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Administrative Adjudication—Revised and Recodified

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I. INTRODUCTION

For nearly forty years, the Administrative Adjudication Act¹ (AAA) has governed the procedures of most Indiana agencies, boards and commissions. Unless specifically exempted,² the various individuals and bodies acting on behalf of the state must adhere to the AAA. Except for relatively few minor amendments, the AAA had remained unchanged since its enactment in 1947.

With the passage of Public Law 361-1985, the 1985 General Assembly created a commission to study state administrative procedures and recommend any necessary changes.³ The bipartisan group, composed of four senators, four representatives, and four citizen members, convened and operated as the Administrative Adjudication Law Recodification and Revision Commission (Commission).⁴ The Commission held eleven

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¹IND. CODE §§ 4-22-1-1 to -30 (1982) (repealed, effective July 1, 1987).

²See *id.* § 4-22-1-2, which specifically exempted from the definition of “agency” the courts, the Governor, military officers or boards, state-funded colleges and universities, benevolent, reformatory, or penal institutions, the Industrial Board, the State Board of Tax Commissioners, and the Public Service Commission. The section also exempted most functions of the Department of State Revenue, but indicated that the provisions of the AAA were “supplementary” to those of the revenue acts. The definition of “administrative adjudication” provided further exemptions from the AAA for specific functions of certain agencies. *Id.*

³Pub. L. No. 361-1985, §§ 1-7 (noncode sections).

⁴The Commission members were Representatives Richard Regnier (Chairman), Mitchell V. Harper, Robert F. Hellmann, and W. Laverne Tincher; Senators John B. Augsburger, William H. Vobach, Lindel O. Hume and James Jontz; and lay members David Allen, Susan Davis Smith, Brian G. Tabler, and Tony Zaleski. ADMIN. ADJUDICATION LAW RECODIFICATION AND REVISION COMM’N, 1985 GEN. ASSEMBLY, FINAL REPORT OF THE ADMINISTRATIVE LAW RECODIFICATION AND REVISION COMMISSION (1985) [hereinafter FINAL REPORT].

official sessions and periodically convened subcommittees to address specific issues. During the course of its study, the Commission received written or oral testimony from at least thirty-nine witnesses.⁵ The final draft approved by the Commission was introduced in the 1986 Session of the General Assembly as House Bill 1339. With some amendments, House Bill 1339 became Public Law 18-1986, which revised and recodified the AAA.⁶ This survey will examine some of the more noteworthy provisions of the new law.

II. STRUCTURE AND GENERAL CONCEPTS OF THE NEW LAW

Public Law 18-1986 created within title 4 a new article 21.5 (new article), effective July 1, 1987, which governs administrative orders and procedures.⁷ Article 21.5 is divided into six chapters,⁸ beginning with a definitional chapter.

Most of chapter 1 is unremarkable in that it sets forth definitions well-established by other laws. However, "agency action" is more broadly defined in the new article than in the AAA. In addition to meaning an order or part of an order, agency action now also refers to the agency's performance of, or failure to perform, any duty, function, or other activity under article 21.5.⁹ Although inclusion of an agency's failure to perform was not part of the AAA definition of administrative adjudication, it is contained in the Uniform Law Commissioners' Model State Administrative Procedure Act (Model Act).¹⁰

The term "order" is also comprehensively defined. It now means more than just a decision following adjudicative proceedings, and specifically includes licenses.¹¹ That definition becomes important in determining when appeal rights accrue under the new article.

Chapter 2 describes the application of the new law by stating that article 21.5 "creates minimum procedural rights and imposes minimum

⁵*Id.* at 1.

⁶See IND. CODE §§ 4-21.5-1-1 to -6-7 (Supp. 1986).

⁷*Id.* The Act also established a committee to study the efficacy of creating a pool of administrative law judges and to study the effect of the Act on such issues as the adequacy of public notice of proceedings, and to propose any appropriate legislation. Pub. L. No. 18-1986, §§ 5-6 (noncode sections).

⁸The new article contains a chapter each on definitions, application, adjudicative proceedings, special proceedings (emergency and temporary orders), judicial review and civil enforcement.

⁹IND. CODE § 4-21.5-1-4 (Supp. 1986).

¹⁰The definition of "agency action" in new IND. CODE § 4-21.5-1-4 is the same as the definition in the MODEL STATE ADMIN. PROCEDURE ACT § 1-102(2) (1981). However, the Indiana statute replaces "discretionary or otherwise" in subsection (3) with "under this article." See IND. CODE § 4-21.5-1-4(3) (Supp. 1986).

¹¹IND. CODE § 4-21.5-1-9 (Supp. 1986).

procedural duties.”¹² An agency may afford greater procedural rights as long as they are not inconsistent with the new article or do not substantially prejudice rights conferred upon other persons by any law.¹³ Unless precluded by another law, a person may waive any right conferred upon him, but may not waive any procedural duty.¹⁴ For example, a person can waive the right to a hearing, but he cannot agree to extend the time for appeal.

The new article applies to agencies and agency actions unless specifically exempted by statute. A review of the agencies and agency functions exempted from the new article reveals that the Commission generally followed the former Indiana Code chapter 4-22-1 regarding application of the procedural law.¹⁵ Notable additional exceptions in the new article include internal agency policy and organizational or procedural actions unrelated to an agency’s licensing or enforcement functions.¹⁶ Examples include budget, personnel, or contract reviews performed by one state agency for another. Certain grant and incentive programs under the auspices of the Lieutenant Governor’s office are also exempted.¹⁷

Chapter 3 of the new article contains the most extensive provisions, those relating to adjudicative proceedings that occur under the agency’s jurisdiction.¹⁸ The Commission changed some requirements that had been established either by the former statute or by case law. However, the Commission adopted other court decisions and agency rules by codifying these into the new article.

