

ALASKA LEGISLATURE COMMITTEE FILES 1997-1998 80/2

9441 HOUSE STATE AFFAIRS

77

3. Section two of the application must be completed by two witnesses who attest that the voter is unable to go to the polls due to a disability. Both witnesses must sign and date section two.
  4. After section one and two are completed, the personal representative returns to the election official who then issues the ballots to the personal representative.
  5. The personal representative delivers the ballots to the voter. The voter marks the ballots and places the ballots in the personal representative envelope.
  6. The voter must sign section three of the personal representative envelope. The voter's signature must be witnessed by the personal representative.
  7. The personal representative delivers the voted ballots back to the election official who issued them.
- The **current process** requires five trips for the personal representative. The personal representative is required to return the ballots to the location where they were issued. The process also involves a total of 6 signatures. The voter must sign two times, the personal representative must sign three times and an additional witness must sign one time.

- The *new process* would consist of the following steps:

1. The voter must apply in writing that he or she wishes to vote by personal representative. The application must contain the voter's name, residence address, a form of identification (social security number, date of birth, voter number), the name of the personal representative and the voter's signature.
2. The personal representative delivers the completed application to an election official. Before the election official issues the ballots, the personal representative must present identification and sign a register. The information required on the register will include the personal representative's name, residence and mailing address, type of identification provided, the name of the voter on whose behalf the ballot is requested and the personal representative's signature.

After signing the register, the personal representative is issued the ballots.

3. The personal representative delivers the ballots to the voter. The voter marks the ballots and completes the voter certificate. The voter certificate will require the voter to state the name of the personal representative that delivered the ballots and it will include a statement of disability. The personal representative must witness the voter's signature

4. The personal representative then delivers the voted ballots to an election official not later than 8:00pm on election day.
- The division believes that the ***new process*** is less confusing to the voter and personal representative. The absentee by personal representative envelope will require less signatures, therefore reducing the number of rejected ballots.
  - For the first time, identification will be required of the personal representative and each election official will have a personal representative accountability log.

APPENDIX 1

# BALLOT TRANSPORTATION AS OF 7/2/96

## PRIMARY ELECTION

1996

Wednesday, August 28, 1996

*Nome  
Pks  
Sitka  
Kit - go direct  
will put away things  
into Juneau  
about 12:30 pm  
AS 64  
same  
Anchorage  
12:30 pm / 2:00 pm*

*Time the polls are  
open / actual  
the location (addresses)  
delivery to us  
(speed pack)*

III FAIRBANKS

I KODIAK

II SEWARD

III VALDEZ

II SOLDOTNA (KENAI APT)

II HOMER

*7:00 AM - direct to Juneau*

*8:45 AM  
7:31 AM / 9:50 AM*

*7:55 AM  
8:35 AM*

*9:05 AM / 9:50 AM*

*7:55 AM  
8:45 AM*

DHL will pickup from the Regional Office in Anchorage and deliver to the Anchorage Airport.

II ANCHORAGE

ANCHORAGE AIRPORT AS AIR CARGO

II PALMER

II WASILLA

Is there DHL in Palmer and Wasilla?

*Pick up Juneau in the pass from Reg II at about 9:00 AM. Waited then for the other locations and sent down @ the time.*

*May need someone contracted out to pickup in Palmer / Wasilla to make flight AS 64 @ 12:30 pm*

Nome will Goldstreak their ballots

IV NOME

I JUNEAU

JUNEAU AIRPORT AS AIR CARGO

I SITKA

I KETCHIKAN

*1:47 PM  
2:15 PM*

*9:55 AM  
2:47 PM*

DIVISION OF ELECTIONS

JUNEAU COURT BLDG.

**HB 259**

***"An Act relating to the maintenance of voter lists and to the inactivation and cancellation of voter registration; and providing for an effective date."***

Prepared by the Division of Elections

**HISTORY OF LIST MAINTENANCE LEGISLATION**

**PURGE PROCEDURE THROUGH 1993**

**PROPOSED LIST MAINTENANCE PROCEDURE**

**FISCAL IMPACT OF LIST MAINTENANCE**

**HB 259**

***"An Act relating to the maintenance of voter lists and to the inactivation and cancellation of voter registration; and providing for an effective date."***

Prepared by the Division of Elections

- Prior to the passage of the National Voter Registration Act (NVRA), the division conducted an annual review of the voter list.
- In July of 1993, the division inactivated 25,652 voters and deleted 37,915 voters. Alaska implemented the NVRA on January 1, 1995 and list maintenance (purge) has not been conducted since that time.
- In order to comply with the federal law, the legislature passed several amendments to Alaska's election statutes. During the preclearance review of the amendments required by section 5 of the federal Voting Rights Act, the U.S. Department of Justice expressed some concern about various provisions of the 1994 legislation.
- The state passed legislation in 1996 in an attempt to comply with federal law. But the U.S. Department of Justice concluded the state's voter purge procedure violates the NVRA and authorized the filing of a lawsuit against the state. This bill is offered in response. The Department of Justice reviewed a previous draft of this bill and has indicated that it may drop its plans to sue the state if the state adopts legislation which eliminates removal of inactive voters from voter lists for nonvoting alone. We believe this bill assures compliance with the act and is consistent with our informal agreement in principle with the Justice Department.

## **HISTORY OF LIST MAINTENANCE LEGISLATION**

- The purge process used up until 1993 consisted of two steps:
  1. Purge notification cards were sent to voters who had not voted in any election in the two preceding calendars. Voters who did not respond within 30 days were placed on an inactive list. Inactivated voters remained on the master registration list but were not included in the reported total number of registered voters. Inactive voters were still eligible to vote and sign initiative petitions.
  2. If, after two general elections had occurred since the purge notification card was mailed, and the voter still had no activity or contact with the division, they were deleted. Their voting records were no longer maintained on any registration list.

