all interested parties.

2. The bill states (at 44.62.710) that:

"A consensus agreement . . . may be modified by an agency as a result of the subsequent regulation making process."

The bill also states, at 44.62.720, that:

"the agency, to the maximum extent possible consistent with the legal or other obligations of the agency, will use the consensus of the committee as the basis for the regulation . . ."

We feel that both of these sections should make it clear that the agency may alter the consensus agreement if significant new information or insight is brought forward as a result of public comment. A definition for "significant new information or insight" needs to be developed, as well.

3. In 44.62.730, "Use of a convener," and 44.62.760, "Facilitator selection, duties and authority," several prospective tasks are spelled out. Since the bill appears to intend that conveners and facilitators can be either state employees (including affected agency staff, unless they have already been designated to represent the agency on the issue at hand), we feel these sections should clearly list the functions for the convener/facilitator roles, and then clearly spell out that they may be agency personnel or contractors, along with any limitations that would apply in the case of either staff or contractor.

4. We also believe that a standard should be established which would allow agencies to certify that conveners/facilitators have certain minimum qualifications, training and experience for their respective roles.

5. We feel the section dealing with potential conflict-of-interest (44.62.770(b)) needs to provide more specific direction to agencies as to how such determinations are to be made, especially with respect to political or financial conflict-of-interest which might not otherwise be evident through public information, unless disclosed by the individual.

6. We note the desire to avoid a fiscal note for this bill. Philosophically, at least, we don't have a problem with agencies being expected to budget for this process if they feel the public interest and the fulfillment of their mandate could be served by negotiated rule-making. However, we feel this bill's otherwise sensible intentions may founder on the section dealing with costs for participation. See 44.62.770(c). We feel it may work against the hoped-for spirit of collaboration if committee members begin deliberations with this sort of financial disparity between them. We feel there is some basis for concern that the views of those "paying their own way" will be given greater weight in some situations, or that some who cannot afford to participate may be entirely excluded if the agency chooses, at its discretion, not to provide funds for all interested parties. To avoid this, we suggest the agencies simply be required to pay all reasonable travel and logistical expenses for convening a committee.

7. It would seem that the provision for accepting grants or gifts to help underwrite a committee's deliberations would be one way for an agency to defray the costs of underwriting the expenses of all participants. However, to avoid the same issue cited above, we feel the bill should stipulate that gifts be limited to those from such foundations or other sources as do not have a direct stake in the outcome of the issues under discussion.

8. The requirements for notice of committee formation should be restored and be made more extensive than provided in the original bill, mandating a broader notification of the public through print (and possibly broadcast) media, including a contact name and phone number to obtain further information.

9. The rules laid out in the original bill for expansion of a committee should be restored and expanded to also apply expressly to the formation of the initial committee. It is very important that this information be provided and be available to the public if this process is to have the desired credibility.

Finally, we suggest that a better way to test the prospects of workability of the negotiated rule-making process in Alaska would be to mandate and fund a couple of pilot projects. The results of these projects might provide a wealth of very pragmatic information that could assure a more cost-efficient, responsive process that would meet the intentions of the sponsors.

We look forward to reviewing subsequent drafts of the bill, and again, thank you for the opportunity to comment.

January 20, 1998

Douglas K. Mertz

**Testimony on CSHB 264(STA), regarding negotiated regulation-making
for Prince William Sound Regional Citizens Advisory Council**

The Prince William Sound RCAC is a non-profit organization formed in the wake of the *Exxon Valdez* oil spill, to protect the communities and the environment of the area impacted by that spill. Its members represent local governments, tourism, environmental groups, and the State Chamber of Commerce.

The RCAC finds the purpose and intent of this bill to be laudable. *However*, the bill in its present form -- work draft 0-LS0910\B -- has serious flaws. The flaws could lead an administrative agency to abuse the authority granted here by biasing the process in favor of selected special interests. Fortunately, those problems have simple solutions which, if adopted, would make the bill worth supporting.