The new article provides in chapter 3, section 1, that notice and service may be made by United States mail or personal service.¹⁹ Agencies no longer have to give notice and service by registered (or certified) mail.²⁰ However, because the new law also provides that the agency

¹²*Id.* § 4-21.5-2-1.

¹³*Id.* § 4-21.5-3-35.

¹⁴*Id.* § 4-21.5-2-2.

¹⁵See *Minutes of the Administrative Adjudication Law Recodification and Revision Commission 1* (Sept. 3, 1985) [hereinafter *Minutes*, Sept. 3, 1985]. The draft before the Commission on that date “exempt[ed] the same agencies and agency actions from the application of IC 4-21.5 that IC 4-22-1-2 currently exempts.” *Id.*

¹⁶IND. CODE § 4-21.5-2-5(5) (Supp. 1986).

¹⁷*Id.* § 4-21.5-2-5(7). See *Minutes of the Administrative Adjudication Law Recodification and Revision Commission 1* (Nov. 7, 1985) [hereinafter *Minutes*, Nov. 7, 1985].

¹⁸IND. CODE §§ 4-21.5-3-1 to -37 (Supp. 1986).

¹⁹*Id.* § 4-21.5-3-1(b). Although the Commission spoke in terms of first class mail, it may be possible to utilize post cards or other forms of United States mail service.

²⁰IND. CODE § 4-22-1-6 (1982) (repealed, effective July 1, 1987) required agency notification by “registered or certified mail” of the matters in issue and the hearing time and place, when the agency was the moving party. IND. CODE § 4-22-1-25 required the use of “registered letter, return receipt requested” for notices of initial determinations. *But see* IND. CODE § 1-1-7-1 (Supp. 1986), which provides that where a statute or duly

must maintain a record of service²¹ and has the burden of persuasion that it has identified and notified persons entitled to notice,²² circumstances may dictate the use of certified mail to establish receipt of service. Service may also be made by publication when the identity, address, or existence of a person is not ascertainable or when allowed by another statute.²³ The former AAA made no provision for service by publication.²⁴

The Commission examined and rejected the holding of a case decided under the old statute, which required notice to be "addressed to the person or persons against whom an order or determination may be made at their last known place of residence, or place of business"²⁵ Citing that statutory language, the Court of Appeals of Indiana, in *Solar Sources, Inc. v. Air Pollution Control Board*,²⁶ held that notice to the person's attorney was not notice to the client.²⁷ In rejecting this holding, the Commission reasoned that if a party had retained counsel or had authorized another representative to receive service, the agency should be allowed to serve that designated entity. Service on the party's attorney should be sufficient and may even be more beneficial than requiring service on the party. An attorney or other representative familiar with administrative procedure may be better able timely to comply with procedural requirements for appeal. Also, authorizing service on the attorney or representative may promote administrative efficiency where an appearance is made on behalf of multiple parties or a class.²⁸ Therefore, the new article allows service upon either the individual or an authorized representative.²⁹

In contrast to the new notice provision, the Commission accepted and codified, in Indiana Code section 4-21.5-3-2, a case that interpreted Indiana Trial Rule 6 regarding computation of time in administrative proceedings.³⁰ The language of trial rule 6(A)³¹ is reflected almost verbatim in the new article, which provides that when the last day of a designated

promulgated rule requires notice to be given by registered mail, the use of certified mail constitutes compliance.

²¹IND. CODE § 4-21.5-3-1(b) (Supp. 1986).

²²*Id.* § 4-21.5-3-5(f).

²³*Id.* § 4-21.5-3-1(d).

²⁴IND. CODE § 4-22-1-6 (1982) (repealed, effective July 1, 1987).

²⁵*Id.*

²⁶409 N.E.2d 1136 (Ind. Ct. App. 1980).

²⁷*Id.*

²⁸See generally *Minutes of the Administrative Adjudication Law Recodification and Revision Commission* 1 (July 23, 1985) [hereinafter *Minutes*, July 23, 1985].

²⁹IND. CODE § 4-21.5-3-1(c) (Supp. 1986).

³⁰*Ball Stores, Inc. v. State Bd. of Tax Comm'rs*, 262 Ind. 386, 316 N.E.2d 674 (1974).

³¹IND. R. TR. P. 6(A).

time period falls on a weekend or holiday, the time period is extended to the next business day.³² Further, if the time period allowed is less than seven days, weekends and holidays are excluded from the calculation. The new article is also consistent with trial rule 6(E) in that it provides that three days are added to any required period when notice is served by mail.³³

Another significant incorporation of the trial rules in the new article involves motions for summary judgment.³⁴ The AAA made no reference to the applicability of summary decisions where only a question of law existed, although at least one agency provided for a summary decision procedure by rule.³⁵ In a recent case, the Indiana Court of Appeals discussed the requirement for exhaustion of administrative remedies.³⁶ The court stated that one factor to be considered is whether the question before the agency is one of fact or law, suggesting that purely legal questions are particularly suited for the judiciary.³⁷ Its review of other factors in the case led the court to conclude that exhaustion of administrative remedies was required before parties could proceed in court.³⁸

With the enactment of summary judgment provisions of the new article, the issue of whether purely legal questions can provide an escape clause from exhaustion requirements seems to be resolved. Because an administrative law judge (ALJ) can entertain motions for summary judgment, which presuppose the absence of a genuine issue as to any material fact,³⁹ the legislature clearly intended that agencies may decide legal issues. Efficiency of the judicial process is served by allowing agencies the opportunity to correct their own errors, to reflect on policy preferences, and to resolve controversies without interruption.⁴⁰ As a practical matter, the question of whether the issues to be determined are purely

³²IND. CODE § 4-21.5-3-2(a)-(b) (Supp. 1986).

³³IND. CODE § 4-21.5-3-2(e) (Supp. 1986); *see also* IND. R. TR. P. 6(E).

³⁴IND. CODE § 4-21.5-3-23 (Supp. 1986) is patterned after the trial rule on summary judgment, IND. R. TR. P. 56.

