

ALASKA LEGISLATURE COMMITTEE FILES 1997-1998 8672

9442 HOUSE STATE AFFAIRS

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

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

003.01 There is a need for the rule.

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

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

003.03A Can adequately represent the interests identified; and

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

legibility.

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

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

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

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

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

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

005.04 A petition for a negotiated rulemaking process shall

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

by

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

4 66

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

007 Establishment of a Negotiated Rulemaking Committee; Procedure.

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

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

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

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

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

008 Negotiated Rulemaking Committee; membership. All members of

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

008.01 Members of a negotiated rulemaking committee may include:

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

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

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

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

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

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

008.02A1 Identification of the applicable negotiated rulemaking proceeding.

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

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

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

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

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

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

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

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

statutes.

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

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

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

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

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

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

010.02 The agency may employ or contract for an

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

010.03 A facilitator approved or selected by a committee shall:

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

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

010.03C Manage the keeping of minutes and records.

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

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

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

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

any source to fund a negotiated rulemaking process if:

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

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

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

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

261 NAC 1 - ATTACHMENT 1  
SAMPLE

BEFORE THE NEBRASKA NATURAL RESOURCES COMMISSION  
STATE OF NEBRASKA

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

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

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

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

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

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

- develop new rules
- amend existing rules, specifically \_\_\_\_ NAC \_\_\_\_,  
entitled \_\_\_\_\_.
- repeal certain existing rules, specifically \_\_\_\_  
NAC \_\_\_\_, entitled \_\_\_\_\_.

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

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

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

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

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

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

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

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

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

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

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

7. The following persons may be willing and qualified to

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

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

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

Dated this \_\_\_\_\_ day of \_\_\_\_\_, 19 \_\_\_\_\_ .

\_\_\_\_\_  
Signature of Petitioner

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

261 NAC 1 - ATTACHMENT 2  
SAMPLE

BEFORE THE NEBRASKA NATURAL RESOURCES COMMISSION  
STATE OF NEBRASKA

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

APPLICATION FOR MEMBERSHIP  
(complete if applicable)

20 75

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

---

Name of applicant (typed or printed)

---

Full address of applicant

---

Applicant's telephone number  
(including area code)

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

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

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

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

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

\_\_\_\_\_ Date

\_\_\_\_\_  
Signature of Applicant

**NOMINATION FOR MEMBERSHIP**  
(complete if applicable)

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

\_\_\_\_\_  
Name of nominee (typed or printed)

\_\_\_\_\_  
Full address of nominee

\_\_\_\_\_  
Nominee's telephone number  
(including area code)

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

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

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

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

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

\_\_\_\_\_ Date

\_\_\_\_\_  
Signature of Nominating Party

\_\_\_\_\_  
Name of nominating party  
(printed or typed)

\_\_\_\_\_  
Full address of nominating party

\_\_\_\_\_  
Telephone number of nominating party  
(include area code)

261 NAC 1 - ATTACHMENT 3  
SAMPLE

BEFORE THE NEBRASKA NATURAL RESOURCES COMMISSION  
STATE OF NEBRASKA

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

APPLICATION FOR MEMBERSHIP  
(complete if applicable)

33 78

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

---

Name of applicant (typed or printed)

---

Full address of applicant

---

Applicant's telephone number  
(including area code)

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

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

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

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

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

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

above-referenced negotiated rulemaking committee.

\_\_\_\_\_ Date

\_\_\_\_\_  
Signature of Applicant

**NOMINATION FOR MEMBERSHIP**  
(complete if applicable)

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

\_\_\_\_\_  
Name of nominee (typed or printed)

\_\_\_\_\_  
Full address of nominee

\_\_\_\_\_  
Nominee's telephone number  
(including area code)

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

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

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

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

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

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

\_\_\_\_\_ Date

\_\_\_\_\_  
Signature of Nominating Party

\_\_\_\_\_  
Name of nominating party  
(printed or typed)

\_\_\_\_\_  
Full address of nominating party

\_\_\_\_\_  
Telephone number of nominating party  
(include area code)

261 NAC 1 - ATTACHMENT 4  
SAMPLE

BEFORE THE NEBRASKA NATURAL RESOURCES COMMISSION  
STATE OF NEBRASKA



CHAPTER 2

Petitioning For Rulemaking

Adopted 12/7/95

NEBRASKA ADMINISTRATIVE CODE

TITLE 261 --- RULES OF AGENCY PROCEDURE

CHAPTER 2 --- PETITIONING FOR RULEMAKING

TABLE OF CONTENTS

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

NEBRASKA ADMINISTRATIVE CODE

TITLE 261 - RULES OF AGENCY PROCEDURE

CHAPTER 2 - PETITIONING FOR RULEMAKING

001 Rulemaking Petition.

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

001.02 Form. The petition shall:

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

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

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

001.02D. Describe the reason for the rules change

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

001.02F. Be signed by:

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

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

002 Petition Consideration and Disposition.

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

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

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

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

NEBRASKA ADMINISTRATIVE CODE

TITLE 261, NEBRASKA ADMINISTRATIVE CODE

NEBRASKA NATURAL RESOURCES COMMISSION

Rules of Agency Procedure

CHAPTER 3

Regulations and Procedures Governing  
Agency Declaratory Orders

Adopted 12/7/95

NEBRASKA ADMINISTRATIVE CODE

TITLE 261 --- RULES OF AGENCY PROCEDURE

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

ALPHABETICAL TABLE OF CONTENTS

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

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

NEBRASKA ADMINISTRATIVE CODE

TITLE 261 --- RULES OF AGENCY PROCEDURE

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

NUMERICAL TABLE OF CONTENTS

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

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

## NEBRASKA ADMINISTRATIVE CODE

### TITLE 261 NAC --- RULES OF AGENCY PROCEDURE

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

- 001      General Information.
- 001.01    Scope of this Chapter. This chapter pertains solely to the procedures to be used by any person or entity seeking issuance of a declaratory order by the agency.
- 001.02    Related Regulations. In addition to this Chapter, related regulations pertaining to administrative procedures before this agency are: 261 NAC Chapter 1, Procedures for Negotiated Rulemaking, 261 NAC Chapter 2, Petitioning for Rulemaking, and 261 NAC Chapter 4, Rules of Practice and Procedure for Hearings in Contested Cases Before an Agency.
- 002      Definitions. As used in this chapter:
- 002.01    Agency shall mean the Nebraska Natural Resources Commission, the agency created by section 2-1504, R.R.S. 1943.