The problems we see are the following:

*** The bill provides for notice of meetings of the regulation committee, but does nothing to provide notice that a committee is being formed or that any action in a particular area of interest is being contemplated. Thus an interested party could discover that a committee had been completely formed and was closed to new members before it even knew about it. Clearly there needs to be a notice provision so that interested parties can ask to be part of the committee. A simple requirement of newspaper advertising should be enough.*

*** Nothing in the bill requires that a committee's makeup be fair and representative of the broad range of interests. The reference to "balanced representation" in p. 2, line 16, is not a requirement that the committee actually be constituted that way. The potential for abuse is clear: The choice of members can be totally arbitrary and biased, quite legally. A commissioner could appoint, for example, only members of environmental groups, or only employees of oil companies, or only members of a regulated profession with no consumer representation. The potential for abuse is made all the worse because the agency's choice of committee members is exempt from judicial review. We suggest a simple requirement that the committee makeup be fair and representative of all main interested viewpoints.*

*** Nothing gives members of the public -- or interests which are not represented on the committee -- any right to participate in meetings or even to make their views known. The bill makes committee meetings subject to the Open Meetings Act, but that act only entitles the public to sit in the corner and watch -- there is no right to participate or speak whatsoever in the Act. So, quite legally, you could have an agency appoint a biased and non-representative committee with no prior notice to anyone else, and the committee could refuse to let any member of the public voice opinions or offer information. Clearly what is needed is a guarantee that non-members may speak at and participate in committee meetings and submit materials to the committee.*

*** The bill states that committee members serve at the pleasure of the head of the agency. That means that any committee member who voices opposition to the particular viewpoint of the commissioner may be unceremoniously booted off, with no reason given. In short, another opportunity for abuse. We believe it would be better to limit the causes for terminating a member to non-attendance, or at least to require the commissioner or agency to state a reason for removing a member.*

*** There is also a technical question whether the provision at p. 4, l.16, making the Open Meetings Act applicable to the committee, is effective, since the terms of the Open Meetings Act do not themselves apply to committee meetings of a non-decisional body within an agency. Since the proper interpretation is ambiguous, to make it certain, you need a simple technical amendment making it clear.*

We have attached proposed language to solve each of these problems. If these problems are resolved, the potential for abuse of the authority granted by this bill would largely disappear.

Suggested amendments to CS HB 264(STA)

PWS RCAC

1. Regarding notice of proposed formation of a regulations committee:

At page 3, l. 13, after "...formulation of a proposed regulation.", insert "*The agency shall request nominations to the committee through notices in newspapers of general circulation at least fourteen days before making appointments to the committee.*"

2. Regarding fair and balanced makeup of regulations committees:

At page 13, l. 16, after "(b)", insert "*the membership of a negotiated regulation making committee shall fairly reflect the main interests and viewpoints regarding the subject of the regulations.*"

3. Regarding the right of the public to participate:

At page 4, l. 3, after "...operation of the negotiated regulation making committee.", insert "*The committee shall permit public testimony at its meetings.*"

4. Regarding termination of a committee member:

At page 3, l. 13-14, delete "serve at the pleasure of the head of the agency" and insert "*may be removed by the head of the agency for good cause.*"

5. Regarding applicability of the Open Meetings Act:

At page 4, l. 16, after "...apply to meetings of a negotiated regulation making committee.", insert "*, notwithstanding anything in those sections to the contrary.*"

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Alaska Conservation Voice
Speaking Out for Alaska's Future

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Statement on HB 264
Provided by the Alaska Conservation Voice

ACV supports direct participation by affected parties in the development of state regulations.

We are concerned that HB 264 will enshrine, in statute, permission for state agencies to work outside of the public process, thus excluding important perspectives in promulgating regulations. We believe that any consensus reached by the committee could provide a rationale to dismiss valuable insight and information obtained through public comment, enabling the agency to sidestep public input by deferring to the consensus reached by "all identifiable interests" on the committee.

Furthermore, as currently drafted, HB 264 fails to insure the identification and inclusion of all affected parties in the proposed negotiated regulation making process. ACV urges at least the addition of provisions necessary to:

- specify a method of identifying affected parties and;
- guaranteeing affected parties their rights to participate in the negotiated regulation making committee.

Thank you for considering our comments.

Alaska State Legislature

REPRESENTATIVE
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House Of Representatives

House District 34

SPONSOR STATEMENT

HB 264, Negotiated Regulation Making

House Bill 264 enables and encourages negotiated regulation/rule making. Currently "neg/reg" is being used by the federal government, Montana, and Nebraska.

The citizens of Alaska are clamoring for the Legislature to do something about the regulation process. Negotiated regulation making addresses the issue on point.

Negotiated regulation making is used only in cases involving very complex or controversial regulations. It is a voluntary process for drafting regulations that brings together those parties who would be significantly impacted by a regulation (rule), including the government, to reach consensus on some or all of its aspects before the rule is formally published as a proposal. An impartial mediator is used to facilitate intensive discussions among the participants, who operate as a committee open to the public.

