

ALASKA LEGISLATURE

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HOUSE and SENATE FINANCE COMMITTEE FILES, 1997-1998

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 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 § 75:105.

INTERPRETIVE NOTES AND DECISIONS

4. Subsequent statute modifying Administrative Procedure Act

Immigration and Naturalization Act displaces APA where it states explicitly that it shall be "sole

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.

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:

4, 156, 186, 321.

46:4.

§ 46:583.

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Castillo-Villagra v INS (1992, CA9)
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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 596 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

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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 3d, 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 convenuee 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 convenuee shall report findings and may make recommendations to the agency. Upon request of the agency, the convenuee 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 convenuee 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 (1994) § 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) § 128.

§ 565. Establishment of committee [Caution: For sunset and savings 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

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(d) 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:

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 § 589, as 5 USCS § 569; in subsec. (d)(2), substituted "566" for "586"; in subsec. (f)(2), substituted "568" for "588"; 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:

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 § 590, as 5 USCS § 570.

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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

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SUBJECT	STATUTORY AUTHORITY	CODE SECTIONS
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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
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Notice of Negotiated Rulemaking Committee; Comment; Applications For Membership	Section 84-926, R.R.S. .994	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; Expenses	Section 84-931, R.R.S. 1994	011
Grants Or Gifts 1994	Section 84-931, R.R.S.	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 shall 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],

17 72

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)

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

In the matter of the Negotiated) Certification of
Rulemaking Committee for) Financial
[Insert name of the proposed) Need
Negotiated Rulemaking Committee],)
____ NAC ____.

STATE OF NEBRASKA)
) ss.
COUNTY OF _____)

COMES NOW the undersigned, being first duly sworn, and hereby states and certifies as follows:

1. I am a member of the above-referenced negotiated rulemaking committee created by the Nebraska Natural Resources Commission.

2. In connection with my duties on that committee, I represent [insert the name of the appropriate identified interest].

3. In connection with my duties on that committee, I have incurred or will incur expenses and/or other costs.

4. I certify that I have a lack of adequate financial resources to serve on the above-referenced negotiated rulemaking committee, and that I need financial assistance from this agency in order to serve.

Signature of Affiant

Subscribed and sworn to before me this _____ day of _____, 19____.

Notary Public

NEBRASKA ADMINISTRATIVE CODE
TITLE 261, NEBRASKA ADMINISTRATIVE CODE
NEBRASKA NATURAL RESOURCES COMMISSION
Rules of Agency Procedure

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

ALPHABETICAL TABLE OF CONTENTS

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

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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

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"

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

NUMERICAL TABLE OF CONTENTS

SUBJECT OR TITLE	STATUTORY AUTHORITY	CODE SECTION
Definitions	Section 84-901, R.R.S. 1994	Section 001
Ex parte Communications	Section 84-914, R.R.S. 1994	Section 002
Intervention	Section 84-912.02, R.R.S. 1994	Section 003

Commencement of Contested Case	Section 84-913, R.R.S. 1994	Section 004
Hearing Officer	Section 84-914, R.R.S. 1994	Section 005
Prehearing Matters	Sections 84-913, 84-914, R.R.S. 1994	Section 006
Hearing of Contested Case	Section 84-913, 84-914, R.R.S. 1994	Section 007
Decision and Order	Section 84-915, R.R.S. 1994	Section 008
Appeal	Section 84-917, R.R.S. 1994	Section 009

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 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 *Joan M. Kasson* Phone: 465-5370
 Division: Administrative Services Division Date: 5/5/97
 Approved by Commissioner: Bruce M. Botelinc, Attorney General *Bruce M. Botelinc* Date: 5/5/97
 Agency: Department of Law

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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 Bartholomey 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 process. BRU: _____
 Sponsor: Rep. James Component: _____
 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: Annals, McConnell *[Signature]* 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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February 9, 1998

Sectional Analysis of CSHB 264
("Negotiated Regulation Making Process")

Section 1 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) the purpose of the new provision is to establish a framework for conducting negotiated regulation making consistent with the APA;
- (2) negotiated regulation making is supplemental to the "regular" regulation process and may be 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; and
- (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 a list of factors for state agency to consider in determining the public interest.

AS 44.62.730 sets out the standard for the use of a convener to assist in the making the determination of need under AS 44.62.720).

AS 44.62.740 sets out the standards for establishment, support, and termination of the committee. Subsection (a) authorizes the agency to establish a negotiated regulation making committee. Subsection (b) allows the agency head to expand the membership if necessary to facilitate the workings of the committee. Subsection (c) requires the agency to make available administrative support to the committee that the agency determines necessary. Subsection (d) terminated the committee upon adoption of the regulation or at earlier date.

AS 44.62.750 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 44.62.760 sets out standards for facilitator selection, duties, and authority. Subsection (a) allows the agency to appoint a facilitator. Subsection (b) requires the facilitator to preside at meetings and coordinate with the agency on the management of records. Subsection (c) provides that facilitator does not have decision-making authority.

AS 44.62.770 set 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 reasonable travel and other expenses in specified circumstances. Subsection (d) allows the state to accept grants or gifts to fund the process if the information on the grant or gift is public, no condition is placed on the grant or gift to the agency, and any other legal requirements have been met.

AS 44.62.780 precludes judicial review of an agency decision to establish, assist, or terminate regulation making committee. A regulation that is product of negotiated regulation making meeting and later subject to judicial review is given no greater deference.

AS 44.62.790 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 44.62.795 sets out confidentiality of certain records or documents that contain proprietary information.

AS 44.62.830 sets out definitions.

Section 2 of the bill provides specified immunity for negotiated regulation making committee and its members for certain acts or omissions occurring in the course and scope of their official duties.

Section 3 of the bill provides an exemption from the procurement code for any contracts for the convener or for the facilitator.

Section 4 of the bill places any state position established as convener or facilitator in the exempt service.

Section 5 of the bill repeals the bill's provisions on July 1, 2003. This provides a sunset provision to allow state agencies and the legislature to evaluate the process after five-year experience with it.

Section 6 of the bill makes the bill effective immediately, if the bill is enacted into law.



House Finance Committee

SUBJECT OF MEETING
 HB 264
 SB 159

DATE: Feb 11, 98

PLACE: Cap 519

	NAME	REPRESENTING	BUSINESS/PERSONAL MAILING ADDRESS	ZIP	(H) PHONE	(W) PHONE	DO YOU WANT TO TESTIFY?	
⑤	Deborah Behr	Dept of Litw	Juneau AK	99811		465-2122	<input checked="" type="radio"/> Y <input type="radio"/> N	
①	Ernie Hall	Chairman of Board AEDC	144 E Potter Dr Anch AK	99518		562 2257	<input checked="" type="radio"/> Y <input type="radio"/> N	C
⑬	Douglas Hertz	Alaska Educ Develp RCAC Pinn. Wd Sound	319 Seaward, June RESIDENCE ADVISORY COUNCIL			6-4044	<input checked="" type="radio"/> Y <input type="radio"/> N	
	John Ference	Div of Insurance	SOB			4652560	<input type="radio"/> Y <input checked="" type="radio"/> N	
④	Patricia Manko	President					<input type="radio"/> Y <input type="radio"/> N	
							<input type="radio"/> Y <input type="radio"/> N	
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							<input type="radio"/> Y <input type="radio"/> N	

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FOR:GLN

TCN:80245

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LOCATION: GLENNALLEN
SB 159 MRS.

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2

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13:31:50

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BY:ANC
FOR:ANC

③

LOCATION: ANCHORAGE
SB 159

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