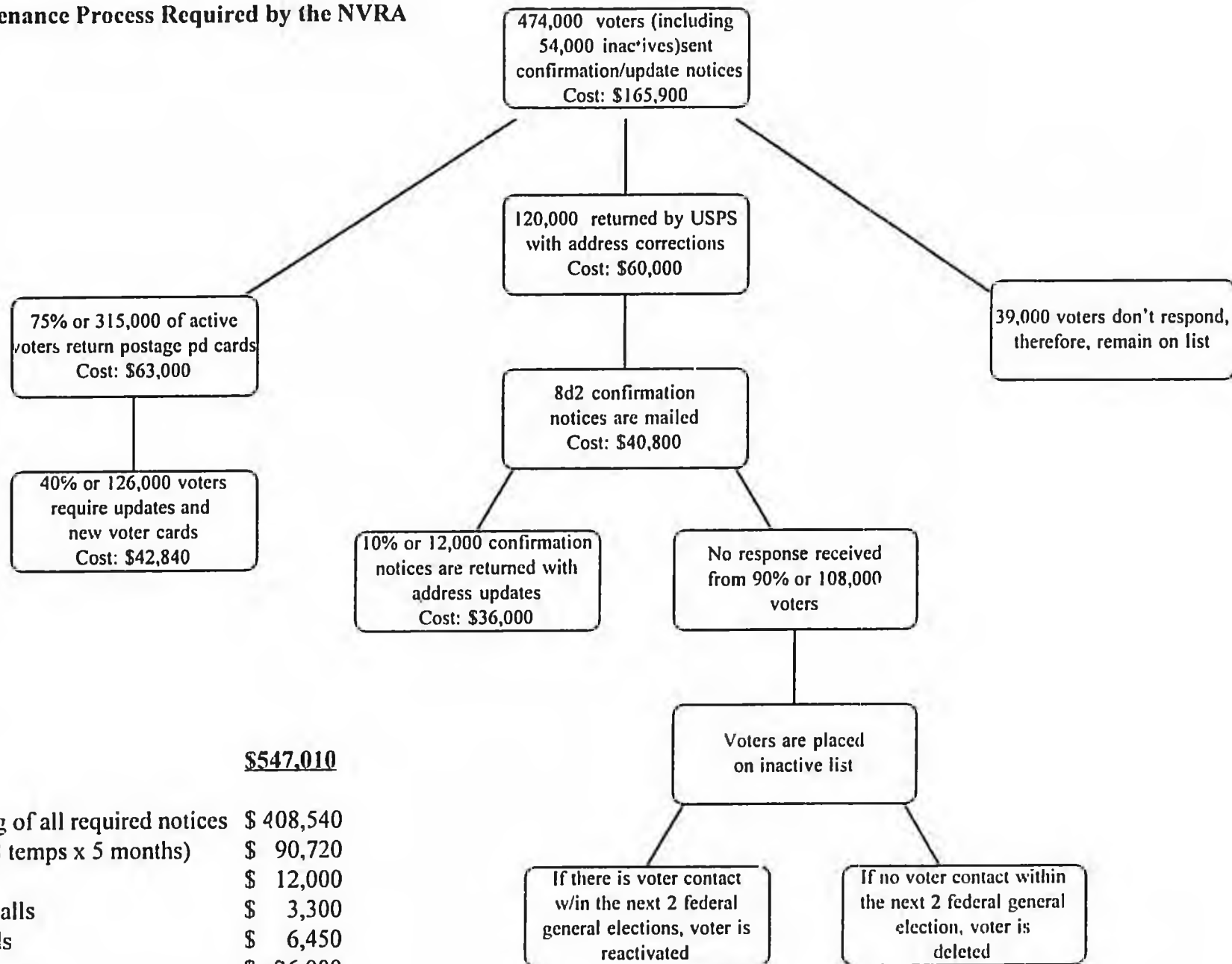
### **PURGE PROCEDURE THROUGH 1993**

- During the first year the new list maintenance is conducted, the procedure would consist of the following steps:
  1. All voters on the active and inactive list would be mailed an address confirmation card. As required by the NVRA, this card would be non-forwardable and return postage paid by the division.
  2. The registration records of all voters who return the address confirmation cards will be updated to reflect the information provided on the card. These voters will be sent new voter identification cards.
  3. The address confirmation cards that are returned by the U.S. Postal Service with address corrections will be sent the NVRA 8(d)(2) confirmation notice. This notice will ask the voter to respond as to whether or not the information provided on the card is correct and if they wish to remain registered. The voters who do not respond by the 45th day after the day the notice was sent will be placed on the inactive list. They will remain on the inactive list for the next two federal general elections. If there is no voter contact within this time period, the voter's record will be deleted. If there is voter contact the voter's registration will be re-activated. The records of voters who do respond to this notice with new information will be updated and mailed voter identification cards.

## **PROPOSED LIST MAINTENANCE PROCEDURE**

- The proposed list maintenance procedure will be expensive. This is due to the two factors: the federal law requires two notices be mailed to voters and that all postage is to be paid by the state.
- The flow chart that follows this page outlines the anticipated fiscal impact of each step in the proposed list maintenance procedure.