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

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

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

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

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

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

### 003 Petition for Declaratory Order.

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

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

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

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

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

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

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

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

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

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

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

003.04A A caption, which shall include:

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

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

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

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

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

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

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

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

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

envelope and clearly marked as an attachment to the petition.

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

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

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

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

004 Submission and Service of Declaratory Order Petition.

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

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

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

005 Disposition of the Petition.

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

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

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

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

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

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

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

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

or

005.02C Set the matter for specified proceedings

as set forth in subsection 005.01 of this Chapter; or

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

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

006

Intervention in Declaratory Order Proceeding.

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

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

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

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

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

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

the matter;

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

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

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

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

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

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

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

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

007 Declaratory Order Proceedings.

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

41

96

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

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

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

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

007.02C Close the proceedings.

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

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

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

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

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

008 Issuance of Declaratory Order.

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

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

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

008.02B The facts upon which the order is based;

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

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

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

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

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

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

contested case.

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

009 Circumstances Under Which Agency will not Issue Declaratory Orders.

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

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

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

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

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

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

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

009.01G An order would substantially prejudice

# 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

contested case.

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

009 Circumstances Under Which Agency will not Issue Declaratory Orders.

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

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

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

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

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

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

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

009.01G An order would substantially prejudice

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

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

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

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

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

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

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

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

Appendix "A"

BEFORE THE NEBRASKA NATURAL RESOURCES COMMISSION  
STATE OF NEBRASKA

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

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

DATED on this      day of      , 199 .

VERIFICATION

STATE OF                    )  
                                  ) ss.  
COUNTY OF                )

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

[Petitioner's signature]

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

NOTARY SEAL

[Notary signature]

NEBRASKA ADMINISTRATIVE CODE

TITLE 261, NEBRASKA ADMINISTRATIVE CODE

NEBRASKA NATURAL RESOURCES COMMISSION

Rules of Agency Procedure

CHAPTER 4

Rules of Practice and Procedure for Hearings  
in Contested Cases

Adopted 12/7/95

NEBRASKA ADMINISTRATIVE CODE

TITLE 261 --- RULES OF AGENCY PROCEDURE

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

CONTESTED CASES

ALPHABETICAL TABLE OF CONTENTS

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

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

## NEBRASKA ADMINISTRATIVE CODE

### TITLE 261 --- RULES OF AGENCY PROCEDURE

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

### CONTESTED CASES

### NUMERICAL TABLE OF CONTENTS

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

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

## NEBRASKA ADMINISTRATIVE CODE

### TITLE 261 --- NAC RULES OF AGENCY PROCEDURE

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

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

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

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

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

hearing.

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

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

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

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

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

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

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

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

## 002 Prohibitions against ex parte communications.

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

002.02. Prohibitions; to whom applicable.

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

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

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

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

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

002.03A. All such written communications;

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

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

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

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

003 Intervention in a contested case.

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

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

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

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

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

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

Those conditions may include:

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

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

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

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

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

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

004 Commencement of a contested case.

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

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

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

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

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

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

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

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

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

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

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

004.07. All pleadings subsequent to the initial petition

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

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

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

005 Hearing officer; criteria.

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

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

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

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

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

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

## 006 Prehearing Procedures.

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

006.01A. If a prehearing conference is conducted:

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

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

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

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

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

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

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

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

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

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

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

006.01B. The hearing officer shall conduct a prehearing conference, as may be appropriate, to deal with such matters as exploration of settlement possibilities, preparation of stipulations, clarification of issues, rulings on identity and limitation of the number of witnesses, objections to proffers of evidence, determination of the extent to which direct evidence,

rebuttal evidence, or cross-examination will be presented in written form and the extent to which telephone, television, or other electronic means will be used as a substitute for proceedings in person, order of presentation of evidence and cross-examination, rulings regarding issuance of subpoenas, discovery orders, and protective orders, and such other matters as will promote the orderly and prompt conduct of the hearing. The hearing officer shall issue a prehearing order incorporating the matters determined at the prehearing conference.

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

006.02. Discovery in contested cases.

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

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

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

006.02B2. State the reasons supporting the motion;

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

issues raised and that agreement has not been achieved; and

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

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

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

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

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

006.03A2. A change in legal representation; or

006.03A3. Settlement negotiations are underway.

006.04. Amendments.

006.04A. A petition may be amended at any time before an answer is filed or is due if notice is given to the respondent or his or her attorney. In all other cases, a petitioner must request permission to amend from the hearing officer.

006.04B. A hearing officer may also allow, in his or her discretion, the filing of supplemental pleadings alleging facts material to the case occurring after the original pleadings were filed. A hearing officer may also permit amendment of pleadings where a mistake appears or where

amendment does not materially change a claim or defense.

006.05. Informal Disposition. Unless otherwise precluded by law, informal disposition may be made of any contested case by stipulation, agreed settlement, consent order, or default.

007 Conducting a contested case hearing.

007.01. Order. At the discretion of the hearing officer, the hearing may be conducted in the following order:

007.01A. The hearing is called to order by the hearing officer. Any preliminary motions, stipulations or agreed orders are entertained.

007.01B. Each party may be permitted to make an opening statement. Opening statements take place in the same order as the presentation of evidence.

007.01C. Presentation of evidence.

007.01C1. Evidence will be received in the following order:

007.01C1(a). Evidence is presented by the petitioner;

007.01C1(b). Evidence is presented by the respondent;

007.01C1(c). Rebuttal evidence is presented by the petitioner; and

007.01C1(d). Surrebuttal evidence is presented by the respondent.

007.01C2. With regard to each witness who testifies, the following examination may be conducted:

007.01C2(a). Direct examination conducted by the party who calls the witness;

007.01C2(b). Cross-examination by the opposing party;

007.01C2(c). Redirect examination by the party who called the witness; and

007.01C2(d). Recross-examination by the opposing party.

