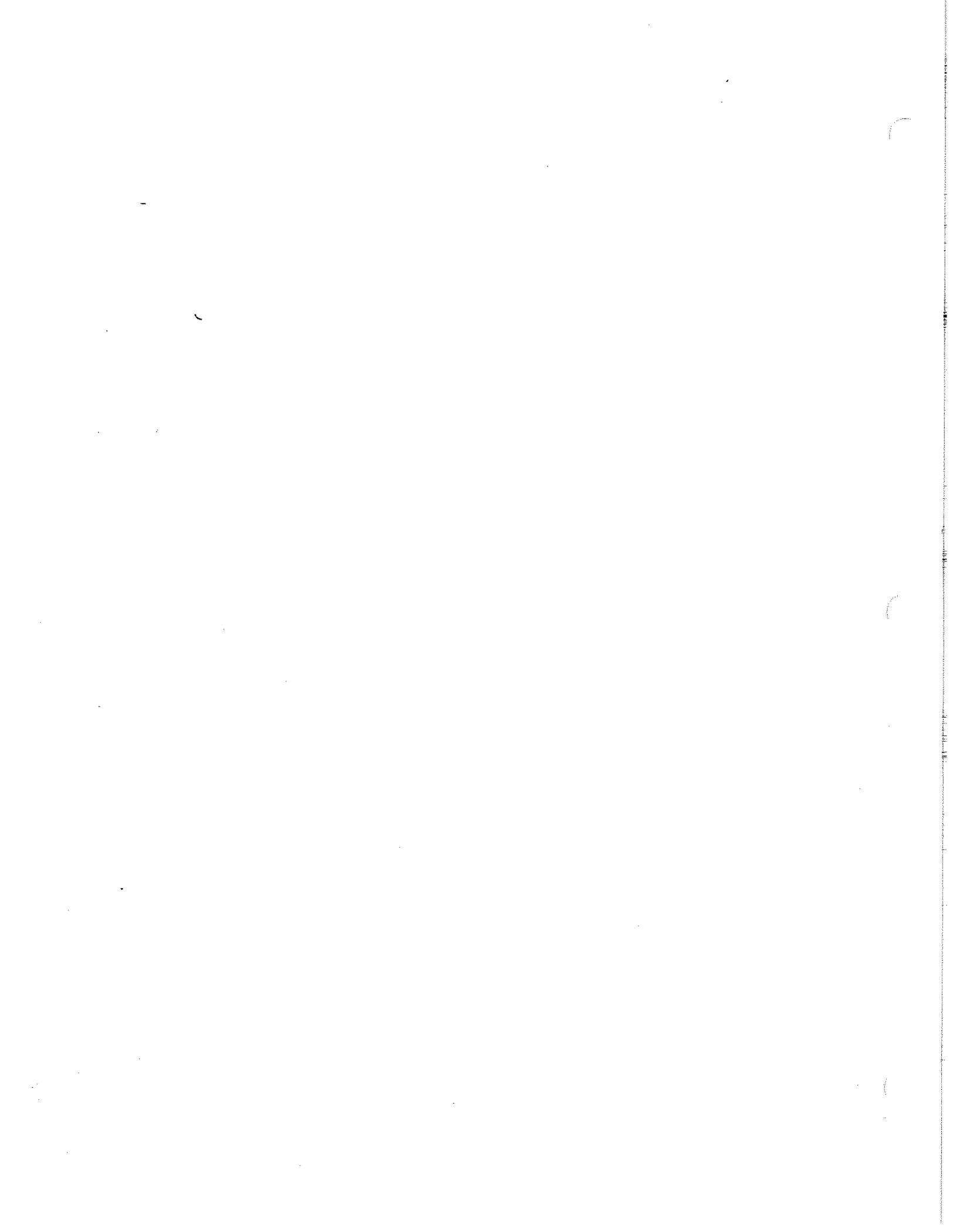


MAR 1 1995

TITLE 184, NEBRASKA ADMINISTRATIVE CODE, CHAPTER 2

NEBRASKA DEPARTMENT OF HEALTH

**RULES OF PRACTICE AND PROCEDURE OF THE DEPARTMENT
OF HEALTH FOR DECLARATORY ORDERS**



NEBRASKA ADMINISTRATIVE CODE

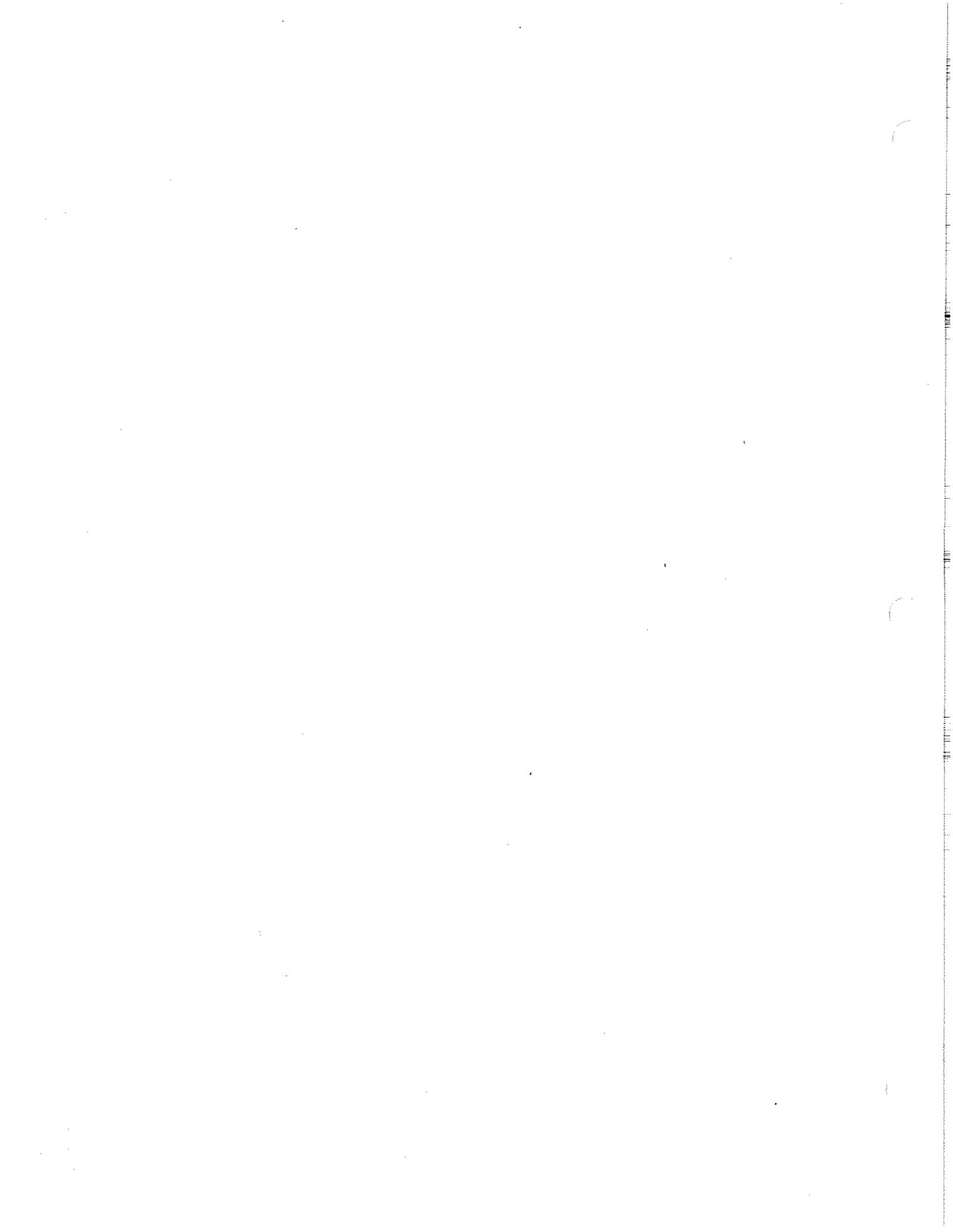
MAR 1 1995

TITLE 184 - NEBRASKA DEPARTMENT OF HEALTH

CHAPTER 2 - RULES OF PRACTICE AND PROCEDURE OF THE DEPARTMENT
OF HEALTH FOR DECLARATORY ORDERS

ALPHABETICAL
TABLE OF CONTENTS

SUBJECT	STATUTORY AUTHORITY	SECTION(S)
Appeals	84-909, 84-907.09	006
Consideration and Disposition of Petitions	84-909, 84-907.09	005
Declaratory Rulings Generally	84-909, 84-907.09	003
Definitions	84-909, 84-907.09	002
Petition for Declaratory Ruling	84-909, 84-907.09	004
Scope	84-909, 84-907.09	001