# List Maintenance Process Required by the NVRA



**Total Costs: \$547,010**

Printing and Mailing of all required notices	\$ 408,540
Personal Services (8 temps x 5 months)	\$ 90,720
Advertising	\$ 12,000
Fax/Long distance calls	\$ 3,300
Microfilming records	\$ 6,450
DIS chargeback	\$ 26,000

Costs of list maintenance in subsequent years estimated to be \$41,760



**FRAN ULMER**  
LIEUTENANT GOVERNOR  
STATE OF ALASKA

February 2, 1998

The Honorable Jeanette James  
Chair, House State Affairs Committee  
Alaska State Legislature  
State Capitol, Room 102  
Juneau, Alaska 99811

Dear Representative James:

During the first session of the 20<sup>th</sup> Alaska State Legislature, HB 259, relating to voter registration list maintenance, was introduced and referred to the House State Affairs committee.

I am writing to ask your support in scheduling a hearing for this legislation at your earliest convenience. Under the National Voter Registration ACT (NVRA) the state's ability to do list maintenance was significantly limited. As a result, the Division of Elections has received complaints from candidates, the press, and the public about the great number of inaccuracies in our voter rolls. It is imperative that the legislature act on this issue this session so that the Division of Elections can address list maintenance issues immediately following the 1998 elections.

Prior to implementation of the NVRA in 1995, Alaska conducted an annual review and purge of the list of registered voters. This review targeted voters without recent voter history. Because one of the premises of the NVRA states that voters cannot be removed solely on their failure to vote, Alaska's list maintenance procedures must be revised.

Legislation was passed in 1996 in an attempt to bring the statute into compliance with federal law, but subsequent review by the United States Department of Justice indicated that the procedures were problematic, and the Department of Justice authorized a lawsuit against the state of Alaska.

The state has reached an informal agreement that the Department of Justice will refrain from suit while the legislature considers changes to the list maintenance procedure.

House Bill 259 was introduced to bring the state's list maintenance requirements into compliance with the National Voter Registration Act (NVRA).

I would appreciate your help in scheduling this bill for a hearing. If you have any questions, please do not hesitate to contact me or the staff at the Division of Elections.

Sincerely,

A handwritten signature in black ink, appearing to read "Fran", written in a cursive style.

Fran Ulmer  
Lieutenant Governor

# STATE OF ALASKA

TONY KNOWLES, GOVERNOR

## OFFICE OF THE LT. GOVERNOR

DIVISION OF ELECTIONS  
P.O. BOX 110017  
JUNEAU, ALASKA 99811-0017  
PHONE: (907) 465-4611

January 15, 1998

The Honorable Jeannette James  
Chair, House State Affairs Committee  
Alaska State Legislature  
State Capitol, Room 102  
Juneau, Alaska 99801

Dear Representative James:

During the first session of the 20<sup>th</sup> Alaska State Legislature, two pieces of legislation for the division of elections were introduced.

House Bills 257 and 259 were referred to the House State Affairs Committee. The division respectfully requests that these two bills be scheduled for hearings. House Bill 257 addresses a number of issues such as simplifying the election notice process, streamlining the personal representative voting process and improving the process for absentee voting by fax. House Bill 259 has been introduced to bring Alaska into compliance with the National Voter Registration Act list maintenance procedures.

I have enclosed a quick reference guide for both of these bills which identifies the proposed changes.

I would appreciate the opportunity to meet with you or your staff concerning these two bills. Please do not hesitate to contact me if you have any questions about our legislation. I can be reached at 465-3935.

Sincerely,



Gail Fenumiai  
Legislative Liaison

Enclosures



U.S. Department of Justice

Civil Rights Division

Office of the Assistant Attorney General

Washington, D.C. 20530

February 11, 1997

VIA TELEFACSIMILE & FEDERAL EXPRESS

The Honorable Bruce M. Botelho  
Attorney General  
State of Alaska  
450 Diamond Courthouse  
P.O. Box 110300  
Juneau, Alaska 99811-0300

Dear Mr. Attorney General:

This is to notify you that I have authorized the filing of a lawsuit against the State of Alaska, the Alaska Lieutenant Governor, and the Alaska Director of Elections to compel compliance with the National Voter Registration Act of 1993 ("NVRA"), 42 U.S.C. §§ 1973gg to 1973gg-10.

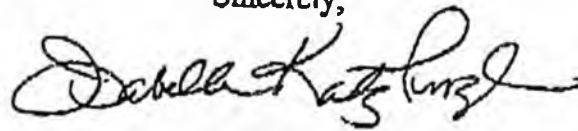
As you are aware, the NVRA, which took effect January 1, 1995, requires that states follow specific procedures and protections set forth in the Act in purging registrants from the registration list for elections for federal office. In particular, the NVRA provides that a voter may not be removed from the registration list for federal elections by reason of the voter's failure to vote. 42 U.S.C. § 1973gg-6(b)(2).

Under Alaska's voter removal procedures, which were adopted for the stated purpose of conforming state law to the requirements of the NVRA, registered voters who fail to vote within a four-year period are specifically targeted for inclusion in the state's voter removal program. These procedures can have the end result of a voter being purged from the voter registration list for federal elections simply for having failed to vote. As we discussed in our December 10, 1996 letter to Assistant Attorney General Kathleen Strasbaugh, these procedures violate the NVRA.

Our concern is that no registered voter in the State of Alaska be purged from the registration list for federal elections because of his or her failure to vote. Thus, we intend to move forward on this matter expeditiously. However, we are willing to delay filing the complaint for a short period of time if the State is willing to resolve this matter voluntarily and negotiate a consent decree that would be filed with the complaint.

Under these circumstances, we request that you apprise us within ten days whether the State wishes to discuss settlement of this matter. Patricia O'Beirne, an attorney in the Voting Section, will be in contact with your office. In the meantime, Ms. O'Beirne can be reached at 202-307-6264.