³⁵*See* Department of Natural Resources Administrative Procedures, IND. ADMIN. CODE tit. 310, r. 0.5-1-11 (Supp. 1986).

³⁶Scott County Fed'n of Teachers v. Scott County School Dist. No. 2, 496 N.E.2d 610 (Ind. Ct. App. 1986).

³⁷The court discussed factors affecting the analysis of whether the issue was one of fact or of law, compiled in 4 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 26:1 (2d ed. 1983), and held that the factors in favor of exhaustion outweigh the factors counseling a departure from the exhaustion requirement. Citing also *Uniroyal, Inc. v. Marshall*, 579 F.2d 1060 (7th Cir. 1978), where the federal court refused to create a *per se* exception for purely legal issues, the Indiana Court of Appeals declined to accept the argument that the absence of factual questions warrants a retreat from the exhaustion requirement. *Scott*, 496 N.E.2d at 614.

³⁸*Id.*

³⁹IND. CODE § 4-21.5-3-23(b) (Supp. 1986).

⁴⁰K. DAVIS, *supra* note 37.

legal or are a mixture of factual and legal questions remains unresolved, until a hearing on summary judgment. Unless arguments are initiated before the administrative tribunal, a trial court may be required to remand the case upon discovering a factual issue.

Possibly the most extreme illustration of a legal question is where a party raises constitutional issues in an agency proceeding. In *Drake v. Department of Natural Resources*,⁴¹ the appellant argued denial of due process. The court of appeals stated that the AAA provided an adequate means for an agency to review constitutional issues, and therefore, equitable relief in court was not available.⁴²

A comparison of two recent cases may assist in defining the parameters of an agency's ability to determine the constitutionality of specific laws. In *Midwest Steel Erection Company v. Commissioner of Labor*,⁴³ the court of appeals apparently looked favorably upon a hearing officer reviewing the constitutionality of a rule, but in *Sunshine Promotions, Inc. v. Ridlen*,⁴⁴ the court stated that an administrative officer has no authority to pass on the constitutional validity of a statute. Such determinations are within the exclusive jurisdiction of the courts under the Declaratory Judgment Act.⁴⁵

With the exception of challenges to the constitutionality of a legislative act, it appears that all other questions of law arising out of agency adjudications are to be decided in the administrative forum, subject to judicial review. The codification of the summary judgment rule in the new article provides a mechanism for agencies to decide those purely legal questions within their jurisdiction.⁴⁶

By using the language of the trial rules,⁴⁷ the new article narrows a line of cases holding that the trial rules do not govern the operations of administrative agencies.⁴⁸ The only trial rules that formerly applied specifically to administrative actions were those regarding discovery.⁴⁹

⁴¹453 N.E.2d 288 (Ind. Ct. App. 1983).

⁴²*Id.* at 293.

⁴³482 N.E.2d 1369 (Ind. Ct. App. 1985).

⁴⁴483 N.E.2d 761 (Ind. Ct. App. 1985).

⁴⁵IND. CODE §§ 34-4-10-1 to -16 (1982).

⁴⁶*See* IND. CODE § 4-21.5-3-23 (Supp. 1986).

⁴⁷*See, e.g., id.* § 4-21.5-3-5(b)(6), requiring that notice to parties is needed for just adjudication pursuant to IND. R. TR. P. 19; IND. CODE § 4-21.5-3-21, (Supp. 1986), which reflects IND. R. TR. P. 24 regarding intervention; IND. CODE § 4-21.5-3-23 (Supp. 1986), which adopts the summary judgment principles of IND. R. TR. P. 56; IND. CODE § 4-21.5-5-6(c) (Supp. 1986) stating that the rules regarding change of venue apply to judicial review.

⁴⁸*See, e.g., State v. Board of Trustees of South Bend*, 474 N.E.2d 520 (Ind. Ct. App. 1985); *Margrat, Inc. v. Indiana State Bd. of Tax Comm'rs*, 448 N.E.2d 684 (Ind. Ct. App. 1982); *Solar Sources, Inc. v. Air Pollution Control Bd.*, 409 N.E.2d 1136 (Ind. Ct. App. 1980).

⁴⁹*See* IND. R. TR. P. 28(F).

The Commission heard testimony from one of the drafters of the Model Act,⁵⁰ who explained that more than one category of administrative procedure is necessary to prevent too many "trial-type" proceedings. The drafter explained that the Indiana Act differs from the Model Act in that the Model Act avoids the burden of having too many "trial-type" proceedings. While the AAA used broad definitions to cover all agency decisions and then specifically exempted many agencies, the Model Act exempts fewer agencies and instead provides several categories of procedures that meet due process requirements but are less complicated than trials.⁵¹ The Model Act also provides for two types of informal proceedings, conference and summary, to handle less controversial issues.⁵² While the Commission declined to name specific procedural categories, the effect of chapter 3 of the new article is to provide for and to differentiate among various types of agency proceedings.⁵³

III. CATEGORIES OF NOTICE PROVISIONS

A. Permit Provisions

Four basic categories of proceedings are established in the notice provisions of chapter 3. Sections 4 and 5 affect notification regarding permits, and sections 6 and 8 apply to regulatory enforcement.⁵⁴

Section 4 concerns the issuance of individual licenses by agencies, including drivers' licenses, noncommercial hunting and fishing licenses, and certain professional licenses.⁵⁵ These types of licenses do not generally arouse controversy or objections by other people. Personnel decisions by agencies are also governed by section 4 because they are not of general applicability. Therefore, notice is required to be given only to the person to whom the order is specifically directed and any others required under another law.⁵⁶

Section 5 applies to permit or status determinations that may be of broad public concern.⁵⁷ Of the many topics addressed by the Commission, the most controversial was probably the question of who receives notice

⁵⁰Dr. L. Harold Levinson, Professor of Law at Vanderbilt University, participated in development of the 1981 version of the Model States Procedure Act, drafted by the National Conference of Commissioners on Uniform State Law. *Minutes of the Administrative Adjudication Law Recodification and Revision Commission* 3 (July 30, 1985) [hereinafter *Minutes*, July 30, 1985].

