

Federal Administrative Procedures Act (APA) - Chapters 5, 7

Michigan Administrative Procedures Act - MCL 24.232-24.306

Natural Resources and Environmental Protection Act (NREPA) - Part 11

Rule Making: (APA - § 553; MCL 24.239-24.245)

General notice of proposed rule making by Federal agencies must be published in the Federal Register.

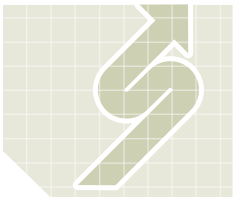
State agencies must file a request for rulemaking with the office of regulatory reform. If the office approves the request, the state agency may begin drafting the proposed rule. MCL 24.239.

The agency must provide notice and an opportunity for the public to submit comments about the proposed rule. The agency must also hold a public hearing and provide notice of that. The agency must provide notice of the hearing and public comment period in 3 newspapers, to the office of regulatory reform so they may publish it in the Michigan register, and to all those who requested notice. MCL 24.239a; 24.241; 24.242.

If an agency does not follow the requirements for the rulemaking process, the rule is not valid. MCL 24.243

After proper notice and comment, the agency must prepare a report summarizing the comments from the public hearing and comment period and submit it to the office of regulatory reform. MCL 24.245.

Any interested person then has the right to petition for a contested case hearing on the matter.



Any person may request an agency promulgate a rule. The agency must, within 90 days, initiate the processing of a rule or issue a concise statement of the reasons for denying the request. The denial is not subject to judicial review. MCL 24.238.



Contested Case Hearings: (APA - §§ 554-557; NREPA - 324.11, MCL 24.271-24.287)

Federal process:

Hearing procedure:

Persons entitled to notice of an agency hearing must be informed of the time, place and nature of the hearing, the legal authority under which it is held, and the matters of fact and law asserted. APA § 554(b).

A person compelled to appear in person before an agency or representative thereof is entitled to counsel. APA § 555(b).

Agency subpoenas authorized by law shall be issued to a party on request and, when required by the rules of procedure, on a statement or showing of general relevance and reasonable scope of the evidence sought. APA § 555(d).

The agency must give all interested parties the opportunity for the submission and consideration of fact, arguments, offers of settlement, or proposals of adjustment when time, the nature of the proceeding and the public interest permit. APA § 554(c).

The proponent of the rule or order has the burden of proof. APA § 556(d).

Any evidence may be received, but the agency should exclude irrelevant, immaterial, or unduly repetitious evidence. APA § 556(d).

Any party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. APA § 556(d).

An agency employee presiding over the proceedings or participating in the final decision must conduct the proceedings in an impartial manner. APA § 556(b).

The agency employee presiding over the proceeding may not consult a person or party on a fact in issue, unless on notice and opportunity for all parties to participate. That employee also may not be responsible to an employee or agency engaged in the performance of investigative or prosecuting functions for the agency. APA § 554(d).

Prior to an initial agency decision by the presiding employee, the parties are entitled to submit proposed findings and conclusions, exceptions to the decisions, and supporting reasons for the exceptions. APA § 557(c).

All decisions must include findings and conclusions, and the reasons or basis therefor on all material issues of fact, law, or discretion presented on the record, and the appropriate rule, order, sanction, relief or denial. APA § 557(c).

State process:

If a person has legal standing to challenge a DEQ decision, they may request a hearing and the DEQ must make a final agency decision.

Petition for a contested case hearing - <http://www.deq.state.mi.us/documents/deq-oah-eqp0201.dot>

The DEQ may use an Administrative Law Judge to conduct the review as a contested case hearing.

The director of the DEQ makes the final decision which is then subject to judicial review.

Hearing procedure:

The agency in charge of the hearing must give appropriate notice of the hearing. MCL 24.271.

An agency authorized to adjudicate contested cases may adopt rules for discovery and depositions to the extent it is appropriate for their proceedings. Otherwise, depositions may be used instead of other evidence if they are taken in compliance with general court rules. MCL 24.274.

If a party makes a request to the agency for records relating to the contested case, the agency must make them available to the other party, unless they are exempt from disclosure by law. MCL 24.274.

If a party fails to appear in a contested case after proper service and notice, the agency may proceed with the hearing and make its final decision. MCL 24.272(1).

A party may file a written answer before the date is set for the hearing. MCL 24.272(2).

The parties may present oral and written arguments on issues of law, policy and fact. They may also cross-examine witnesses and present rebuttal evidence. MCL 24.272(3), (4).

An agency may issue subpoenas for the attendance and testimony of witnesses and the production of evidence if it is authorized by statute to issue subpoenas. MCL 24.273.

If an agency relies on witnesses in a contested case who have made prior statements or reports with respect to the case, the agency must make those available to the opposing party for their use on cross-examination. MCL 24.274.

The rules of evidence applied in a non-jury civil case should be applied to contested case hearings, except that an agency may also admit and give probative effect to evidence of a type commonly relied upon by reasonably prudent men in the conduct of their affairs. MCL 24.275.

Evidence, including records and documents in the possession of the agency, must be offered and made a part of the record. The official deciding the case may only consider evidence made part of the record. MCL 24.276.

The presiding officer is designated and authorized by the agency, and he or she must conduct the hearing in an impartial manner. MCL 24.279.

A member or employee of an agency assigned to make a decision in a contested case hearing or to make findings of fact and conclusions of law may not communicate, directly or indirectly, with any party or his representative. This may be allowed if the decision-maker provides notice to all parties and an opportunity to participate. MCL 24.282.

A final decision must be made within a reasonable time and include separate findings of fact and conclusions of law. A copy must be mailed to each party and his or her attorney. MCL 24.285.

The agency must prepare an official record of hearing which should include relevant information from the record and the final decision. MCL 24.286.

An agency may order a rehearing in a contested case on its own motion or at the request of a party. MCL 24.287.

MEPA specifies that when a contested case is available, a MEPA case may be remanded to the contested case to create a record for the court to review later. MEPA allows temporary injunctions to be put in place to protect the environment in the meantime. MCL 324.1704.

Judicial Review: (APA - §§ 702, 704-706; MCL 24.301-24.306)

A person adversely affected or aggrieved by a final agency action is entitled to judicial review.

This does not include those adversely affected by agency inaction, unless the agency had a duty to act and did not.

A preliminary, procedural, or intermediate agency action or ruling is not directly reviewable until the final agency decision is made.

Under the state APA, a person must exhaust all administrative remedies available within an agency and receive a final agency decision before seeking judicial review of that decision. MCL 24.301.

Under the federal APA, any final agency action for which there is no other adequate remedy in a court are subject to judicial review. APA § 704.

The court may postpone the effective date of the agency action or preserve status or rights pending the conclusion of the proceedings.

The reviewing court must:

- (1) Compel agency action unlawfully withheld or unreasonably delayed and;
- (2) Hold unlawful and set aside agency action, findings, and conclusions found to be:
 - (A) Arbitrary and capricious, an abuse of discretion, or not in accordance with the law;
 - (B) Contrary to constitutional right, power, privilege or immunity;
 - (C) In excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
 - (D) Without observance of procedure required by law;
 - (E) Unsupported by substantial evidence in a case subject to an agency proceeding or hearing; or
 - (F) Unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