Regulations drafted using this process tend to be more technically accurate, clear and specific, and less likely to be challenged in litigation than are rules drafted by the agency alone without input from outside parties. The APA notice process remains unchanged.

The negotiated regulation making process costs more money at the front end than the traditional approach (e.g. the added cost for a facilitator). Agency personnel must work closely as a team with outside representatives and their time must be dedicated to the project if it is to succeed. However, the advantages clearly outweigh these considerations. Because representatives of all the interested parties draft the regulation, the formal process of public notice and comment is generally very smooth, with few concerns being raised. More importantly, lengthy regulation litigation is generally eliminated and compliance with the rule is believed to be much higher. Thus, agency long-term costs of litigation and enforcement are sharply reduced.

Use of the negotiated regulation making process requires most agencies to change the way they are accustomed to developing a rule. Standard practice in rule development is to have a particular office in the agency develop a draft regulatory document, and then that document is critiqued and reformulated as it is sequentially referred to other parts of the agency, the department, the Executive Branch, and the public. By contrast, in negotiated regulation making the parties are brought together for simultaneous discussion and consideration of particular issues at the beginning of the process.

We have a great deal of back-up on this process if you are interested in more details, and we hope you will support HB 264.

STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

TONY KNOWLES, GOVERNOR

PLEASE REPLY TO:

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May 5, 1997

Honorable Jeanette James
Representative
Chairperson
House State Affairs Committee
State Capitol, Room 102
Juneau, Alaska 99801

Re: HB 265

Dear Representative James:

We have reviewed HB 265, and find that it presently presents no legal problems.

Please contact me if I can be of further assistance to you on this matter.

Very truly yours,

BRUCE M. BOTELHO
ATTORNEY GENERAL

By:



Sarah J. Felix
Assistant Attorney General

SJF:clh

cc: Pat Pourchot
Legislative Director
Office of the Governor

Chrystal Smith
Legislative Liaison
Department of Law

Deborah Behr
Assistant Attorney General

cc:Mail for: Barbara Cotting

Subject: fiscal notes

From: Barbara Cotting 05/02/1997 10:06 AM

To: SHARI_KOCHMAN@GOV.STATE.AK.US at CC2MHS1

To:

I have scheduled the following bills in House State Affairs and need fiscal notes:

HB 265 Reports & Records, State Agencies Tuesday, May 6

HB 264 Negotiated Regulation Making Tuesday, May 6

Thanks.

A. INTRODUCTION

My name is Robert Huntington Knight, Jr. 2705

I am here representing myself to testify on HB 264.

I appreciate tremendously the opportunity to do so.

I will address the matter of credentials and background before giving an opinion on the bill. If you have questions of me or my background, I would ask that you hold them until that is done. On questions about the bill, I would prefer to deal with questions on the bill as we go through the bill. Is that acceptable?

B. Education, Qualifications, and Memberships

My education includes an Ars Baccalaureae from Yale, a Juris Doctor from Georgetown, and I am currently completing an interdisciplinary Ph.D. in Education Leadership and Policy at the University of Alaska Fairbanks.

My first exposure to administrative regulations occurred in 1965 when I served as an Assistant Registrar of Voters in New Haven, Connecticut. My first formal exposure to Administrative Law occurred in 1967. The late Carl McFarland -- former Deputy Attorney General under Franklin Roosevelt sometimes said to be the father of administrative law -- was my professor at the University of Virginia School of Law. I dropped out of Virginia to join the 1968 Presidential Campaign.

My training and experience with Administrative Law includes involvement in academic coursework, teaching in a Masters of Public Administration program and seminars, professional training, and federal, state, local, and tribal regulatory systems and regulations.

My international experience with regulations includes serving as Head of US Delegation to Nato Environmental Meetings on Acid Rain and Law of the Sea negotiations, and private consultant to the Kingdom of Saudi Arabia on restoration of habitat and domestic breeding of endangered species. I also worked with that nation on land record issues.

My federal experience with regulations includes writing, reviewing, approving, implementing, enforcing, and litigating them. As a founding member of the US Environmental Protection Agency, I was privileged to work on the task force which set up EPA's administrative regulatory processes. As a member of the Presidents Management Council Staff, I was privileged to draft Presidential Executive Orders to rework regulatory relationships among departments.