⁵¹*Id.* at 4.

⁵²*Id.*

⁵³IND. CODE §§ 4-21.5-3-1 to -37 (Supp. 1986).

⁵⁴*Id.* §§ 4-21.5-3-4, -5, -6, -8.

⁵⁵*Id.* § 4-21.5-3-4(a).

⁵⁶*Id.* § 4-21.5-3-4(b).

⁵⁷*Id.* § 4-21.5-3-5.

of the "general interest" type of administrative permit proceedings. The notice issue was a primary focus in illustrating the need for revision of the AAA.⁵⁸

The Commission was established as an outgrowth of Senate Enrolled Act No. 341.⁵⁹ The Natural Resources Advisory Committee⁶⁰ had initiated this bill in the 1985 session in an effort to amend, not rewrite, the AAA. Prominent among the considerations of the Natural Resources Advisory Committee was the formidable notice problem created by *Indiana Environmental Management Board v. Town of Bremen*.⁶¹

The *Town of Bremen* case involved construction and operation permits for a sanitary landfill granted by the Indiana Environmental Management Board (EMB).⁶² The town and several private citizens sought to obtain judicial review of the permit issuance and to enjoin its effectiveness pending review. The trial court eventually ordered that the EMB's action be set aside and vacated.⁶³ The Indiana Court of Appeals found that the town and the citizens were entitled to pursue administrative remedies under the AAA, including the opportunity for settlement and for an adjudicatory hearing.⁶⁴ The court further found that the AAA required the agency to notify all "affected persons" by registered (or certified) mail or in person of its initial determination.⁶⁵ Failure to provide the appellees with their due process rights under the AAA rendered the permits void *ab initio*.⁶⁶

⁵⁸*Minutes of the Administrative Adjudication Law Recodification and Revision Commission* App. E, at 2 (July 2, 1985) [hereinafter *Minutes*, July 2, 1985].

⁵⁹The original bill, as introduced by Senator Augsburger, would have amended several sections of the AAA to clarify problematic areas. It was eventually determined that the entire 1947 Act might be in need of careful review by a study committee, so the bill was amended to create the Commission.

⁶⁰IND. CODE § 2-5-5-1 (1982) created the Natural Resources Advisory Committee which consists of eight members of the General Assembly. The statute was amended in 1985 to change the name to the Natural Resources Study Committee. IND. CODE § 2-5-5-1 (Supp. 1986).

⁶¹458 N.E.2d 672 (Ind. Ct. App. 1984).

⁶²The Solid Waste Management Board now issues these permits pursuant to Pub. L. No. 143-1985, § 49 (codified at IND. CODE § 13-1-12-8 (Supp. 1985)).

⁶³*Town of Bremen*, 458 N.E.2d at 673.

⁶⁴IND. CODE §§ 4-22-1-4, -25 (1982) (repealed, effective July 1, 1987) specifically afforded the opportunity for settlement and adjustment of all claims, controversies, and issues. The court of appeals found the "public hearing" provided for under the EMB law, IND. CODE § 13-7-17-1 to -2 (1982), was preliminary and supplementary to the AAA hearing requirements. *Town of Bremen*, 458 N.E.2d at 675.

⁶⁵Citing as authority *Grether v. Indiana State Bd. of Dental Examiners*, 239 Ind. 619, 159 N.E.2d 131 (1959), the court of appeals found that the apparently permissive notification language of IND. CODE § 4-22-1-25 (1982) (repealed, effective July 1, 1987) was mandatory. *Town of Bremen*, 458 N.E.2d at 675 n.1.

⁶⁶*Town of Bremen*, 458 N.E.2d at 676.

The *Town of Bremen* decision created the potential that a permit issued by an agency acting under the AAA might be voided at any subsequent time when an affected person complained that he was not given proper notice of the issuance of the permit. Identification of "affected persons" is relatively simple in some types of agency actions. However, other areas regulated by AAA agencies, such as the recently created environmental protection programs, almost defy definition of who may be affected. The Commission heard evidence concerning the need for clarification as to whom the agencies must notify.⁶⁷ Notification is important because it allows for administrative appeal if objections are timely filed.⁶⁸

The Commission minutes reflect that the first draft of the new article incorporated notice provisions from the introduced version of Senate Bill No. 341.⁶⁹ The essence of the original bill is probably most apparent in the new article's notice provisions regarding permits of public concern. Much of the Commission's work centered on defining and balancing an individual's right to receive notice against a permit applicant's right to proceed within a reasonable time frame.

The final version of the new article requires notice of an agency order to a list of persons, beginning with the person to whom the order is directed and any others required by law, as described in section 4.⁷⁰ In addition to the requirements of section 4, the public participation type of permits under section 5 also require notice to each competitor in cases of mutually exclusive licenses, to each person who files a written request for notice, to each person with a substantial and direct proprietary interest, and to each person needed for just adjudication as described in the language of Indiana Trial Rule 19.⁷¹ The Commission decided that if the agency was aware that a person had the type of interest described in the trial rule, he should be afforded an opportunity for participation early in the decision-making process. The agency may request the permit applicant to assist in identifying these persons.⁷² Failure

⁶⁷See, e.g., *Minutes*, July 30, 1985, *supra* note 50, at 2, regarding statements by a representative of the Indiana Manufacturers' Association; *Minutes of the Administrative Adjudication Law Recodification and Revision Commission Subcommittee 2-3* (July 16, 1985) [hereinafter *Minutes*, July 16, 1985], regarding statements by representatives of the Indiana State Board of Health, by an independent hearing officer under contract to the State Board of Health, and by a representative of the Department of Natural Resources; *Minutes*, July 2, 1985, *supra* note 58, at App. E, 2, regarding the results of a survey of state agencies by the Office of Attorney General. See also *Minutes*, July 30, 1985, *supra* note 50, at 7, for the contrary views of the Hoosier Environmental Council.