007.01D. After the evidence is presented, each party may have opportunity to make a closing argument. Closing arguments shall be made in the same order as the presentation of evidence. The hearing officer may request that the parties submit briefs in lieu of closing arguments.

007.02. Evidence.

007.02A. In contested cases an agency or hearing officer may admit and give probative effect to evidence which possesses probative value commonly accepted by reasonably prudent persons in the conduct of their affairs and may exclude incompetent, irrelevant, immaterial and unduly repetitious evidence.

007.02B. Any party to a formal hearing before the agency, from which a decision may be appealed to the courts of this state, may request that the agency be bound by the rules of evidence applicable in district court by delivering to the agency at least three days prior to the holding of the hearing a written request therefore. Such request shall include the requesting party's agreement to be liable for the payment of costs incurred thereby and upon any appeal or review thereof, including the cost of court reporting services which the requesting party shall procure for the hearing.

007.02C. Documentary evidence may be received in the form of copies or excerpts or incorporated by reference.

007.02D. All evidence including records and documents in the possession of the agency of which it desires to avail

itself shall be offered and made a part of the record in the case. No factual information or evidence other than the record shall be considered in the determination of the case.

007.02E. A hearing officer or designee may administer oaths and issue subpoenas in accordance with the rules of civil procedure except as may otherwise be prescribed by law. Subpoenas and orders issued under this subsection may be enforced by the district court.

007.02F. The agency shall give effect to the rules of privilege recognized by law.

007.02G. The agency may take official notice of cognizable facts and in addition may take official notice of general, technical, or scientific facts within its specialized knowledge and the rules and regulations adopted and promulgated by it.

007.02G1. Parties shall be notified either before or during the hearing or by reference in preliminary reports or otherwise of materials so noticed.

007.02G2. Parties shall be afforded an opportunity to contest facts so noticed.

007.02G3. The record shall contain a written record of everything officially noticed.

007.02H. The agency may utilize its experience, technical competence and specialized knowledge in the evaluation of the evidence presented to it.

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

007.04. Official record.

007.04A. The agency shall prepare an official record, which shall include testimony and exhibits, in each contested case, but it shall not be necessary to transcribe the record of the proceedings unless requested for purpose of rehearing or appeal, in which event the transcript and record shall be furnished by the agency upon request and tender of the cost of preparation.

007.04B. The agency shall maintain an official record of each contested case under the Administrative Procedure Act for at least four years following the date of the final order.

007.04C. The agency record shall consist only of the following:

007.04C1. Notices of all proceedings;

007.04C2. Any pleadings, motions, requests, preliminary or intermediate rulings and orders, and similar correspondence to or from the agency pertaining to the contested case;

007.04C3. The record of the hearing before the agency, including all exhibits and evidence introduced during such hearing, a statement of matters officially noticed by the agency during the proceeding, and all proffers of proof and objections and rulings thereon; and

007.04C4. The final order.

007.04D. As provided in 261 NAC 4 Section 002.03 the hearing officer or the agency director or any employee or commission member who is or may reasonably be expected to be involved in the decision making process of the contested case who receives or who makes or knowingly causes to be made an ex parte communication as set forth in that subsection shall make the appropriate filings which shall be included in the official record of the contested case.

007.04E. Except to the extent that the Administrative Procedure Act or another statute provides otherwise, the agency record shall constitute the exclusive basis for agency action in contested cases under the act and for judicial review thereof.

007.05. Costs. All costs of a formal hearing shall be paid by the party or parties against whom a final decision is rendered.

008 Decision and order in a contested case.

008.01. Every decision and order adverse to a party to the proceeding, rendered by the agency in a contested case, shall be in writing or stated in the record and shall be accompanied by findings of fact and conclusions of law.

008.02. The decision and order should include:

008.02A. The name of the agency and name of the proceeding;

008.02B. The time and place of the hearing;

008.02C. The names of all parties or their attorneys who entered an appearance at the hearing;

008.02D. The findings of fact consisting of a concise statement of the conclusions upon each contested issue of fact;

008.02E. The conclusions of law consisting of the applications of the controlling law to the facts found and the legal results arising therefrom; and

008.02F. The order consisting of the action taken by the agency as a result of the facts found and the legal conclusions arising therefrom.

008.03. Parties to the proceeding shall be notified of the decision and order in person or by mail. A copy of the decision and order and accompanying findings and conclusions shall be delivered or mailed upon request to each party or his

or her attorney of record.

009 Appeals.

009.01. Any person aggrieved by a final decision in a contested case is entitled to judicial review under the Administrative Procedure Act or to resort to such other means of review as may be provided by law.

009.02. Parties desiring to appeal an agency decision must file a petition for review in the district court of the county where the agency action is taken within thirty days after the service of the final decision by the agency. The thirty day period for appeal commences to run from the date of mailing of the notice of order and decision to the parties or their attorneys of record. Service of the petition and summons must be made in accordance with Nebraska law.

009.03. Unless otherwise provided by statute, the procedures of section 84-917, R.R.S. 1994, govern the procedure for taking an appeal.

# FISCAL NOTE

STATE OF ALASKA  
1997 LEGISLATIVE SESSION

BILL NO. HB 264

Revision Date: \_\_\_\_\_ Dept. Affected: Department of Law  
 Title: "An Act providing for a negotiated  
regulation making process; and providing for an effective date." BRU: Criminal Division/Civil Division  
 Sponsor: Representative James Component: All (except Administration & Support)  
 Requester: House State Affairs Committee COMPONENT SERIAL NO. 2085/2087-89/2091-2

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

OPERATING EXPENDITURES	FY 98	FY 99	FY 00	FY 01	FY 02	FY 03
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	*****	*****	*****	*****	*****	*****

CAPITAL EXPENDITURES						
----------------------	--	--	--	--	--	--

CHANGE IN REVENUES ( )						
------------------------	--	--	--	--	--	--

**FUND SOURCE** (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1006 GF/MHTIA						
Other						
TOTAL	*****	*****	*****	*****	*****	*****

Estimate of any current year (FY97) cost: \$ 0.0

**POSITIONS**

FULL-TIME	0.0	0.0	0.0	0.0	0.0	0.0
PART-TIME						
TEMPORARY						

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

HB 264 establishes a negotiated regulation making process, in addition to the provisions of the Administrative Procedure Act, to encourage the resolution of controversial issues before commencement of the formal regulations making process. Negotiated rulemaking is intended to be used as a supplemental process to permit the direct participation of affected interests in the development of new regulations or the amendment and repeal of existing regulations.