At the State level, service includes a stint as Division Director for the Municipal and Regional Assistance Division of Community and Regional Affairs. At the local level, I have worked with Planning Commissions, Zoning Commissions, and served on a Halfway House Board. At the Tribal level, I served as General Manager of Nome Eskimo Community as well as a variety of consulting assignments to Alaska Native Foundation and a number of villages.

My negotiation experience extends back to the mid-1960's. We did not call informal mediation or facilitation by those names back then. In the '90's, I took a formal two credit course in mediation at the University of Alaska Anchorage as well as Alaska Bar Association Alternative Dispute Resolution training, Victim Offender Mediation Training, and have attended the programs provided by the Alaska Dispute Settlement Association.

I taught administrative law as an adjunct in the late '70's and also served as a consultant to the National Association of Attorneys General. I taught a seminar on managing the public law office including what today we call negotiated regulatory approaches and served on their Science and Technology Committee. I served as a law clerk to the Third Judicial District Superior Court Chief Judge of Administrative Appeals researching and drafting administrative law opinions in administrative appeals.

Memberships include ADSA [the Alaska Dispute Settlement Association] the Alaska Bar ADR Section on Alternative Dispute Resolution, SPIDR [Society of Professionals in Dispute Resolution], and the District of Columbia Bar Association. I am not a member of the Alaska Bar other than the ADR section which permits non-lawyers to join and do not practice law in Alaska. The American Arbitration Association qualified me as an arbitrator and I served on a panel of theirs to develop mediated approaches to the

resolution of environmental and public policy issues. I also served as the reporter for the ADSA Committee on Standards of Practice.

In the private sector, I have done work for clients on regulatory matters and worked with departments and agencies like Anchorage International Airport, Labor, and DEC on behalf of clients with regulatory problems.

I have other training, experience, and memberships, but this covers a cross section of the high points. I offer these credentials as the bases for my opinions on the matters before the Committee.

C. EXPERIENCE WITH NEGOTIATED REGULATIONS

The bill before the Committee proposes a system or approach to technically or politically complex regulatory drafting. HB 264 is based upon the federal statute and two successful state statutes used in Nebraska and Montana. Staff has done an excellent job in pulling together the background.

From my perspective, the approach works.

Back before the idea of a statute was even thought of for such matters, we used this approach whenever there were difficult problems to be resolved in a regulatory scheme. I learned the practicalities of it from folks who had developed it to cope with otherwise impossible situations. Though regulations have been around since civilizations first began to develop, the regulated society in which we live did not begin to take shape until the 1930's and did not begin to flower until the 1960's.

What purpose do regulations serve?

If we cannot answer that question, then we cannot deal with them effectively. In my view, regulations provide the detail to flesh out policy set by the legislature in a statute. Issuing regulations allows folks with training and expertise to get involved in establishing the stability of expectations which most of us require to go about our business on a day-to-day basis.

Regulations are driven by technological change, economic change, and social change. They provide the same sheet of music to everyone concerned with or involved in a particular kind of activity. To the extent that they do so in an understandable and observable manner and promote stability of expectations, they are useful. To the extent they aggravate, irritate, and impede citizens in the conduct of their business, they are not useful.

Their purpose is not to control but to provide a basis for self-control of specified activities to enhance the quality of life for all of us. Factories which provide jobs and products serve useful functions. Factories which discharge wastes into a near-by river create problems. Up until our population grew to the levels we now deal with, factories were not very large and pollution problems were not great. I date the turn-around to 1952 when the Thames River caught on fire in London. The British resolved to clean up their act.

The news media reported a salmon observed making its way up the Thames not long ago. It took 40 years to turn things around, but the Thames is no longer an open sewer.

The US began to address problems like this about the same time, but without much fanfare. I led a campaign in 1966 to clean up a small river running through New Haven. The Connecticut General Assembly appropriated the money to do so in 1967. Today, the Mill River runs clean. That turned out to be an unusual event. Most cleanup campaigns are marked like our airport regulations with a lot of rancor. It worked back then because I got everyone involved in figuring out how to clean it up. It seemed the right thing to do and it worked.

In the development of anti-pollution regulations in the late '60's and early 70's, I relied on the knowledge and expertise of those who had been there, done that, and got the T-shirt. We had no statutory or cultural prohibition against consulting those affected. Then again, government had not inspired the hostility levels in the general public that it has in recent years.

For whatever reason, politicians and bureaucracy in some quarters began to believe it had the answers to society's problems. Those answers were to be fixed in regulations. Enforcing those regulations would change the world into the better place we all know it could be. Lots of folks bought into that. Social engineering became the goal of a great many regulatory schemes.