⁶⁸See *supra* note 67.

⁶⁹*Minutes*, Sept. 3, 1985, *supra* note 15, at 2.

⁷⁰IND. CODE § 4-21.5-3-4(b) (Supp. 1986).

⁷¹*Id.* § 4-21.5-3-5(b)(1)-(6).

⁷²*Id.* § 4-21.5-3-5(f).

to notify the persons defined in section 5(b) can result in the invalidation of the order granting or denying the permit if the unnotified person can sustain his burden of persuasion that he has been substantially prejudiced by the agency decision.⁷³

B. Enforcement Provisions

Indiana Code section 4-21.5-3-6 codifies a type of regulatory enforcement that was not specifically recognized by the former statute. The AAA provided that when an investigation or inspection revealed a violation, no final order could be issued without a hearing and notice.⁷⁴

Certain agency practices allow for the issuance of an order which becomes final if no objections are filed.⁷⁵ The Commission heard testimony that often a respondent did not wish to invoke the hearing process for minor violations because of the time and complicated process; representatives of various agencies stressed the importance of expediting the administrative process whenever possible.⁷⁶ The new article thus recognizes orders that impose a sanction or terminate a legal interest, other than in permit situations, which become effective by statute without an adjudicative proceeding unless review is timely requested.⁷⁷

The more traditional type of enforcement action is described in section 8 of chapter 3. The section describes enforcement actions that can be pursued only through filing a complaint and conducting a proceeding under chapter 3.⁷⁸ These types of suits might arise in regulatory areas for which the agency has no statutory authority to proceed under Indiana Code section 4-21.5-3-6 or for which the streamlining of the action is not of prime importance.⁷⁹

Both types of enforcement proceedings require the agency to give notice to each person to whom an order may be directed and to any other person required by law to be notified.⁸⁰

IV. PARTIES AND INTERVENTION

Corollary to the issue of notice is that of intervention. A person who is entitled to notice is not necessarily a party unless he is designated

⁷³*Id.*

⁷⁴IND. CODE § 4-22-1-5 (1982) (repealed, effective July 1, 1987).

⁷⁵*See, e.g.*, procedures under IND. CODE §§ 22-8-1.1-1 to -50, 13-4.1-1-1 to -15-15 (1982).

⁷⁶*See Minutes*, July 30, 1985 *supra* note 50, at 5, 9; *Minutes*, July 16, 1985, *supra* note 67, at 3.

⁷⁷IND. CODE § 4-21.5-3-6(a) (Supp. 1986).

⁷⁸*Id.* § 4-21.5-3-8.

⁷⁹*Id.* § 4-21.5-3-6.

⁸⁰*Id.* §§ 4-21.5-3-6(b), -8(b).

as a party in the record of proceeding.⁸¹ The only exception is a person against whom any resulting enforcement order under chapter 3, section 8, will be specifically directed.⁸² That person will automatically be a party, as will any other persons who properly file a petition for review of an agency order under chapter 3, section 7. For all other persons, the new article creates rights of intervention in the agency hearing process which are consistent with state and federal trial rules.

Prior to a hearing, mandatory intervention is recognized for persons granted an unconditional right to intervene by any other statute.⁸³ Permissive intervention exists for those who demonstrate that they may be substantially prejudiced or who have a conditional right to intervene under another statute.⁸⁴

During a hearing, intervention may be allowed if the petitioner has a conditional right to intervene or presents a common question of law or fact.⁸⁵ The ALJ must also determine that allowing intervention after the hearing has begun will not impair either the interests of justice or the prompt conduct of the proceedings.⁸⁶ Reflective of the state and federal rules on this subject, the new article requires the ALJ to consider whether the intervention will unduly delay or prejudice the legal interests of the parties.⁸⁷

A person eligible to receive notice of an initial agency order, who did not have actual notice in time to intervene or who was wrongfully denied intervention, may have standing to obtain judicial review of that agency order if the requisite prejudice is shown.⁸⁸ The placement of this provision in chapter 5 suggests that the proper time to appeal a denial of party status is when all of the issues are considered on judicial review. The absence of an interlocutory appeal for denial of intervention differs from a 1981 amendment to Indiana Trial Rule 24.⁸⁹

⁸¹*Id.* §§ 4-21.5-3-4(b), -5(b), -6(b).

⁸²*Id.* § 4-21.5-3-8(b).

⁸³*Id.* § 4-21.5-3-21(a)(1). Certain statutes and rules guarantee broad rights of intervention. *See, e.g.*, IND. CODE §§ 13-6-1-1 to -6 (1982 & Supp. 1986), regarding environmental lawsuits; IND. ADMIN. CODE tit. 310, r. 12-1-3 (1984), regarding surface mining.

⁸⁴IND. CODE § 4-21.5-3-21(a)(2) (Supp. 1986).

⁸⁵*Id.* § 4-21.5-3-21(c).

⁸⁶*Id.*

⁸⁷*Id.*; *see also* FED. R. CIV. P. 24; IND. R. TR. P. 24.

⁸⁸IND. CODE § 4-21.5-5-3 (Supp. 1986).