NEBRASKA ADMINISTRATIVE CODE

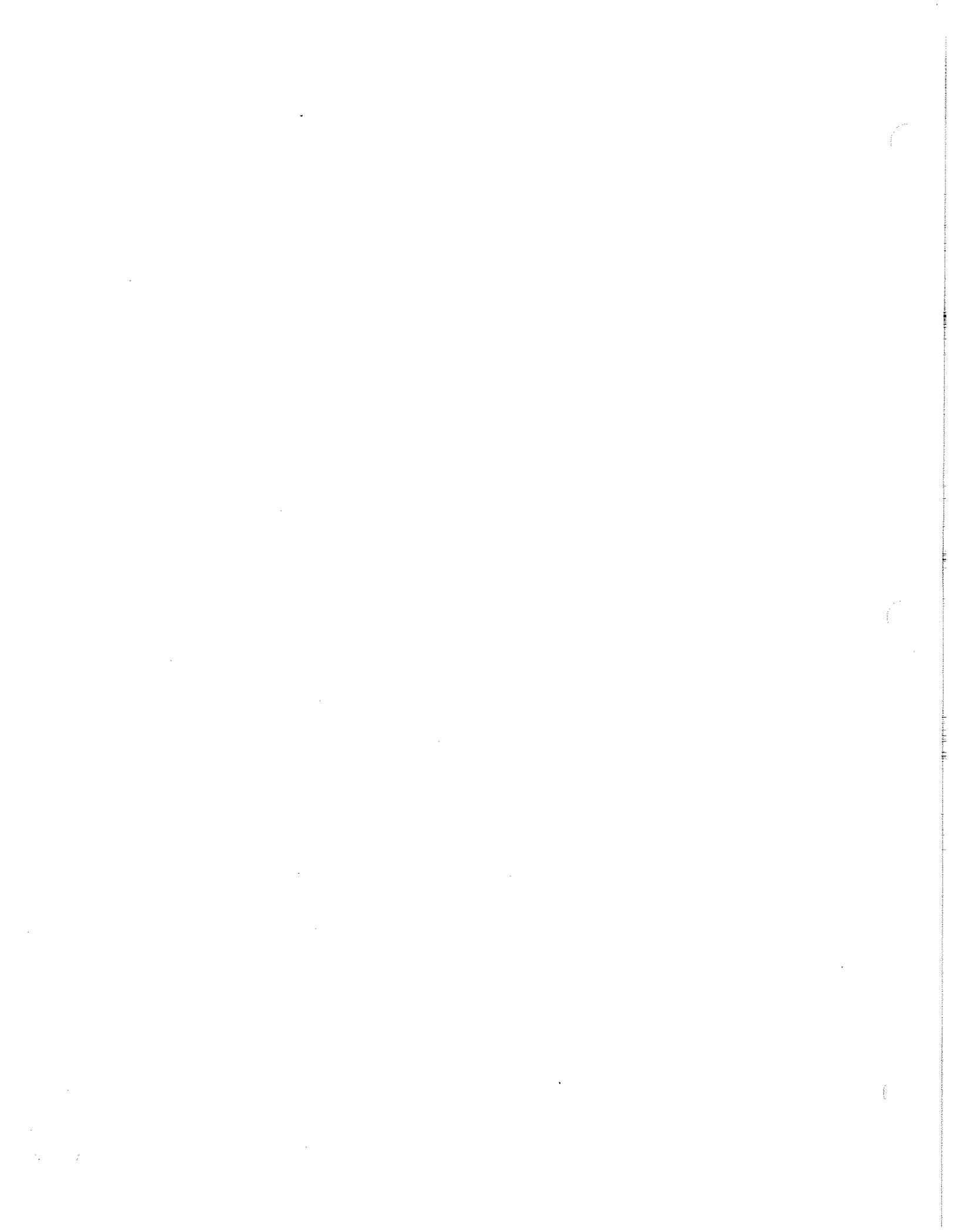
MAR 1 1995

TITLE 184 - NEBRASKA DEPARTMENT OF HEALTH

**CHAPTER 2 - RULES OF PRACTICE AND PROCEDURE OF THE DEPARTMENT
OF HEALTH FOR DECLARATORY ORDERS**

**NUMERICAL
TABLE OF CONTENTS**

SUBJECT	STATUTORY AUTHORITY	SECTION(S)
Scope	84-909, 84-907.09	001
Definitions	84-909, 84-907.09	002
Declaratory Rulings Generally	84-909, 84-907.09	003
Petition for Declaratory Ruling	84-909, 84-907.09	004
Consideration and Disposition of Petitions	84-909, 84-907.09	005
Appeals	84-909, 84-907.09	006