Up top, I said we have to know the purpose of regulations if we are to write and implement them successfully. Social engineering did not work well; still does not. Time Magazine's April 29th issue a year ago covered the failure of integration rules. Environmental cleanup went fairly well for a while, but overweening bureaucrats tried to take it too far the same way the Internal Revenue Service did. EPA and IRS are among the agencies which draw the most flak from the public for their approach to their jobs.

It does not have to be that way. Government serves the people; not the other way around. What Rousseau in the 18th century called the Social Contract asserts as its basis that all of us are born with all rights and privileges. We trade in some of these to society for society's protections. Those protections are only as firm as the police power of the state. When

government attempts to use the police power of the state to control folks, it tends to fall on its face.

Prohibition, drugs, integration, and school reform are four areas where government has failed to come close to stated goals. The consent of the governed is part and parcel of the American tradition. Negotiated rule making is a modern day extension of that tradition.

Your experience, my experience, and history all tell us that government rules which make life more difficult and fail to enhance it fail. A government which sends police out to arrest folks who violate important rules is applauded. Rules promulgated to make life easier for government seldom succeed. Rules which enhance the quality of life for society generally succeed. Speed limits are the most obvious example of that.

Success comes from taking the time to ascertain the needs of all those involved and acting accordingly. Notions of inclusion, fairness, courtesy, and notice tend to enhance the probabilities of success. On that note, lets look at HB 264.

Before I do so, are there any questions about my credentials?

D. OPINION ON THE PROPOSED LEGISLATION

Generally speaking, I find this proposed legislation a breath of fresh air. It addresses most of the issues directly, clearly, and cogently.

If the Committee will indulge me, I would like to go through the sections of the bill and comment. There is room, I believe, for some improvement in a few places. These are not language changes and the suggestions are not semantic ones.

If after this is done and the Committee wishes to take these suggestions under advisement before passing out the bill, I will be happy to work informally with Committee staff on the bill if that would be useful.

[[go to bill and do the sections]]

What is the purpose of a regulation? Who does it serve? How?

The eight-fold path to regulatory bliss is found in the classic five questions of who, what, why, where, and when plus how, how much, and how much cost?

A Committee is directed by a good facilitator is often the best way to wring out these questions and get good or at least workable answers. HB 264 will allow the State of Alaska to do this effectively.

Draft suggestions for HB 264 from Robert Knight. 4/26/97

Page 2. Sec. 2. line 19. INSERT between the words 'resolve' and
'controversial'

the words: "technically complex or"

Page 2. Sec. 2. line 28. INSERT after the last word in the line as a new
sentence.

"Modifications must be timely distributed for comment to interested participants in the negotiated regulation group which developed the document modified."

Page 5. Sec. 2. line 5. INSERT a new subsection (8) to read

"When persons are known by a department or agency proposing regulations to have an interest in the proposed regulations or the subject of the proposed regulations, the agency or department may send direct notices to such persons but is under no obligation to do so generally."

Page 8. Sec. 2. line 18. INSERT a new subsection (3)

"The facilitator shall be employed by and paid under contract to the State of Alaska if not already employed by government and serving as a facilitator as a part of prescribed duties. Travel, per diem, and expenses shall be paid at standard rates."

E. CONCLUSIONS

The bill is an excellent one. Were it to go forward without my suggestions, it would succeed. I believe that DEC has had some experience with technical groups resolving technical issues prior to issuing regulations. If they have not been consulted, that experience might prove useful if incorporated into this bill or in a separate bill.

HB 264 has my full support.

Thank you for the opportunity to testify.

Legislative Research Services

Alaska State Legislature
Legislative Affairs Agency
Division of Legal & Research Services




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April 10, 1997

MEMORANDUM

TO: Representative Jeannette James

FROM: Paul Brand 
Legislative Analyst

RE: **Negotiated Rulemaking: Drafting Regulations by Involving Affected Parties**
Research Request 97.080

You asked about negotiated rulemaking--the practice of involving affected parties in regulation drafting prior to the public comment period required under Alaska's Administrative Procedures Act. Specifically, you wanted to know if Alaska law currently permits this practice, and, if so, what methods various departments use to involve affected groups. You also wanted to know about similar practices used in other states and by the federal government. After a brief summary, this memorandum provides an overview of the negotiated rulemaking process, reviews Alaska's regulation drafting policies, and examines the negotiated rulemaking efforts in other states and by the federal government.