⁸⁹IND. R. TR. P. 24(C) was amended in 1981. The previous rule stated that "The court's determination upon a motion to intervene may be challenged only by appeal from the final judgment or order in the cause." IND. R. TR. P. 24(C) (amended 1981). But in *Indiana Bankers Ass'n v. First Fed. Sav. & Loan Ass'n of East Chicago*, 180 Ind. App. 157, 387 N.E.2d 107 (1979), the court of appeals found that there may be facts and circumstances which support the use of an interlocutory appeal under IND. R. APP. P. 4(B)(5) when a motion to intervene is denied. The 1981 amendment changed the quoted language of the trial rule to read, "The court's determination upon a motion to intervene

The new article does contain a provision for judicial review of a nonfinal agency action if a person establishes both that an immediate and irreparable harm would occur and that no adequate remedy exists at law. The new law also specifically provides that the failure to comply with procedural requirements may not be used as the basis for finding an inadequate remedy at law.⁹⁰ This precludes a person from missing his statutory deadline for filing a petition for review, and then claiming that he has no adequate remedy at law. The provision allowing limited review of nonfinal agency actions may potentially allow challenges in court of decisions on petitions for stay or intervention if the requisite standards can be satisfied.

V. EFFECTIVE DATE OF ORDERS AND STAY PROVISIONS

Another major issue addressed by the new article is when an order, particularly one concerning a license, becomes effective. The AAA provided that "every order or determination so made shall be in full force and effect after it is duly entered and spread of record in the permanent records of the agency"⁹¹ The revocation of a license or permit was effective as of the date of revocation "until and unless set aside by a court on review."⁹²

This AAA language sometimes created dual effective dates for agency orders. If an order both revoked a permit and required remedial measures or the payment of a fine, the revocation was effective as soon as the ultimate authority voted to revoke. However, the portion of the order requiring corrective action or a civil penalty was not effective until the order was "spread of record," a term not defined in the AAA. Because the time for filing a petition for judicial review of a final order ran from the receipt of notice,⁹³ most agencies used the date of service of the notice as the effective date of all fully adjudicated orders.

The old AAA did not resolve the problem of determining the effective date of licenses or permits approved by an agency without full adjudication. Section 25 of the AAA stated that if no objections were filed,

shall be interlocutory for all purposes unless made final under Trial Rule 54(B)." IND. R. TR. P. 24(C). Cf. *Developmental Disabilities Residential Facilities Council v. Metropolitan Dev. Comm'n of Marion County*, 455 N.E.2d 960 (Ind. Ct. App. 1983), which held that on appeal, a denial of permissive intervention is reviewable only for an abuse of discretion.

⁹⁰IND. CODE § 4-21.5-5-2(c) (Supp. 1986).

⁹¹IND. CODE § 4-22-1-13 (1982) (repealed, effective July 1, 1987).

⁹²*Id.*

⁹³*Id.* § 4-22-1-14 required the petition to be filed fifteen days after the receipt of notice. The new article gives parties thirty days after service of notice to file a petition for review. IND. CODE § 4-21.5-5-5 (Supp. 1986).

a permit was effective fifteen days after service.⁹⁴ If objections were filed by the applicant or another affected person, there was authority suggesting that the effectiveness of a permit was automatically delayed until all procedural requirements were met and a final order was entered.⁹⁵

Some agencies, however, have differing statutory language regarding permits. For example, the Environmental Management Act provides that the decision of the Commissioner of the Indiana Environmental Management Board to approve or deny a permit is effective immediately unless otherwise stated.⁹⁶

The Commission heard divergent views on many issues, including the effectiveness of orders.⁹⁷ Its members recognized that some agency orders require a meaningful opportunity for appeal before they take effect, while others are more appropriately effective upon issuance. The requirements for the effectiveness of orders follow a rationale similar to that of the notice categories in terms of allowing an opportunity for public reaction.

Individual permits or licenses of minor public concern are effective when served.⁹⁸ Other permits become effective when the time allowed for seeking administrative review expires.⁹⁹

If both a petition for review and a petition for stay of effectiveness are filed before an order becomes effective, any part of the order within the scope of the petition for stay may be delayed for an additional fifteen days while the ALJ conducts a preliminary hearing.¹⁰⁰ The ALJ may stay the order in whole or in part.¹⁰¹

When the ALJ orders a partial stay, an applicant may elect to proceed with the unaffected portions of the permit.¹⁰² The applicant assumes the risk that the entire permit could be later voided following a hearing, but that risk may be preferable to the complete standstill created by the filing of an objection under the AAA. The partial stay provisions expedite the adjudicative proceedings and protect the interests of the applicant and other affected persons by isolating for adjudication those contested portions of the permit which are severable.

⁹⁴IND. CODE § 4-22-1-25 (1982) (repealed, effective July 1, 1987).

⁹⁵*Id.*; see also *Indiana Env'tl. Management Bd. v. Town of Bremen*, 458 N.E.2d 672 (Ind. Ct. App. 1984).

⁹⁶Pub. L. No. 143-1985, § 149 (codified at IND. CODE § 13-7-10-2.5(b) (Supp. 1985)).

⁹⁷FINAL REPORT, *supra* note 4, at 3.

⁹⁸IND. CODE § 4-21.5-3-4(d) (Supp. 1986).

⁹⁹The period for seeking administrative review is fifteen days unless a longer time is granted by another statute. Thus, most orders are effective under IND. CODE § 4-21.5-3-5(f) (Supp. 1986) within fifteen days unless petitions for review and for stay of effectiveness have been filed.

¹⁰⁰IND. CODE § 4-21.5-3-5(f) (Supp. 1986).

¹⁰¹*Id.* § 4-21.5-3-5(h).

¹⁰²See *id.*

The express ability of an agency to stay the effectiveness of orders may be the most fundamental change in administrative law created by the new article. Under the AAA, only the courts had jurisdiction to stay agency action pending judicial review.¹⁰³ Caselaw interpreting the AAA provided that the stay mechanism could be used as an equitable remedy for preserving the status quo to avoid undue hardship.¹⁰⁴ The language of the new article concerning judicial stay is practically unchanged from the AAA.¹⁰⁵ Thus, presumably the same principles will apply to the new article after a final order or determination is made by the agency.