The regulations attorney of the Department of Law is charged under AS 44.62.125 with assisting agencies with the functions related to administrative regulations. What is unclear at this time is how many agencies would use the optional process outlined in HB 264. The department would assist those agencies to the best extent our resources would allow, but without additional information, we cannot quantify what level of resources would likely be required.

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

PREPARER TO PROVIDE ALL DISTRIBUTION COPIES TO GOVERNOR'S LEGISLATIVE OFFICE  
 For further distribution information, call the Governor's Legislative Office

121

Revision Date: \_\_\_\_\_ Dept. Affected: Revenue  
 Title: Negotiated Regulation Making BRU: Revenue Operations  
 Component: Income and Excise Audit  
 Sponsor: Representative James  
 Requestor: (H) STA COMPONENT SERIAL NO. 113

Expenditures/Revenues: (Thousands of Dollars)

OPERATING EXPENDITURES	FY 98	FY 99	FY 00	FY 01	FY 02	FY 03
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	****	****	****	****	****	****
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF	0.0	0.0	0.0	0.0	0.0	0.0
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY97) cost \$ 0.0

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary)

\*\*\*\* (See Attached Analysis)

Prepared by: Robert Bartholomew Phone: 465-4773  
 Division: Income and Excise Audit Date: May 5, 1997  
 Approved by Commissioner: Wilson L. Condon Date: May 5, 1997  
 Agency: Revenue

PREPARER TO PROVIDE ALL DISTRIBUTION COPIES TO GOVERNOR'S LEGISLATIVE OFFICE

For further distribution information call the Governor's Legislative Office

HB 264  
Negotiated Regulation Making  
May 5, 1997  
Page 2

HB 264 would establish a set of procedures that an administrative agency may use as a part of the regulation adoption process. These procedures would establish a committee to resolve controversial issues before the formal regulation adoption process under AS 44.62 begins. The committee would review and negotiate the issues, and make a recommendation to the agency. The agency would then presumably propose that regulation under the existing requirements of AS 44.62.

The Department of Revenue has successfully used a process similar to the negotiated regulation process. We believe that most of what the bill would provide is currently permissible under existing statute. There is a great deal of merit to an open exchange of ideas before an agency commits itself in writing to what it believes is the best solution to an issue. But because of several important differences between our procedures and the ones authorized by HB 264, the Department of Revenue would not use these procedures, and therefore the fiscal impact of the bill would be minimal.

We have used a "working group" approach in several regulations projects. Some of the differences between our procedures and the ones in HB 264 follow. First, we do not use the term "negotiated." To the extent that the concept implies a compromise between positions, it is inappropriate for our programs. Our aim in tax regulations is simplicity, clarity, equity and faithfulness to statutory language; we don't adopt regulations to "raise revenue." But the duty to administer the tax laws belongs with the department. By the same token, both CSED and PFD affect far too many people for it to be appropriate to "negotiate" between the agency and a small group.

Second, we don't identify specific members of a committee, and would not pay their travel to meetings. The meetings are open to the public. It would be too cumbersome to deal with a set membership. Finally, our system is far less formalized than that envisioned by HB 264.

# FISCAL NOTE

STATE OF ALASKA  
1997 LEGISLATIVE SESSION

BILL NO. HB 264

Revision Date: \_\_\_\_\_ Dept. Affected: All departments except Revenue  
 Title: An Act providing for a negotiated rulemaking BRU: \_\_\_\_\_  
 process: \_\_\_\_\_ Component: \_\_\_\_\_  
 Sponsor: Rep. James  
 Requester: House State Affairs Committee COMPONENT SERIAL NO. \_\_\_\_\_

**Expenditures/Revenues**

(Thousands of Dollars)

OPERATING EXPENDITURES	FY 98	FY 99	FY 00	FY 01	FY 02	FY 03
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
<b>TOTAL OPERATING</b>	***	***	***	***	***	***

CAPITAL EXPENDITURES						
----------------------	--	--	--	--	--	--

CHANGE IN REVENUES ( )						
------------------------	--	--	--	--	--	--

**FUND SOURCE**

(Thousands of Dollars)

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

Estimate of any current year (FY97) cost: \$ 0.0

**POSITIONS**

FULL-TIME						
PART-TIME						
TEMPORARY						

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

This bill would authorize state agencies to use a negotiated rulemaking process. Use of this process would not be mandatory, and would depend on a determination by agencies that such a process would be in the public interest, based on several factors listed in the bill.

The asterisks on this fiscal note indicate that the fiscal impact of the bill is indeterminate. Further analysis and clarification of the scope of the bill is necessary to determine the extent to which negotiated rulemaking would be used and the cost of the process.

Prepared by: Annalae McConnell  
 Division: Office of Management and Budget  
 Approved by Commissioner: Jim Ayers, Chief of Staff  
 Agency: Office of the Governor

Phone: 465-4660  
 Date: 5/5/97  
 Date: 5/5/97

**PREPARER TO PROVIDE ALL DISTRIBUTION COPIES TO GOVERNOR'S LEGISLATIVE OFFICE**

For further distribution information, call the Governor's Legislative Office

May 5, 1997

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

Section 1 of the bill adds a new requirement that notices relating to the establishment of a negotiated regulation making committee be published in the Alaska Administrative Journal.

Section 2 of the bill sets out a new article in the Administrative Procedure Act (APA) to establish procedures for negotiated regulation making. The sections are explained as follows:

AS 44.62.710 sets out the purpose and applicability of negotiated rulemaking. It explains that

(1) negotiated regulation making should be used, whenever appropriate, to resolve controversial issues before the formal regulation making process is begun;

(2) negotiated regulation making is supplemental to the "regular" regulation process and maybe used to develop conclusions;

(3) a state agency may modify the consensus as a result of the subsequent regulation making process;

(4) innovation and experimentation in negotiation regulation making process is not limited by the bill;

(5) other state agencies that are not subject to APA may use the process.