Summary

Negotiated rulemaking is a voluntary process for drafting regulations that brings together those parties affected by a rule for the purpose of reaching consensus on all or a portion of a proposed regulation before formally soliciting public comment.¹ Alaska's laws do not currently require or encourage the use of negotiated rulemaking, but some state agencies already use the process. Department of Environmental Conservation officials used negotiated rulemaking committees to help draft highly technical and contentious air and water quality regulations prior to completing the formal requirements of Alaska's Administrative Procedures Act. Department officials selected committee members and conducted meetings following the requirements of Alaska's Open Meeting and Public Records Acts. While many states informally solicit the ideas of affected

¹The content of negotiated rulemaking committee discussions as well as all documents used by its members become public records. This presents some limitations on the process because business and industry officials may be reluctant to divulge sensitive information during work group meetings because this material would be available to their competitors.

parties when drafting regulations, the use of formal negotiated rulemaking is a relatively new practice. Congress formally recognized negotiated rulemaking by passing the Negotiated Rulemaking Act of 1990. Since 1990, lawmakers in two states, Montana and Nebraska, have incorporated negotiated rulemaking acts into their statutes, encouraging agencies to use the practice whenever appropriate. According to federal and state officials with whom we spoke, negotiated rulemaking is appropriate for highly contentious regulations that affect a limited number of parties. To be successful, a negotiated rulemaking committee must be small enough to give its members an opportunity to communicate their concerns; committee size usually does not exceed 25 members. The goal of the committee is to reach consensus on all or a portion of a proposed regulation. Once the committee reaches consensus, the formal regulation adoption process often proceeds quickly as little public comment is received. Federal and state officials from agencies currently using negotiated rulemaking speak favorably of the process. The U.S. Environmental Protection Agency and the U.S. Department of Labor, the agencies with the most experience in negotiated rulemaking, report reduced litigation costs and enhanced relations with industry officials, environmental advocates, and labor relations groups.

Overview of Negotiated Rulemaking

Negotiated rulemaking is a technique for drafting regulations that brings together those parties directly affected by a proposed rule, in a committee, to resolve particularly contentious or controversial issues prior to the formal regulation adoption process. After identifying a particularly contentious regulation that affects a limited number of parties, agency officials publish notice of their intent to form a negotiated rulemaking committee. The agency director selects the committee members from responses to the public notice and appoints a neutral mediator to oversee the committee's meetings.² The committee's goal is to reach a consensus decision on a proposed regulation.³ Once the committee reaches consensus, the agency uses the committee's proposals when completing the formal regulation drafting requirements.

It is important to note that the agency first completes the negotiated rulemaking process and then begins the formal regulation drafting process. In doing so, negotiated rulemaking does not conflict with the formal regulation drafting practices used by most states and the federal government. Negotiated rulemaking is a preparatory process used to resolve controversial issues prior to the commencement of formal rulemaking.

²The committee's meetings are open to the public and all records, reports, and research used by the committee are made available for public review.

³If the committee cannot reach consensus on the entirety of a rule, they prepare a report for the agency detailing areas of agreement and dispute. Agency officials then would be responsible for drafting the final regulation.

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April 10, 1997

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During the formal regulation adoption process, the agency may change the committee's proposed regulation based on public comment. This requirement preserves the rights of private citizens to testify on proposed regulations. One of the advantages of negotiated rulemaking is that the public comment period normally proceeds smoothly because the committee has already resolved many potentially sensitive issues. Additionally, negotiated rulemaking may reduce the cost of litigation by resolving the concerns of industry and other parties without the need for judicial review.

Some federal and state agencies have criticized negotiated rulemaking because the process requires additional agency resources for the regulation drafting process. Hiring a neutral mediator and devoting agency resources to the committee process are costs not generally associated with regulation drafting.⁴ Officials of federal agencies that regularly use negotiated rulemaking committees defend these added costs by comparing the cost of negotiated rulemaking committees to that of litigation.

Alaska's Regulation Drafting Practices and Negotiated Rulemaking

The Alaska Department of Law publishes a manual for drafting administrative regulations which thoroughly describes the regulation adoption process required under Alaska's Administrative Procedures Act (APA).⁵ According to Deborah Behr, Assistant Attorney General, Alaska's APA does not specifically address the issue of negotiated rulemaking because this method of developing regulations has only recently become popular. While negotiated rulemaking is not formally identified in the APA, Ms. Behr indicated that some state departments have used similar techniques when developing regulations.⁶

According to John Stone, Environmental Conservation Manager for the Department of Environmental Conservation's Division of Air and Water Quality, the department has used

⁴The expenses of committee members, other than agency personnel, are not generally paid by the state. Members are responsible for their own travel and lodging costs when attending committee meetings. All the negotiated rulemaking acts we reviewed, however, allow the state to pay travel and per diem expenses for committee members if they are unable to afford the cost and their presence is vital to the committee's success.