Under the new law, the ALJ can stay agency orders in both categories of licensing during the course of administrative adjudication.¹⁰⁶ This change is consistent with the 1981 revision of the Model State Administrative Procedure Act, which provides that the presiding officer may take action on a petition for stay, either before or after the effective date of the initial or final order.¹⁰⁷ The new article also gives the ultimate authority discretion to grant petitions for stay during efforts to modify a final order.¹⁰⁸

VI. EMERGENCY AND OTHER TEMPORARY ORDERS

Acting upon requests by several agencies,¹⁰⁹ the Commission expanded upon the brief allusion in the AAA to emergency and temporary orders.¹¹⁰ The new article includes chapter 4, which applies if an emergency exists or if a statute authorizes immediate agency action.¹¹¹

¹⁰³See IND. CODE §§ 4-22-1-13, -17 (1982) (repealed, effective July 1, 1987), which recognized an "automatic stay of agency action where expressly provided for by law."

¹⁰⁴However, the court could not extend a permit beyond its effective date, thus constituting a judicially created renewal permit. *Alcoholic Beverage Comm'n v. Lake Super. Ct. Room 4 Sitting at Gary*, 259 Ind. 123, 284 N.E.2d 746 (1972).

¹⁰⁵Compare IND. CODE § 4-22-1-17 (1982) (repealed, effective July 1, 1987) with IND. CODE § 4-21.5-5-9 (Supp. 1986).

¹⁰⁶IND. CODE §§ 4-21.5-3-4(e), -5(f), -5(h) (Supp. 1986).

¹⁰⁷MODEL STATE ADMIN. PROCEDURE ACT § 4-217 (1981). The comment following that section indicates that "[t]he 1961 Revised Model Act mentioned a stay granted by the agency or ordered by the court only in the context of judicial review, Section 15(c)," *Id.* § 4-217 comment.

¹⁰⁸IND. CODE § 4-21.5-3-31(b) (Supp. 1986).

¹⁰⁹See, e.g., *Minutes*, July 23, 1985, *supra* note 28, at 4, regarding statements by a representative of the Health Professions Bureau; *Minutes*, July 16, 1985, *supra* note 67, at 3, regarding statements by a representative of the Department of Natural Resources; *Minutes*, July 2, 1985, *supra* note 58, at App. E, at 3, regarding a survey of state agencies by the Office of Attorney General.

¹¹⁰IND. CODE § 4-22-1-5 (1982) (repealed, effective July 1, 1987) provided only that "in a case of emergency a temporary order may be made by such agency to be effective only until notice may be given and hearing had as herein provided." No other guidance was provided for emergency proceedings.

¹¹¹IND. CODE § 4-21.5-4-1 (Supp. 1986).

The chapter provides for an order with or without notice or hearing, that is effective when issued.¹¹² The agency is, however, required to give "such notice as is practicable" to persons required to comply with the order.¹¹³

Upon request, the agency must set the matter for evidentiary hearing "as quickly as is practicable."¹¹⁴ At hearing the ALJ may void, terminate, modify, stay, or continue the order.¹¹⁵ The order expires on the date set in the order, the date set by statute, or the elapse of ninety days, whichever is earliest.¹¹⁶ As long as the adjudicative process is being pursued under chapter 3, the order may be renewed for successive ninety day periods unless precluded by law.¹¹⁷

The emergency provisions are available as an adjunct to the other categories of proceedings described in chapter 4,¹¹⁸ chapter 5,¹¹⁹ chapter 6,¹²⁰ and chapter 8,¹²¹ of the new article.

VII. JUDICIAL REVIEW AND CIVIL ENFORCEMENT

The new article codifies most of the old statutory requirements and court interpretations of the AAA regarding judicial review. Since it heard few complaints about the standards for court review of agency action, the Commission retained the core provisions of the AAA in this area.¹²² Certain scattered caselaw principles were legislatively enacted so that all the requirements for administrative adjudication are in one article.

For example, countless cases have held that a party must exhaust his administrative remedies before seeking judicial review.¹²³ The exhaustion requirement is specifically stated in chapter 5 of the new article.¹²⁴ As was true under the AAA,¹²⁵ the new article provides that

¹¹²Some statutes require a hearing prior to the issuance of a temporary order. *See, e.g.*, IND. CODE § 13-4.1-11-8 (1982).

¹¹³IND. CODE §§ 4-21.5-4-2, -3 (Supp. 1986).

¹¹⁴*Id.* § 4-21.5-4-4.

¹¹⁵*Id.*

¹¹⁶*Id.* § 4-21.5-4-5.

¹¹⁷*Id.*

¹¹⁸*Id.* § 4-21.5-3-4(d).

¹¹⁹*Id.* § 4-21.5-3-5(g).

¹²⁰*Id.* § 4-21.5-3-6(d).

¹²¹*Id.* § 4-21.5-3-8(a).

¹²²*See id.* §§ 4-21.5-5-1 to -16.

¹²³*See, e.g.*, *Scott County Fed'n of Teachers v. Scott County School Dist. No. 2*, 496 N.E.2d 610 (Ind. Ct. App. 1986); *Drake v. Indiana Dep't of Natural Resources*, 453 N.E.2d 293 (Ind. Ct. App. 1983); *Thompson v. Medical Licensing Bd.*, 180 Ind. App. 333, 389 N.E.2d 43 (1979), *cert. denied*, 449 U.S. 937 (1980).

¹²⁴IND. CODE § 4-21.5-5-4 (Supp. 1986).