Sincerely,

A handwritten signature in cursive script, appearing to read "Isabelle Katz Pinzler".

Isabelle Katz Pinzler  
Acting Assistant Attorney General  
Civil Rights Division

# FISCAL NOTE

No. 1  
 Bill Version: HB 259  
 (H) Publish Date: 4/22/97

STATE OF ALASKA  
 1997 LEGISLATIVE SESSION

Revision Date _____	Dept. Affected <u>Office of the Governor</u>
Title <u>Maintenance of voter lists</u>	BRU <u>Elective Operations</u>
Sponsor <u>Rules Committee</u>	Component <u>Elections</u>
Requester <u>Governor</u>	Component Serial No. <u>#21</u>

**Expenditures/Revenues**

(Thousands of Dollars)

OPERATING EXPENDITURES	FY 98	FY 99	FY 00	FY 01	FY 02	FY 03
Personal Services	90.7	22.7	22.7	22.7	22.7	22.7
Travel						
Contractual	456.3	19.1	19.1	19.1	19.1	19.1
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
<b>TOTAL OPERATING</b>	<b>547.0</b>	<b>41.8</b>	<b>41.8</b>	<b>41.8</b>	<b>41.8</b>	<b>41.8</b>

CAPITAL EXPENDITURES						
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CHANGE IN REVENUES [    ]						
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**FUND SOURCE**

(Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF	547.0	41.8	41.8	41.8	41.8	41.8
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other						
<b>TOTAL</b>	<b>547.0</b>	<b>41.8</b>	<b>41.8</b>	<b>41.8</b>	<b>41.8</b>	<b>41.8</b>

Estimate of any current year (FY97) cost: none

**POSITIONS**

Full-time						
Part-time						
Temporary	8					

**ANALYSIS:** *(Attach a separate page if necessary)*

This fiscal note assumes that all registered voters will be sent an address update/confirmation card the first year after passage. It has been five years since the last list maintenance occurred and a statewide mailing will significantly improve the accuracy of the registration rolls.

The fiscal note shows \$90.7 in personal services, anticipating the need for 8 temporary employees (range 8A) for 5 months. An employee can process 150 registrations a day. Temporary employees will also process 246,000 microfilmed records. The fiscal note shows \$456.3 in contractual costs: \$12.0 in advertising, \$139.1 for the printing of the address update/confirmation cards, the 8d2 notices (required by the NVRA and sent to all voters with mail returned by the USPS) and the new voter id cards, \$269.4 in postage costs (NVRA requires that the division pay all postage costs), \$3.3 for increased telephone/fax charges, \$6.5 for microfilming and \$26.0 for VREMS programming changes and increased DIS charges.

Prepared by <u>Dana LaTour</u>	Phone <u>465-5347</u>
Division <u>Division of Elections</u>	Date <u>4/8/97</u>
Approved by Co <u>Lt. Governor Fran Ulmer</u>	Date <u>4/9/97</u>
Agency <u>Office of the Lieutenant Governor</u>	

TONY KNOWLES  
GOVERNOR



STATE OF ALASKA  
OFFICE OF THE GOVERNOR  
JUNEAU

HB 259  
P.O. Box 110001  
Juneau, Alaska 99811-0001  
(907) 465-3500  
Fax (907) 465-3532

April 18, 1997

The Honorable Gail Phillips  
Speaker of the House  
Alaska State Legislature  
State Capitol  
Juneau, AK 99801-1182

Dear Speaker Phillips:

Maintaining clean voter registration lists is a critical part of ensuring the integrity of the electoral process. The bill I transmit today establishes a method that allows for annual maintenance of Alaska's voter registration lists as set out in the National Voter Registration Act (NVRA).

Prior to the 1994 passage of the NVRA, the Division of Elections reviewed the voter registration list annually and inactivated those people from the rolls who had not voted for at least two years. They were then deleted from the rolls four years later if they were never heard from. The NVRA, however, does not allow voter removal based on non-voting alone, without any prior notice.

The state passed legislation in 1996 in an attempt to comply with federal law. But the U.S. Department of Justice ruled the state's voter purge procedure continued to violate the NVRA and authorized the filing of a lawsuit against the state. This bill is offered in response. The Department of Justice has reviewed the bill and has indicated the federal government will drop its lawsuit against the state if it becomes law. Under this legislation, inactive voters will be sent multiple notices with a chance to respond before being removed from voter lists.

This legislation is necessary in order to avoid a costly lawsuit and to improve the accuracy of Alaska's voter registration rolls.

Sincerely,

A handwritten signature in cursive script that reads "Tony Knowles".  
Tony Knowles  
Governor

# FISCAL NOTE

STATE OF ALASKA  
1998 LEGISLATIVE SESSION

BILL NO. HB 259

Revision Date 2/11/98 Dept. Affected Office of the Governor  
 Title An Act relating to the maintenance of voter BRU Elective Operations  
 lists \_\_\_\_\_ Component Elections  
 Sponsor Rules Committee  
 Requester House State Affairs Component Serial No. #21

**Expenditures/Revenues** (Thousands of Dollars)

OPERATING EXPENDITURES	FY 99	FY 00	FY 01	FY 02	FY 03	FY 04
Personal Services	90.7	22.7	22.7	22.7	22.7	22.7
Travel						
Contractual	396.3	19.1	19.1	19.1	19.1	19.1
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
<b>TOTAL OPERATING</b>	<b>487.0</b>	<b>41.8</b>	<b>41.8</b>	<b>41.8</b>	<b>41.8</b>	<b>41.8</b>