⁵Alaska Department of Law, "Drafting Manual for Administrative Regulations," October 1995, p.8. Attachment A is a copy of a flow chart that describes the steps followed by department officials when they prepare regulations.

⁶Ms. Behr stated that negotiated rulemaking committees, under current state law, must develop regulation proposals prior to the formal notice-and-comment period required under the Alaska's APA. Additionally, the committees must follow the provisions of Alaska's Open Meetings and Public Records Acts (AS 44.62.310 and AS 9.25.110).

negotiated rulemaking to draft air and water quality regulations. These regulations are often highly technical and involve numerous interest groups. Because of the technical nature of many regulations, Mr. Stone feels that the use of negotiated rulemaking not only results in a consensus decision with affected parties, but also allows department officials to thoroughly explain the complexity of many regulations. Mr. Stone stressed that a consensus does not always result in the complete satisfaction of committee members, but generally the final regulations are responsive to their concerns.

Negotiated Rulemaking in Other States

According to Brenda Erickson, regulation specialist with the National Conference of State Legislatures (NCSL), many states informally solicit information from affected groups when drafting regulations, but the use of formal negotiated rulemaking committees is a relatively new practice. Based on the results of a Westlaw search and discussions with regulation specialists from NCSL, we identified two states, Montana and Nebraska, that have incorporated negotiated rulemaking acts into their state statutes.⁷ The Negotiated Rulemaking Acts of both states are similar to each other and provide a means of resolving potentially controversial issues prior to formal rulemaking procedures.⁸

The statutes of both states clearly recognize that the use of negotiated rulemaking committees are appropriate only in certain circumstances; consequently, both states' statutes contain nearly identical lists of criteria that agency directors must consider when determining if negotiated rulemaking is appropriate. Among those criteria, the agency directors must consider if:

- There are a limited number of identifiable interests that will be significantly affected by the rule;
- There is a reasonable likelihood that the agency can convene a committee that provides balanced representation of the affected parties;
- There is a reasonable likelihood that the committee will reach consensus on the proposed regulation; and

⁷Attachments B and C are copies of the Negotiated Rulemaking Acts of Montana and Nebraska, respectively.

⁸Nebraska's Negotiated Rulemaking Act differs from Montana's in that it specifically prohibits individuals incarcerated in correctional institutions from requesting the use of negotiated rulemaking.

- The agency has adequate resources and is willing to commit those resources to the negotiated rulemaking committee.

According to Annette Covar of Nebraska's Department of Environmental Quality (DEQ), the department has used negotiated rulemaking techniques in drafting several environmental regulations. She indicated that the expense of a mediator makes negotiated rulemaking impractical in many situations, but for complex regulations the practice has proven valuable. She also stated that DEQ used informal negotiated rulemaking techniques prior to Nebraska's law and they continue to do so for many regulations. Ms. Covar views negotiated rulemaking techniques as valuable whether or not the agency establishes a formal committee.

In Montana, lawmakers are encouraging the use of negotiated rulemaking by all departments. According to Todd McMaster of Montana's Office of Legislative Research, negotiated rulemaking has been used successfully by several departments. Mr. McMaster stated that the Montana Consensus Council, located in the governor's office, provides mediators for negotiated rulemaking committees and training to state agencies that are developing negotiated rulemaking procedures.

We asked the Montana Consensus Council to send us information on their agency education initiatives. We will review and forward this information to you as soon as it is available.

Negotiated Rulemaking in Federal Agencies

Federal agencies began experimenting with negotiated rulemaking in the early 1980s, but it was not until federal lawmakers passed the Negotiated Rulemaking Act of 1990 that agencies used the practice with frequency (Attachment D).⁹ The number of regulations drafted using negotiated rulemaking is increasing, but many agency officials continue to show reluctance. A comprehensive review of negotiated rulemaking by the John F. Kennedy School of Government at Harvard University attributes this reluctance to the recency of the new legislation and the limited number of regulations for which negotiated rulemaking is appropriate.¹⁰

Among those federal agencies that routinely use negotiated rulemaking, the Environmental Protection Agency and the Department of Labor have done so most frequently. Based on agency

⁹Attachment D contains a copy of the Negotiated Rulemaking Act of 1990 (5 USC § 561 through § 570).