AS 44.62.720 sets out the standards for determination of the need for negotiated regulation making. The state agency may use it when it is "the public interest." This section sets out at list of factors for state agency to consider in determining the public interest.

AS 44.62.730 sets out the process by which a person petitions for the use of a negotiated regulation making committee. The bill requires each state agency to prescribe form and procedure. The state agency has 60 days to grant during the petition. The section precludes a prisoner from petitioning to the Department of Corrections for negotiated regulation making committee.

AS 44.62.740 sets out the standard for the use of a convener to assist in the making the determination of need.

AS 44.62.750(a) requires the agency to publish notice of a committee formation in the Alaska Administrative Journal and, as appropriate, in newspapers and other publications. Subsection (b) allows the agency at the same time to start the formal regulations process. Subsection (c) requires the lieutenant governor to establish and maintain a list of persons who wish to receive notices regarding negotiated committees. Subsection (d) requires the agency to provide a period of at least 30 days for the submission of comments on committee formulation.

AS 44.62.760 sets out the standards for establishment, support, and termination of the committee. The section requires the agency to notify person who commented on or applied for memberships; if the agency denies the petition to form a committee, it must provide notice in the Alaska Administrative Journal and, as appropriate, in newspapers and other publications. Subsection (e) requires the agency to provide appropriate administrative technical support to the committee. Subsection (d) terminates the committee upon adoption of the regulation or at earlier date.

AS 44.62.770 allows the committee to expand its own membership. The request may be made by a petition from a person whose interest will not be adequately represented by the existing committee make-up.

AS 44.62.780 sets out the committee duties, procedure, and report. Subsection (d) allows the committee to transmit a report, if it reaches consensus. Subsection (e) allows the committee, if it does not reach consensus to transmit a report specifying areas on which consensus was reached and unresolved issues. Subsection (f) requires the committee to comply with the Open Meetings Act requirements.

AS 44.62.790 sets out standards for facilitator selection, duties, and authority. Subsection (a) allows the agency to nominate a facilitator, subject to the approval of the committee. If the committee does not approve the committee is authorized to select a facilitator. Subsection (b) requires the facilitator to preside at meetings and manage the keeping of minutes and records. Subsection (c) provides that facilitator does not have decision-making authority.

AS 44.62.800 sets out the standards for employees, contractors, expenses, and funding relating to the committee. Subsection (a) allows the agency to employ or contract for services for a person to serve as a convener or facilitator or use the services of a state employee for those purposes. Subsection (b) precludes consideration of a person as a convener or facilitator if the person has a financial or other interest that would prevent the person from serving in an impartial and independent manner. Subsection (c) requires committee members to pay for their own expenses of participation, except that agency may pay for travel and other expenses and a reasonable daily rate of compensation in appropriate circumstances. Subsection (d) allows

the agency to accept gifts to fund the process if the information on the gift is public, no condition is placed on the donation to the agency, and there is consensus that committee to accept it.

AS 44.62.810 precludes judicial review of an agency decision to establish, assist, or terminate regulation making committee.

AS 44.62.820 requires negotiated regulation making to be an additional process to APA rulemaking. This section requires that negotiation "shall, where possible, occur" before formal regulation process begins.

AS 44.62.830 sets out definitions.

Anchorage  
750 W. 2nd Avenue, Suite 109  
Anchorage, Alaska 99501  
phone: 907-258-6171  
fax: 907-258-6177  
email: unite@akvoice.org

**Alaska Conservation Voice**  
*Speaking Out for Alaska's Future*

Juneau  
P.O. Box 22151  
Juneau, Alaska 99802  
phone: 907-463-3366  
fax: 907-463-3312  
email: unite@akvoice.org

---

**Testimony of the Alaska Conservation Voice on CS HB 264**

Thank you for the opportunity to comment on this bill.

Although we are in agreement with its general intent, we are not entirely persuaded that the bill, as drafted, will fulfill the sponsor's hopes.

While we withhold final judgement on HB 264, we welcome the opportunity to offer several additional suggestions that would improve its administration and make it more responsive to the public interest.

1. Our greatest concerns are that
  - the method for selecting participants is too discretionary, lacking a methodology that would insure proper representation, and that
  - the bill fails to guarantee participation of all interested parties.

2. The bill states (at 44.62.710) that:

"A consensus agreement . . . may be modified by an agency as a result of the subsequent regulation making process."

The bill also states, at 44.62.720, that:

"the agency, to the maximum extent possible consistent with the legal or other obligations of the agency, will use the consensus of the committee as the basis for the regulation . . ."

We feel that both of these sections should make it clear that the agency may alter the consensus agreement if significant new information or insight is brought forward as a result of public comment. A definition for "significant new information or insight" needs to be developed, as well.

3. In 44.62.730, "Use of a convener," and 44.62.760, "Facilitator selection, duties and authority," several prospective tasks are spelled out. Since the bill appears to intend that conveners and facilitators can be either state employees (including affected agency staff, unless they have already been designated to represent the agency on the issue at hand), we feel these sections should clearly list the functions for the convener/facilitator roles, and then clearly spell out that they may be agency personnel or contractors, along with any limitations that would apply in the case of either staff or contractor.

4. We also believe that a standard should be established which would allow agencies to certify that conveners/facilitators have certain minimum qualifications, training and experience for their respective roles.

5. We feel the section dealing with potential conflict-of-interest (44.62.770(b)) needs to provide more specific direction to agencies as to how such determinations are to be made, especially with respect to political or financial conflict-of-interest which might not otherwise be evident through public information, unless disclosed by the individual.

6. We note the desire to avoid a fiscal note for this bill. Philosophically, at least, we don't have a problem with agencies being expected to budget for this process if they feel the public interest and the fulfillment of their mandate could be served by negotiated rule-making. However, we feel this bill's otherwise sensible intentions may founder on the section dealing with costs for participation. See 44.62.770(c). We feel it may work against the hoped-for spirit of collaboration if committee members begin deliberations with this sort of financial disparity between them. We feel there is some basis for concern that the views of those "paying their own way" will be given greater weight in some situations, or that some who cannot afford to participate may be entirely excluded if the agency chooses, at its discretion, not to provide funds for all interested parties. To avoid this, we suggest the agencies simply be required to pay all reasonable travel and logistical expenses for convening a committee.