<b>CAPITAL EXPENDITURES</b>						
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<b>CHANGE IN REVENUES ( )</b>						
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**FUND SOURCE** (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF	487.0	41.8	41.8	41.8	41.8	41.8
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type)						
<b>TOTAL</b>	<b>487.0</b>	<b>41.8</b>	<b>41.8</b>	<b>41.8</b>	<b>41.8</b>	<b>41.8</b>

Estimate of any current year (FY99) cost: none

**POSITIONS**

Full-time						
Part-time						
Temporary	8					

**ANALYSIS:** (Attach a separate page if necessary)

This fiscal note assumes that all registered voters will be sent an address update/confirmation card the first year after passage. It has been six years since the last list maintenance occurred and a statewide mailing will significantly improve the accuracy of the registration rolls.

The fiscal note shows \$90.7 in personal services, anticipating the need for 8 temporary employees (range BA) for 5 months. An employee can process 150 registrations a day. Temporary employees will also process 246,000 microfilmed records. The fiscal note shows \$396.3 in contractual costs: \$12.0 in advertising, \$139.1 for the printing of the address update/confirmation cards, the 8d2 notices (required by the NVRA and sent to all voters with mail returned by the USPS) and new voter id cards, \$209.4 in postage costs (NVRA requires that the division pay all postage costs), \$3.3 for increased telephone/fax charges, \$6.5 for microfilming and \$26.0 for VREMS programming changes and increased DIS charges.

Prepared by Dana LaTour Phone 465-5347  
 Division Division of Elections Date 2/11/98  
 Approved by C Lt. Governor Fran Ulmer Date 2/11/98  
 Agency Office of the Lieutenant Governor

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**HB**

**264**

HOUSE COMMITTEE REPORT

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

FURTHER REFERRALS:

Fi

Date of Committee Action: 1/20/98

The STATE AFFAIRS Committee considered:

HI

HOUSE BILL NO. 264

NEGOTIATED REGULATION MAK

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

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

[ ] additional referral to \_\_\_\_\_ Committee [ ] attached amendment(s)

ADOPTS: \_\_\_\_\_ Letter of Intent

ATTACHES NEW FISCAL NOTE(S): (Dept)

APPROVES PREVIOUS: (Dept/Date)

[ ] fiscal note(s) \_\_\_\_\_

[ ] fiscal note(s) \_\_\_\_\_

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

[ ] zero fiscal note(s) \_\_\_\_\_

SIGNING WITH RECOMMENDATIONS	DP	DNP	NR	AM
Jeannette James	✓			
K. D. S. O.			✓	
Mary H. ...	✓			
Fred ...	✓			
[Signature]		✓		
[Signature]			✓	
[Signature]				✓

CHAIR'S SIGNATURE \_\_\_\_\_

100 S. Hill Street HASTING

Sub Committee

HB 264

Ben Kowitz

~~Dyson~~ Hodgins

James



# STATE OF ALASKA

THE ALASKA STATE LEGISLATURE

House of Representatives

Representative Jeannette James

House State Affairs Committee, Chair

Joint Regulation Review Committee, Chair

Capitol Building

Juneau, AK 99801

(907) 465-3743 ph

(907) 465-2381 fax

## INDEX *Teri Banister-Drafter*

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

Sponsor: Rep. Jeannette James

5/8/97

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HOUSE BILL NO. 264

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTIETH LEGISLATURE - FIRST SESSION

BY REPRESENTATIVE JAMES

Introduced: 4/25/97

Referred: State Affairs, Finance

A BILL

FOR AN ACT ENTITLED

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 the agency;

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

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

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

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

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

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

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

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

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

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

1 date.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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



# STATE OF ALASKA

THE ALASKA STATE LEGISLATURE

## House of Representatives

Representative Jeannette James

House State Affairs Committee, Chair

Joint Regulation Review Committee, Chair

Capitol Building

Juneau, AK 99801

(907) 465-3743 ph

(907) 465-2381 fax

TO: House State Affairs Committee

FROM: Rep. Jeannette James

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

DATE: 4/25/97

### SPONSOR STATEMENT

#### HB 264 Negotiated Regulation/rule Making

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

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

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

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

Regulations drafted using this process tend to be

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BY REPRESENTATIVE JAMES

TO: HB 264

- 1 Page 2, line 26:
- 2 Delete "consensus agreement reached"
- 3 Insert "decision made"
  
- 4 Page 3, line 14:
- 5 Delete "reach a consensus"
- 6 Insert "make a decision"
  
- 7 Page 3, lines 16 - 17:
- 8 Delete all material.
  
- 9 Renumber the following paragraphs accordingly.
  
- 10 Page 3, line 23:
- 11 Delete "consensus"
- 12 Insert "decision"
  
- 13 Page 6, line 3:
- 14 Delete "consensus"
- 15 Insert "majority vote"
  
- 16 Page 6, line 22:
- 17 Delete "consensus"
- 18 Insert "majority vote"