¹²⁵IND. CODE § 4-22-1-18 (1982) (repealed effective July 1, 1987); *see also* *Indiana Bd. of Chiropractic Examiners v. Chamberlain*, 495 N.E.2d 794 (Ind. Ct. App. 1986); *Indiana Alcoholic Beverage Comm'n v. Johnson*, 158 Ind. App. 467, 303 N.E.2d 64 (1973).

a court on review may not substitute its judgment for that of the agency, nor may it try the case *de novo*.¹²⁶

The new article also retains the AAA's standards for granting relief on judicial review.¹²⁷ If substantial prejudice is shown under these standards, the reviewing court may set aside an agency action. Consistent with the AAA, the court may remand the case for further proceedings and compel agency action when it is unreasonably delayed or unlawfully withheld.¹²⁸

One major change from the AAA is that the new article gives a party thirty days to file a petition for judicial review,¹²⁹ instead of the previous fifteen day period.¹³⁰ Likewise doubled is the time for filing the agency record with the court.¹³¹

Cognizant of the case of *Shettle v. Meeks*¹³² in which the court of appeals held that an agency must bear the cost of preparing a transcript for judicial review, the Commission clarified the procedures for obtaining a record of the proceedings. The ALJ must have the hearing recorded at the agency's expense, but the agency is not required to prepare a transcript.¹³³ Any party may, at his own expense, cause a reporter to prepare a transcript.¹³⁴ Despite the provisions of the Access to Public Records Law,¹³⁵ the agency may charge a petitioner the reasonable costs of preparing necessary copies and transcripts for the court.¹³⁶

Reasonable costs would include the charge by a reporting service for preparing, upon request, a hearing transcript that would not otherwise have been transcribed. The party making the request would pay for the transcript unless indigency was established.¹³⁷

Chapter 6 of the new article concerns civil enforcement of agency orders. A verified petition for civil enforcement is the proper mechanism to request court-ordered compliance.¹³⁸ The state¹³⁹ or any party, under

¹²⁶IND. CODE § 4-21.5-5-11 (Supp. 1986).

¹²⁷Compare IND. CODE § 4-22-1-18 (1982) (repealed, effective July 1, 1987) with IND. CODE § 4-21.5-5-14(d) (Supp. 1986).

¹²⁸Compare IND. CODE § 4-22-1-18 (1982) (repealed, effective July 1, 1987) with IND. CODE § 4-21.5-5-15 (Supp. 1986).

¹²⁹IND. CODE § 4-21.5-5-5 (Supp. 1986).

¹³⁰IND. CODE § 4-22-1-14 (1982) (repealed, effective July 1, 1987).

¹³¹Compare IND. CODE § 4-22-1-14 (1982) (repealed, effective July 1, 1987) with IND. CODE § 4-21.5-5-13 (Supp. 1986).

¹³²465 N.E.2d 1136 (Ind. Ct. App. 1984).

¹³³IND. CODE § 4-21.5-3-25(g) (Supp. 1986).

¹³⁴*Id.*

¹³⁵IND. CODE §§ 5-14-3-1 to -10 (Supp. 1986).

¹³⁶IND. CODE § 4-21.5-5-13(d) (Supp. 1986).

¹³⁷*Id.*

¹³⁸*Id.* § 4-21.5-6-1.

¹³⁹See *id.* § 4-21.5-6-1, which provides that the petition for enforcement may be filed by an agency in its own name, by an agency in the name of the state, by the Attorney General in his own name, or by the Attorney General in the name of the state at the request of an agency.

specified conditions,¹⁴⁰ may file a petition to enforce an agency's order by injunction, restraining order, or other appropriate relief.¹⁴¹ The resulting court orders are appealable through the rules governing civil appeals from the courts.¹⁴²

Chapter 6 also addresses the enforcement of subpoenas, discovery orders, and protective orders issued by an agency.¹⁴³ The Commission considered testimony that the procedure under the AAA, in which only the Attorney General could seek enforcement¹⁴⁴ of subpoenas, on behalf of the agency involved, created an undue burden and possible conflicts of interest for that office.¹⁴⁵ As a result, the new article provides that any party to an agency proceeding can seek enforcement of the agency's discovery orders.¹⁴⁶

VIII. CONCLUSION

The new article addresses many issues that have arisen since the enactment of the AAA in 1947. It incorporates the principles of numerous court decisions and trial rules in recognition of the increased sophistication of questions presented to modern agencies as they attempt to effectuate state and federal requirements. Because of the complexity of the legislation, the Commission provided, in the House Enrolled Act 1339,¹⁴⁷ for a second summer study committee to examine certain issues and recommend appropriate legislation to the Indiana General Assembly during the 1987 session. This second committee, named the Administrative Adjudication Commission, met during the summer of 1986 to propose minor changes in the new article. A bill that makes several technical corrections and minor revisions received the consensus of the summer group and will be introduced to the General Assembly as a Commission bill in 1987.¹⁴⁸

¹⁴⁰See *id.* § 4-21.5-6-3(b), which precludes commencement of an enforcement action by a party if sixty days have not elapsed since notice of intent to sue was given, if the agency is diligently prosecuting a petition for civil enforcement of the same order, or if a petition for review of the order is pending.

¹⁴¹*Id.* § 4-21.5-6-6.

¹⁴²*Id.* § 4-21.5-6-7.

¹⁴³*Id.* § 4-21.5-6-2.

¹⁴⁴IND. CODE § 4-22-1-21 (1982) (repealed, effective July 1, 1987).

¹⁴⁵See *Minutes*, July 2, 1985, *supra* note 58, at App. E; FINAL REPORT, *supra* note 4.

¹⁴⁶IND. CODE § 4-21.5-6-2(b) (Supp. 1986).

¹⁴⁷Pub. L. No. 18-1986, §§ 5, 6 (non-code section).

¹⁴⁸When the Administrative Adjudication Commission met in 1986, it considered making changes in the new article in the areas of the pooling of administrative law judges, state employee arbitration, civil enforcement, and notice provisions concerning landfills. The Commission declined to recommend any new legislation on these subjects to the General Assembly during the 1987 session. ADMIN. ADJUDICATION COMM'N, 1986 GEN. ASSEMBLY, FINAL REPORT OF THE ADMINISTRATIVE ADJUDICATION COMMISSION, NOVEMBER 1, 1986 (1986).