7. It would seem that the provision for accepting grants or gifts to help underwrite a committee's deliberations would be one way for an agency to defray the costs of underwriting the expenses of all participants. However, to avoid the same issue cited above, we feel the bill should stipulate that gifts be limited to those from such foundations or other sources as do not have a direct stake in the outcome of the issues under discussion.

8. The requirements for notice of committee formation should be restored and be made more extensive than provided in the original bill, mandating a broader notification of the public through print (and possibly broadcast) media, including a contact name and phone number to obtain further information.

9. The rules laid out in the original bill for expansion of a committee should be restored and expanded to also apply expressly to the formation of the initial committee. It is very important that this information be provided and be available to the public if this process is to have the desired credibility.

Finally, we suggest that a better way to test the prospects of workability of the negotiated rule-making process in Alaska would be to mandate and fund a couple of pilot projects. The results of these projects might provide a wealth of very pragmatic information that could assure a more cost-efficient, responsive process that would meet the intentions of the sponsors.

We look forward to reviewing subsequent drafts of the bill, and again, thank you for the opportunity to comment.

January 20, 1998

Douglas K. Mertz

**Testimony on CSHB 264(STA), regarding negotiated regulation-making  
for Prince William Sound Regional Citizens Advisory Council**

The Prince William Sound RCAC is a non-profit organization formed in the wake of the *Exxon Valdez* oil spill, to protect the communities and the environment of the area impacted by that spill. Its members represent local governments, tourism, environmental groups, and the State Chamber of Commerce.

The RCAC finds the purpose and intent of this bill to be laudable. *However*, the bill in its present form -- work draft 0-LS0910\B -- has serious flaws. The flaws could lead an administrative agency to abuse the authority granted here by biasing the process in favor of selected special interests. Fortunately, those problems have simple solutions which, if adopted, would make the bill worth supporting.

The problems we see are the following:

*\*\* The bill provides for notice of meetings of the regulation committee, but does nothing to provide notice that a committee is being formed or that any action in a particular area of interest is being contemplated. Thus an interested party could discover that a committee had been completely formed and was closed to new members before it even knew about it. Clearly there needs to be a notice provision so that interested parties can ask to be part of the committee. A simple requirement of newspaper advertising should be enough.*

*\*\* Nothing in the bill requires that a committee's makeup be fair and representative of the broad range of interests. The reference to "balanced representation" in p. 2, line 16, is not a requirement that the committee actually be constituted that way. The potential for abuse is clear: The choice of members can be totally arbitrary and biased, quite legally. A commissioner could appoint, for example, only members of environmental groups, or only employees of oil companies, or only members of a regulated profession with no consumer representation. The potential for abuse is made all the worse because the agency's choice of committee members is exempt from judicial review. We suggest a simple requirement that the committee makeup be fair and representative of all main interested viewpoints.*

*\*\* Nothing gives members of the public -- or interests which are not represented on the committee -- any right to participate in meetings or even to make their views known. The bill makes committee meetings subject to the Open Meetings Act, but that act only entitles the public to sit in the corner and watch -- there is no right to participate or speak whatsoever in the Act. So, quite legally, you could have an agency appoint a biased and non-representative committee with no prior notice to anyone else, and the committee could refuse to let any member of the public voice opinions or offer information. Clearly what is needed is a guarantee that non-members may speak at and participate in committee meetings and submit materials to the committee.*

*\*\* The bill states that committee members serve at the pleasure of the head of the agency. That means that any committee member who voices opposition to the particular viewpoint of the commissioner may be unceremoniously booted off, with no reason given. In short, another opportunity for abuse. We believe it would be better to limit the causes for terminating a member to non-attendance, or at least to require the commissioner or agency to state a reason for removing a member.*

*\*\* There is also a technical question whether the provision at p. 4, l.16, making the Open Meetings Act applicable to the committee, is effective, since the terms of the Open Meetings Act do not themselves apply to committee meetings of a non-decisional body within an agency. Since the proper interpretation is ambiguous, to make it certain, you need a simple technical amendment making it clear.*

We have attached proposed language to solve each of these problems. If these problems are resolved, the potential for abuse of the authority granted by this bill would largely disappear.

Suggested amendments to CS HB 264(STA)

PWS RCAC

1. Regarding notice of proposed formation of a regulations committee:

At page 3, l. 13, after "...formulation of a proposed regulation.", insert "*The agency shall request nominations to the committee through notices in newspapers of general circulation at least fourteen days before making appointments to the committee.*"

2. Regarding fair and balanced makeup of regulations committees:

At page 13, l. 16, after "(b)", insert "*the membership of a negotiated regulation making committee shall fairly reflect the main interests and viewpoints regarding the subject of the regulations.*"

3. Regarding the right of the public to participate:

At page 4, l. 3, after "...operation of the negotiated regulation making committee.", insert "*The committee shall permit public testimony at its meetings.*"

4. Regarding termination of a committee member:

At page 3, l. 13-14, delete "serve at the pleasure of the head of the agency" and insert "*may be removed by the head of the agency for good cause.*"

5. Regarding applicability of the Open Meetings Act:

At page 4, l. 16, after "...apply to meetings of a negotiated regulation making committee.", insert "*, notwithstanding anything in those sections to the contrary.*"

Anchorage  
750 W. 2nd Avenue, Suite 109  
Anchorage, Alaska 99501  
phone: 907-258-6171  
fax: 907-258-6177  
email: unite@akvoice.org

**Alaska Conservation Voice**  
*Speaking Out for Alaska's Future*

Juneau  
P.O. Box 22151  
Juneau, Alaska 99802  
phone: 907-463-3366  
fax: 907-463-3312  
email: unite@akvoice.org

---

**Statement on HB 264**  
**Provided by the Alaska Conservation Voice**

ACV supports direct participation by affected parties in the development of state regulations.

We are concerned that HB 264 will enshrine, in statute, permission for state agencies to work outside of the public process, thus excluding important perspectives in promulgating regulations. We believe that any consensus reached by the committee could provide a rationale to dismiss valuable insight and information obtained through public comment, enabling the agency to sidestep public input by deferring to the consensus reached by "all identifiable interests" on the committee.