1 Page 6, line 26:

2 Delete "reach consensus"

3 Insert "make a decision"

4 Page 7, line 3:

5 Delete "achieves consensus"

6 Insert "reaches a decision"

7 Page 7, lines 7 - 8:

8 Delete "consensus on"

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

10 Page 7, line 9:

11 Delete "consensus"

12 Insert "a decision"

13 Page 7, line 19:

14 Delete "consensus"

15 Insert "majority vote"

16 Page 7, line 22:

17 Delete "consensus"

18 Insert "majority vote"

19 Page 7, line 29:

20 Delete "achieve consensus"

21 Insert "make a decision"

22 Page 8, line 27:

23 Delete "there is consensus among"

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

1           Insert "make a decision"

2   Page 9, lines 16 - 18:

3           Delete all material.

4   Renumber the following paragraphs accordingly.

5   Page 9, following line 20:

6           Insert a new paragraph to read:

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

8   Renumber the following paragraphs accordingly.

9   Page 9, following line 22:

10           Insert a new paragraph to read:

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

13   Renumber the following paragraphs accordingly.

14   Page 9, line 26:

15           Delete "reaching a consensus"

16           Insert "making a decision"

A M E N D M E N T

OFFERED IN THE HOUSE

BY REPRESENTATIVE JAMES

TO: HB 264

1 Page 7, following line 2:

2 Insert a new subsection to read:

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

11 Reletter the following subsections accordingly.

*use commissioners to substitute*

A M E N D M E N T

OFFERED IN THE HOUSE

BY REPRESENTATIVE JAMES

TO: HB 264

1 Page 7, following line 15:

2 Insert a new section to read:

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

8

9

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BY REPRESENTATIVE JAMES

TO: HB 264

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

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

4 Page 5, lines 7 - 9:

5       Delete all material.

6 Reletter the following subsections accordingly.

7 Page 5, line 13:

8       Delete "30"

9       Insert "15"

10 Page 9, line 10:

11       Delete "shall, where possible, occur before"

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

13 Page 9, line 11:

14       Delete "begin"

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

A M E N D M E N T

OFFERED IN THE HOUSE

BY REPRESENTATIVE JAMES

TO: HB 264

1 Page 8, following line 29:

2 Insert a new section to read:

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

A M E N D M E N T

OFFERED IN THE HOUSE  
TO: HB 264

BY REPRESENTATIVE JAMES

- 1 Page 9, line 13:
- 2 Delete "board, commission,"
  
- 3 Page 9, line 15, following "regulations;":
- 4 Insert "however, "agency" does not include a board or commission;"

# Legislative Research Services

Alaska State Legislature  
Legislative Affairs Agency  
Division of Legal & Research Services



130 Seward Street, Suite 218  
Juneau, Alaska 99801-2196  
Phone: (907) 465-3991  
Fax: (907) 463-3351

April 10, 1997

## MEMORANDUM

TO: Representative Jeannette James

FROM: Paul Brand   
Legislative Analyst

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

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

### Summary

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

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

Representative James  
April 10, 1997  
Page 2

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

### **Overview of Negotiated Rulemaking**

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

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

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

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

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Page 3

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

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

#### **Alaska's Regulation Drafting Practices and Negotiated Rulemaking**

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

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

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

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

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

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

### **Negotiated Rulemaking in Other States**

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

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

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

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

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

# CORRECTION

THE FOLLOWING DOCUMENT(S)  
HAVE BEEN REFILMED TO  
ASSURE LEGIBILITY OR PAGINATION



Rev. 6/98

Central Microfilm Services  
Department of Education  
State of Alaska

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

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

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

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

### **Negotiated Rulemaking in Federal Agencies**

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

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

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

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

Representative James  
April 10, 1997  
Page 6

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

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

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

Attachments

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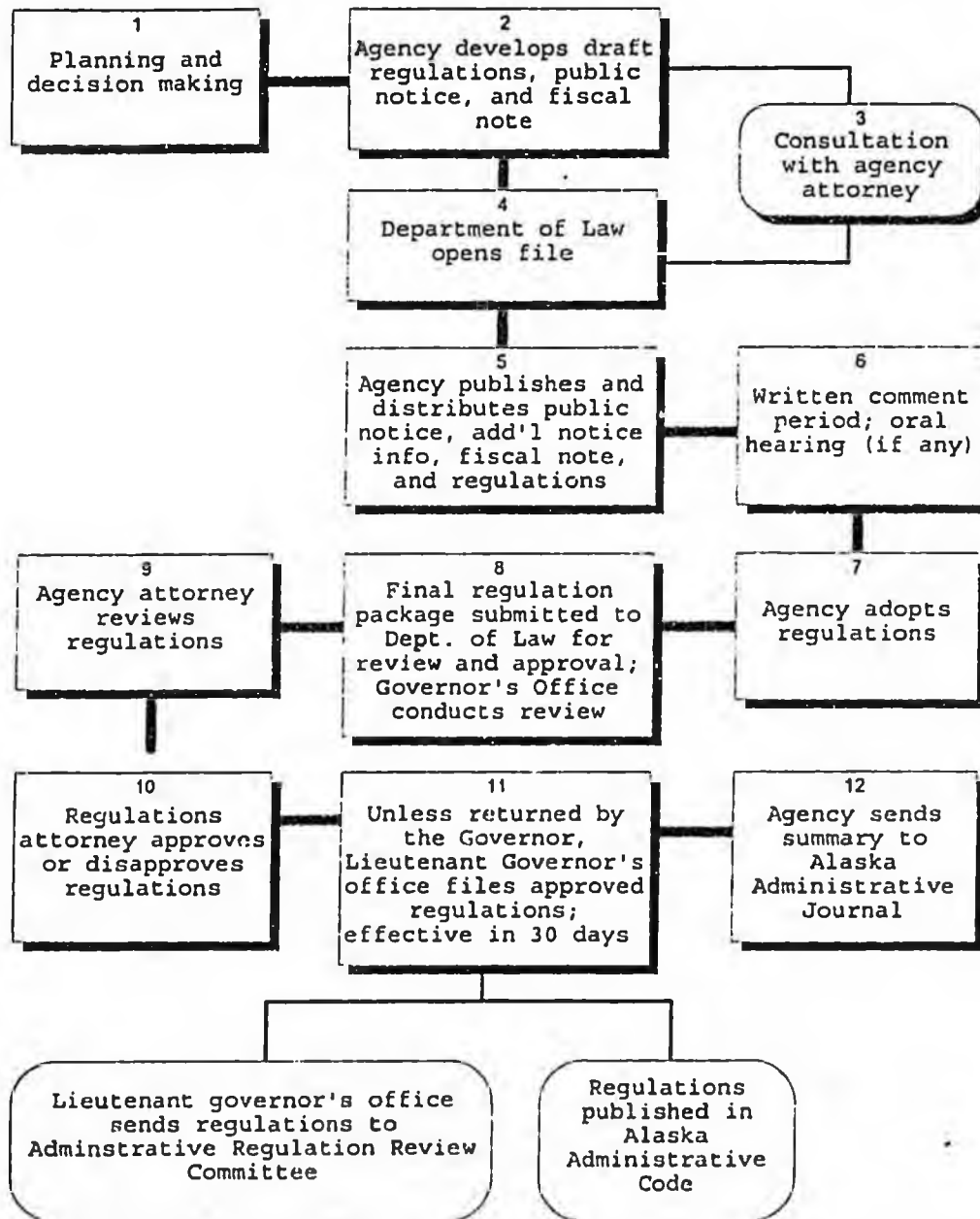
<sup>11</sup>United States Department of Labor, June 27, 1996, *OSHA Chief Lauds "Negotiated Rulemaking" As a Way to Cut Red Tape and Bureaucracy* [Online]. Available on the World Wide Web at <http://www.osha.gov/media/oshnews/june96/osha96-253.html> [accessed April 2, 1997].