¹⁰Coglianes, Cary (no date), *Assessing Consensus: The Promise and Performance of Negotiated Rulemaking*[Online]. Available on the World Wide Web at internet address <http://www.ksg.harvard.edu/prg/coglianes/rulemake.htm> [accessed April 9, 1997].

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reports, these departments have had successful negotiated rulemaking experiences.¹¹ The agencies report reduced litigation costs, increased industry compliance with regulations, and enhanced working relationships with industry officials, environmental advocates, and labor relations groups.

Currently, we are in the process of obtaining additional information on federal negotiated rulemaking practices, including a negotiated rulemaking handbook from the U.S. Department of Labor. We will forward this information to you once it arrives.

I hope this information is useful for your purposes. Please do not hesitate to contact me if you have additional questions.

Attachments

¹¹United States Department of Labor, June 27, 1996, *OSHA Chief Lauds "Negotiated Rulemaking" As a Way to Cut Red Tape and Bureaucracy* [Online]. Available on the World Wide Web at <http://www.osha.gov/media/oshnews/june96/osha96-253.html> [accessed April 2, 1997].

FISCAL NOTE

STATE OF ALASKA
1997 LEGISLATIVE SESSION

BILL NO. HB 264

Revision Date: _____ Dept. Affected: All departments except Revenue
 Title: An Act providing for a negotiated rulemaking BRU: _____
process. Component: _____
 Sponsor: Rep. James
 Requester: House State Affairs Committee COMPONENT SERIAL NO. _____

Expenditures/Revenues (Thousands of Dollars)

OPERATING EXPENDITURES	FY 98	FY 99	FY 00	FY 01	FY 02	FY 03
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	***	***	***	***	***	***

CAPITAL EXPENDITURES						
----------------------	--	--	--	--	--	--

CHANGE IN REVENUES ()						
------------------------	--	--	--	--	--	--

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other						
TOTAL	***	***	***	***	***	***

Estimate of any current year (FY97) cost: \$ 0.0

POSITIONS

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary)

This bill would authorize state agencies to use a negotiated rulemaking process. Use of this process would not be mandatory, and would depend on a determination by agencies that such a process would be in the public interest, based on several factors listed in the bill.

The asterisks on this fiscal note indicate that the fiscal impact of the bill is indeterminate. Further analysis and clarification of the scope of the bill is necessary to determine the extent to which negotiated rulemaking would be used and the cost of the process.

Prepared by: Annaloe McConnell Phone: 465-4660
 Division: Office of Management and Budget Date: 5/5/97
 Approved by Commissioner: Jim Ayers, Chief of Staff Date: 5/5/97
 Agency: Office of the Governor

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FISCAL NOTE

STATE OF ALASKA
1997 LEGISLATIVE SESSION

BILL NO. HB264

Revision Date: _____ ept. Affected: Health and Social Services
 Title: An Act providing for a negotiated regulation BRU: Administrative Services
making process Component: Administrative Support Services
 Sponsor: Rep. James COMPONENT SERIAL NO. 320
 Requestor: House (STA) See also (SN#): _____

Expenditures/Revenues:

(Thousands of Dollars)

OPERATING	FY98	FY99	FY00	FY01	FY02	FY03
PERSONAL SERVICES	0.0	0.0	0.0	0.0	0.0	0.0
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0

CAPITAL EXPENDITURES						
----------------------	--	--	--	--	--	--

CHANGES IN REVENUES ()						
-------------------------	--	--	--	--	--	--

FUND SOURCE

(Thousands of Dollars)

1002 Federal Receipts	0.0					
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (please specify)						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

Estimate of any current year (FY97) cost: \$0.0

ANALYSIS: (Attach a separate page if necessary)

The use of the negotiated regulation making process that this bill establishes would be discretionary. One of the factors that an agency could consider in determining whether to use the process is its ability and willingness to commit resources. The Department would not, therefore, be obligated to engage in negotiated regulations making if resources were not available. Thus there is no direct fiscal impact on the Department.

5/1/97
 Prepared by: Janet Clarke
 Division: Div. Admin Services
 Approved by Commissioner: Karen Perdue, Commissioner
 Agency: Department of Health & Social Services

Phone: 465-3082
 Date: 05/01/97
 Date: 5/1/97

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