Furthermore, as currently drafted, HB 264 fails to insure the identification and inclusion of all affected parties in the proposed negotiated regulation making process. ACV urges at least the addition of provisions necessary to:

- specify a method of identifying affected parties and;
- guaranteeing affected parties their rights to participate in the negotiated regulation making committee.

Thank you for considering our comments.

# Alaska State Legislature

REPRESENTATIVE  
**JEANNETTE JAMES**  
P.O. Box 56622  
North Pole, Alaska 99705  
(907) 488-1546  
FAX (907) 488-4271



While in Juneau  
State Capitol  
Juneau, Alaska  
99801-1182  
(907) 465-3743  
FAX (907) 465-2381

## House Of Representatives

House District 34

### SPONSOR STATEMENT

#### HB 264, Negotiated Regulation Making

House Bill 264 enables and encourages negotiated regulation/rule making. Currently "neg/reg" is being used by the federal government, Montana, and Nebraska.

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

Negotiated regulation making is used only in cases involving very complex or controversial regulations. It is a voluntary process for drafting regulations that brings together those parties who would be significantly impacted by a regulation (rule), including the government, to reach consensus on some or all of its aspects before the rule is formally published as a proposal. An impartial mediator is used to facilitate intensive discussions among the participants, who operate as a committee open to the public.

Regulations drafted using this process tend to be more technically accurate, clear and specific, and less likely to be challenged in litigation than are rules drafted by the agency alone without input from outside parties. The APA notice process remains unchanged.

The negotiated regulation making process costs more money at the front end than the traditional approach (e.g. the added cost for a facilitator). Agency personnel must work closely as a team with outside representatives and their time must be dedicated to the project if it is to succeed. However, the advantages clearly outweigh these considerations. Because representatives of all the interested parties draft the regulation, the formal process of public notice and comment is generally very smooth, with few concerns being raised. More importantly, lengthy regulation litigation is generally eliminated and compliance with the rule is believed to be much higher. Thus, agency long-term costs of litigation and enforcement are sharply reduced.

Use of the negotiated regulation making process requires most agencies to change the way they are accustomed to developing a rule. Standard practice in rule development is to have a particular office in the agency develop a draft regulatory document, and then that document is critiqued and reformulated as it is sequentially referred to other parts of the agency, the department, the Executive Branch, and the public. By contrast, in negotiated regulation making the parties are brought together for simultaneous discussion and consideration of particular issues at the beginning of the process.

We have a great deal of back-up on this process if you are interested in more details, and we hope you will support HB 264.

# STATE OF ALASKA

## DEPARTMENT OF LAW

### OFFICE OF THE ATTORNEY GENERAL

TONY KNOWLES, GOVERNOR

PLEASE REPLY TO:

1031 WEST 4TH AVENUE, SUITE 200  
ANCHORAGE, ALASKA 99501-1994  
PHONE: (907) 269-5100  
FAX: (907) 276-3697

KEY BANK BUILDING  
100 CUSHMAN ST., SUITE 400  
FAIRBANKS, ALASKA 99701-4679  
PHONE: (907) 451-2811  
FAX: (907) 451-2846

P.O. BOX 110300-DIMOND COURT HOUSE  
JUNEAU, ALASKA 99811-0300  
PHONE: (907) 465-3600  
FAX: (907) 465-6735

May 5, 1997

Honorable Jeanette James  
Representative  
Chairperson  
House State Affairs Committee  
State Capitol, Room 102  
Juneau, Alaska 99801

Re: HB 265

Dear Representative James:

We have reviewed HB 265, and find that it presently presents no legal problems.

Please contact me if I can be of further assistance to you on this matter.

Very truly yours,

BRUCE M. BOTELHO  
ATTORNEY GENERAL

By:



Sarah J. Felix  
Assistant Attorney General

SJF:clh

cc: Pat Pourchot  
Legislative Director  
Office of the Governor

Chrystal Smith  
Legislative Liaison  
Department of Law

Deborah Behr  
Assistant Attorney General

---

---

**cc:Mail for: Barbara Cotting**

---

---

**Subject:** fiscal notes

**From:** Barbara Cotting 05/02/1997 10:06 AM

**To:** SHARI\_KOCHMAN@GOV.STATE.AK.US at CC2MHS1

**To:**

---

---

I have scheduled the following bills in House State Affairs and need fiscal notes:

HB 265 Reports & Records, State Agencies Tuesday, May 6

HB 264 Negotiated Regulation Making Tuesday, May 6

Thanks.

A. INTRODUCTION

My name is Robert Huntington Knight, Jr. 2705

I am here representing myself to testify on HB 264.

I appreciate tremendously the opportunity to do so.

I will address the matter of credentials and background before giving an opinion on the bill. If you have questions of me or my background, I would ask that you hold them until that is done. On questions about the bill, I would prefer to deal with questions on the bill as we go through the bill. Is that acceptable?

B. Education, Qualifications, and Memberships

My education includes an Ars Baccalaureae from Yale, a Juris Doctor from Georgetown, and I am currently completing an interdisciplinary Ph.D. in Education Leadership and Policy at the University of Alaska Fairbanks.

My first exposure to administrative regulations occurred in 1965 when I served as an Assistant Registrar of Voters in New Haven, Connecticut. My first formal exposure to Administrative Law occurred in 1967. The late Carl McFarland -- former Deputy Attorney General under Franklin Roosevelt sometimes said to be the father of administrative law -- was my professor at the University of Virginia School of Law. I dropped out of Virginia to join the 1968 Presidential Campaign.

My training and experience with Administrative Law includes involvement in academic coursework, teaching in a Masters of Public Administration program and seminars, professional training, and federal, state, local, and tribal regulatory systems and regulations.

My international experience with regulations includes serving as Head of US Delegation to Nato Environmental Meetings on Acid Rain and Law of the Sea negotiations, and private consultant to the Kingdom of Saudi Arabia on restoration of habitat and domestic breeding of endangered species. I also worked with that nation on land record issues.

My federal experience with regulations includes writing, reviewing, approving, implementing, enforcing, and litigating them. As a founding member of the US Environmental Protection Agency, I was privileged to work on the task force which set up EPA's administrative regulatory processes. As a member of the Presidents Management Council Staff, I was privileged to draft Presidential Executive Orders to rework regulatory relationships among departments.