Page for notes

**ATTACHMENT A**

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

# Steps in the Regulations Process



**ATTACHMENT B**

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

Part 1 General Provisions

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

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

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

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

Cross-References

Informal conferences and committees, 2-4-304.

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

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

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

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

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

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

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

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

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

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

- (a) statements concerning only the internal management of an agency and not affecting private rights or procedures available to the public;
- (b) formal opinions of the attorney general and declaratory rulings issued pursuant to 2-4-501;
- (c) rules relating to the use of public works, facilities, streets, and highways when the substance of the rules is indicated to the public by means of signs or signals;
- (d) rules implementing the state personnel classification plan, the state wage and salary plan, or the statewide budgeting and accounting system;
- (e) uniform rules adopted pursuant to interstate compact, except that the rules must be filed in accordance with 2-4-306 and must be published in the Administrative Rules of Montana.

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

Cross-References

Informal conferences and committees, 2-4-304.

Declaratory rulings by agencies, 2-4-501.

2-5-104. Determination of need for negotiated rulemaking committee.

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

- (a) there is a need for a rule;
- (b) there are a limited number of identifiable interests that will be significantly affected by the rule;
- (c) there is a reasonable likelihood that a committee can be convened with a balanced representation of persons who:
  - (i) can adequately represent the interests identified under subsection (1)(b); and
  - (ii) are willing to negotiate in good faith to reach a consensus on the proposed rule;
- (d) there is a reasonable likelihood that a committee will reach a consensus on the proposed rule within a fixed period of time;
- (e) the negotiated rulemaking procedure will not unreasonably delay the notice of proposed rulemaking and the issuance of the final rule;
- (f) the agency has adequate resources and is willing to commit those resources, including technical assistance, to the committee; and
- (g) the agency, to the maximum extent possible consistent with the legal obligations of the agency, will use the consensus of the committee as the basis for the rule proposed by the agency.

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

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Montana Negotiated Rulemaking Act

is a framework for the Montana Administrative Rulemaking process. Agency and state agencies use this process to resolve conflicts in the rulemaking process. Public notification and the Administrative Procedure Act. The committee may be used in the rulemaking process. This is an experimental rulemaking process.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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- 2-6-201. Purpose.
- 2-6-202. Definitions.
- 2-6-203. Secretary of
- 2-6-204. State record:
- 2-6-205. Preservation
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b) the grant or gift is given to and accepted by the agency without placing condition on the membership of a negotiated rulemaking committee or the outcome of the negotiated rulemaking process; and  
 c) there is consensus among the members of the negotiated rulemaking committee established pursuant to 2-5-106 that the acceptance of the grant or will not diminish the integrity of the negotiated rulemaking process.

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

## CHAPTER 6 PUBLIC RECORDS

### Part 1 — Public Records Generally

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

### Part 2 — Public Records Management

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

### Part 3 — Records of Elected Executive Branch Officers

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

### Part 4 — Local Government Records

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

**ATTACHMENT C**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(b) NEGOTIATED RULEMAKING ACT

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

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

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

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

Cross Reference

Administrative Procedure Act, see section 84-920.

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

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

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

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

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

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

Source: Laws 1994, LB 446, § 3.

Operative date August 1, 1994.

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

(a) There is a need for a rule;

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

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

(i) Can adequately represent the interests identified; and

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Source: Laws 1994, LB 446, § 6.

Operative date August 1, 1994.

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

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

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

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

Source: Laws 1994, LB 446, § 7.

Operative date August 1, 1994.

*Cross Reference*

Administrative Procedure Act, see section 84-920.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Source: Laws 1994, LB 446, § 9.

Operative date August 1, 1994.

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

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

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

Source: Laws 1994, LB 446, § 10.

Operative date August 1, 1994.

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

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

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

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

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

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

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

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

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

Source: Laws 1994, LB 446, § 11.  
Operative date August 1, 1994.