At the State level, service includes a stint as Division Director for the Municipal and Regional Assistance Division of Community and Regional Affairs. At the local level, I have worked with Planning Commissions, Zoning Commissions, and served on a Halfway House Board. At the Tribal level, I served as General Manager of Nome Eskimo Community as well as a variety of consulting assignments to Alaska Native Foundation and a number of villages.

My negotiation experience extends back to the mid-1960's. We did not call informal mediation or facilitation by those names back then. In the '90's, I took a formal two credit course in mediation at the University of Alaska Anchorage as well as Alaska Bar Association Alternative Dispute Resolution training, Victim Offender Mediation Training, and have attended the programs provided by the Alaska Dispute Settlement Association.

I taught administrative law as an adjunct in the late '70's and also served as a consultant to the National Association of Attorneys General. I taught a seminar on managing the public law office including what today we call negotiated regulatory approaches and served on their Science and Technology Committee. I served as a law clerk to the Third Judicial District Superior Court Chief Judge of Administrative Appeals researching and drafting administrative law opinions in administrative appeals.

Memberships include ADSA [the Alaska Dispute Settlement Association] the Alaska Bar ADR Section on Alternative Dispute Resolution, SPIDR [Society of Professionals in Dispute Resolution], and the District of Columbia Bar Association. I am not a member of the Alaska Bar other than the ADR section which permits non-lawyers to join and do not practice law in Alaska. The American Arbitration Association qualified me as an arbitrator and I served on a panel of theirs to develop mediated approaches to the

resolution of environmental and public policy issues. I also served as the reporter for the ADSA Committee on Standards of Practice.

In the private sector, I have done work for clients on regulatory matters and worked with departments and agencies like Anchorage International Airport, Labor, and DEC on behalf of clients with regulatory problems.

I have other training, experience, and memberships, but this covers a cross section of the high points. I offer these credentials as the bases for my opinions on the matters before the Committee.

### C. EXPERIENCE WITH NEGOTIATED REGULATIONS

The bill before the Committee proposes a system or approach to technically or politically complex regulatory drafting. HB 264 is based upon the federal statute and two successful state statutes used in Nebraska and Montana. Staff has done an excellent job in pulling together the background.

From my perspective, the approach works.

Back before the idea of a statute was even thought of for such matters, we used this approach whenever there were difficult problems to be resolved in a regulatory scheme. I learned the practicalities of it from folks who had developed it to cope with otherwise impossible situations. Though regulations have been around since civilizations first began to develop, the regulated society in which we live did not begin to take shape until the 1930's and did not begin to flower until the 1960's.

What purpose do regulations serve?

If we cannot answer that question, then we cannot deal with them effectively. In my view, regulations provide the detail to flesh out policy set by the legislature in a statute. Issuing regulations allows folks with training and expertise to get involved in establishing the stability of expectations which most of us require to go about our business on a day-to-day basis.

Regulations are driven by technological change, economic change, and social change. They provide the same sheet of music to everyone concerned with or involved in a particular kind of activity. To the extent that they do so in an understandable and observable manner and promote stability of expectations, they are useful. To the extent they aggravate, irritate, and impede citizens in the conduct of their business, they are not useful.

Their purpose is not to control but to provide a basis for self-control of specified activities to enhance the quality of life for all of us. Factories which provide jobs and products serve useful functions. Factories which discharge wastes into a near-by river create problems. Up until our population grew to the levels we now deal with, factories were not very large and pollution problems were not great. I date the turn-around to 1952 when the Thames River caught on fire in London. The British resolved to clean up their act.

The news media reported a salmon observed making its way up the Thames not long ago. It took 40 years to turn things around, but the Thames is no longer an open sewer.

The US began to address problems like this about the same time, but without much fanfare. I led a campaign in 1966 to clean up a small river running through New Haven. The Connecticut General Assembly appropriated the money to do so in 1967. Today, the Mill River runs clean. That turned out to be an unusual event. Most cleanup campaigns are marked like our airport regulations with a lot of rancor. It worked back then because I got everyone involved in figuring out how to clean it up. It seemed the right thing to do and it worked.

In the development of anti-pollution regulations in the late '60's and early 70's, I relied on the knowledge and expertise of those who had been there, done that, and got the T-shirt. We had no statutory or cultural prohibition against consulting those affected. Then again, government had not inspired the hostility levels in the general public that it has in recent years.

For whatever reason, politicians and bureaucracy in some quarters began to believe it had the answers to society's problems. Those answers were to be fixed in regulations. Enforcing those regulations would change the world into the better place we all know it could be. Lots of folks bought into that. Social engineering became the goal of a great many regulatory schemes.

Up top, I said we have to know the purpose of regulations if we are to write and implement them successfully. Social engineering did not work well; still does not. Time Magazine's April 29th issue a year ago covered the failure of integration rules. Environmental cleanup went fairly well for a while, but overweening bureaucrats tried to take it too far the same way the Internal Revenue Service did. EPA and IRS are among the agencies which draw the most flak from the public for their approach to their jobs.

It does not have to be that way. Government serves the people; not the other way around. What Rousseau in the 18th century called the Social Contract asserts as its basis that all of us are born with all rights and privileges. We trade in some of these to society for society's protections. Those protections are only as firm as the police power of the state. When

government attempts to use the police power of the state to control folks, it tends to fall on its face.

Prohibition, drugs, integration, and school reform are four areas where government has failed to come close to stated goals. The consent of the governed is part and parcel of the American tradition. Negotiated rule making is a modern day extension of that tradition.

Your experience, my experience, and history all tell us that government rules which make life more difficult and fail to enhance it fail. A government which sends police out to arrest folks who violate important rules is applauded. Rules promulgated to make life easier for government seldom succeed. Rules which enhance the quality of life for society generally succeed. Speed limits are the most obvious example of that.

Success comes from taking the time to ascertain the needs of all those involved and acting accordingly. Notions of inclusion, fairness, courtesy, and notice tend to enhance the probabilities of success. On that note, lets look at HB 264.

Before I do so, are there any questions about my credentials?