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

Source: Laws 1994, LB 446, § 12.  
Operative date August 1, 1994.

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

ARTICLE 10  
BASIC WORKWEEK

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

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

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**ATTACHMENT D**

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

## RESEARCH GUIDE:

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

## INTERPRETIVE NOTES AND DECISIONS

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

## SUBCHAPTER III. NEGOTIATED RULEMAKING PROCEDURE

## HISTORY; ANCILLARY LAWS AND DIRECTIVES

## Prospective amendments:

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

## Amendments:

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

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

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

## HISTORY; ANCILLARY LAWS AND DIRECTIVES

## Explanatory notes:

This section formerly appeared as 5 USCS § 581.

## Prospective amendments:

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

## Amendments:

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

## Short title:

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

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

## Other provisions:

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

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"The Congress makes the following findings:

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

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

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

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

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

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

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

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

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

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

RESEARCH GUIDE

Am Jur:

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

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

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

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

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

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

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

**HISTORY; ANCILLARY LAWS AND DIRECTIVES**

Prospective amendments:

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

Amendments:

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

**RESEARCH GUIDE**

Federal Procedure L Ed:

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

Am Jur:

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

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

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

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

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

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

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

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

**HISTORY; ANCILLARY LAWS AND DIRECTIVES**

Prospective amendments:

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

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

**Amendments:**

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

**RESEARCH GUIDE**

Federal Procedure L Ed:

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

Am Jur.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

**HISTORY; ANCILLARY LAWS AND DIRECTIVES**

**Prospective amendments:**

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

**Amendments:**

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

**RESEARCH GUIDE**

Federal Procedure L Ed:

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

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

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

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

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

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

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

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

#### HISTORY; ANCILLARY LAWS AND DIRECTIVES

##### Prospective amendments:

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

##### Amendments:

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

#### RESEARCH GUIDE

##### Federal Procedure L Ed:

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

##### Am Jur:

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

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

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

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

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

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

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

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

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

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

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

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

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Prospective amendments:

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

Amendments:

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

RESEARCH GUIDE

Federal Procedure L Ed:

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

Am Jur:

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

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

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

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

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Prospective amendments:

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

Amendments:

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

RESEARCH GUIDE

Federal Procedure L Ed:

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

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Am Jur:

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

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

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

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

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

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

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

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

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

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

#### HISTORY; ANCILLARY LAWS AND DIRECTIVES

##### Prospective amendments:

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

##### Amendments:

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

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

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

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

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

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

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(d) Compilation of data on negotiated rulemaking; report to Congress. (1) Compilation of data. The Administrative Conference of the United States shall compile and maintain data related to negotiated rulemaking and shall act as a clearinghouse to assist agencies and parties participating in negotiated rulemaking proceedings.

(2) Submission of information by agencies. Each agency engaged in negotiated rulemaking shall provide to the Administrative Conference of the United States a copy of any reports submitted to the agency by negotiated rulemaking committees under section 566 and such additional information as necessary to enable the Administrative Conference of the United States to comply with this subsection.

(3) Reports to Congress: The Administrative Conference of the United States shall review and analyze the reports and information received under this subsection and shall transmit a biennial report to the Committee on Governmental Affairs of the Senate and the appropriate committees of the House of Representatives that—

(A) provides recommendations for effective use by agencies of negotiated rulemaking; and

(B) describes the nature and amounts of expenditures made by the Administrative Conference of the United States to accomplish the purposes of this subchapter [5 USCS §§ 561 et seq.].

(e) Training in negotiated rulemaking. The Administrative Conference of the United States is authorized to provide training in negotiated rulemaking techniques and procedures for personnel of the Federal Government either on a reimbursable or nonreimbursable basis. Such training may be extended to private individuals on a reimbursable basis.

(f) Payment of expenses of agencies. The Chairman of the Administrative Conference of the United States is authorized to pay, upon request of an agency, all or part of the expenses of establishing a negotiated rulemaking committee and conducting a negotiated rulemaking. Such expenses may include, but are not limited to—

(1) the costs of conveners and facilitators;

(2) the expenses of committee members determined by the agency to be eligible for assistance under section 568(c); and

(3) training costs.

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

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

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

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Prospective amendments:

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

Amendments:

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

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

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

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Prospective amendments:

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

Amendments:

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

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

Negotiated Rulemaking Committee; Expenses	Section 84-931, R.R.S. 1994	011
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Negotiated Rulemaking Committee; Operation	Section 84-929, R.R.S. 1994	009
Negotiated Rulemaking Committee; Termination	Section 84-927, R.R.S. 1994	013
Notice of Negotiated Rulemaking Committee; Comment; Applications For Membership	Section 84-926, R.R.S. 1994	006
Petitions For Use Of Negotiated Rulemaking Committee	Section 84-925, R.R.S. 1994	005

NEBRASKA ADMINISTRATIVE CODE

TITLE 261 --- RULES OF AGENCY PROCEDURE

CHAPTER 1 --- PROCEDURES FOR NEGOTIATED RULEMAKING

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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
Establishment Of A Negotiated Rulemaking Committee; Procedure	Section 84-927, R.R.S. 1994	007
Negotiated Rulemaking Committee; Membership	Sections 84-924, 84-928, R.R.S. 1994	008
Negotiated Rulemaking Committee; Operation	Section 84-929, R.R.S. 1994	009
Facilitators; Selection; Duties	Section 84-930, R.R.S. 1994	010
Negotiated Rulemaking Committee; Expenses	Section 84-931, R.R.S. 1994	011
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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  
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tariffs, and any rules of interpretation thereof, and for the