NEBRASKA ADMINISTRATIVE CODE

1995

TITLE 184 - NEBRASKA DEPARTMENT OF HEALTH

CHAPTER 2 - RULES OF PRACTICE AND PROCEDURE OF THE DEPARTMENT OF HEALTH FOR DECLARATORY ORDERS

INDEX TO REGULATIONS

Section	Subject	Page
001	SCOPE	1
002	DEFINITIONS	1
002.01	Argument	1
002.02	Contested Case	1
002.03	Declaratory order	1
002.04	Department	1
002.05	Director	1
002.06	Intervenor	1
002.07	Necessary Party	1
002.08	Party	1
002.09	Person	1
002.10	Petition	2
002.11	Petitioner	2
002.12	Rule or Regulation	2
003	DECLARATORY ORDERS GENERALLY	2
003.01	Purpose	2
003.02	Subjects for Declaratory Orders	2
003.03	Who May Request An Order	3
003.04	When An Order May Be Requested	3
003.05	Effect of Ruling	3
004	PETITION FOR DECLARATORY ORDER	3
004.01	Request	3
004.02	Form	3
004.03	Content	4
004.04	Sample Petition	5
004.05	Filing	5
004.06	Number of Copies	6
004.07	Reception of Petition	6
004.08	Request for Receipt	6
004.09	Service of Petition	6

005	CONSIDERATION AND DISPOSITION OF PETITIONS	6
005.01	Process Generally	6
005.02	By Whom Made	8
005.03	Additional Information	8
005.04	Oral Presentation (Argument), When	10
005.05	Oral Presentation, Procedure	10
005.06	Brief	11
005.07	Decision, When	11
005.08	Decision, Form	11
005.09	Decision, Content	11
005.10	Decision, Service	12
005.11	Refusal to Rule, Grounds	12
006	APPEAL	13
006.01	Right of Review	13
006.02	Stay	13
006.03	Record	14
006.04	Costs	14

ATTACHMENTS

A	Sample Petition for Declaratory Order	
---	---------------------------------------	--

TITLE 184 - NEBRASKA DEPARTMENT OF HEALTH
CHAPTER 2 - RULES OF PRACTICE AND PROCEDURE OF THE
DEPARTMENT OF HEALTH FOR DECLARATORY ORDERS

FILED
SECRETARY OF STATE
MAR -1 950 12325

001 SCOPE. These rules and regulations govern the form to be used in petitioning the Department for a declaratory order and the procedure for submission of petitions, their consideration, and their disposition.

002 DEFINITIONS. As used in these regulations the following definitions shall apply:

002.01 Argument means 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.

002.02 Contested Case means a proceeding before the Department 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 Department.

002.03 Declaratory Order means a written response by the Department to a question submitted by an person with respect to the applicability to specified circumstances of any statute, rule, regulation or order within the primary jurisdiction of the Department.

002.04 Department means the Department of Health.

002.05 Director means the Director of Health.

002.06 Intervenor shall mean persons 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.

002.07 Necessary Party as distinguished from a general interest such as may be the concern of the public at large, and who is or would be adversely affected in a legally cognizable way by the uncertainty sought to be resolved.

002.08 Party means the petitioner and any person granted leave to intervene in a declaratory order proceeding.

002.09 Person means individuals, partnerships, any bodies politic or corporations, either profit or non-profit.

APPROVED

FEB 28 1995

Benjamin Nels Overnc
BENJAMIN NELSON
OVERNC

Amendments
APPROVED
DON STENBERG
ATTORNEY GENERAL
SEP 14 1994
BY *Lynn A. Melon*
Assistant Attorney General

**Title 184
Chapter 2**

002.10 Petition shall mean the document filed in accordance with section 003 of these regulations to initiate or to intervene in a declaratory order proceeding.

002.011 Petitioner means the person filing a petition for declaratory order.

002.12 Rule or Regulation means any rule, regulation, or standard issued by the Department certified and filed with the Secretary of State of the State of Nebraska under the Administrative Procedure Act, Neb. Rev. Stat. §84-901 et seq.

003 DECLARATORY RULINGS GENERALLY

003.01 Purpose. A declaratory order procedure provides a means by which persons, may request a response to a question about a statute, regulation, or order as it applies to specified circumstances.

003.02 Subjects for Declaratory Orders. A declaratory order may be requested on the applicability of a statute, regulation or order enforced by the Department.

003.02A "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.

003.02B A declaratory order may be requested only on the applicability of existing statutes and rules and regulations.

003.02C 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 taken place or is taking place.

003.02D A declaratory order is not a mechanism for review or appeal of a decision made by the Department in a contested case.

MAR 1 1997

Title 184
Chapter 2

003.02E A declaratory order may not be requested to obtain a declaration by the Department that a statute or regulation is unconstitutional, or that a regulation of the Department is invalid.

003.02F A declaratory order may not be issued by the Department 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.

003.03 Who May Request An Order. Any person may request a declaratory order from the Department. The parties shall be the petitioner and any persons who qualify for intervention and file timely petitions for intervention under section 005.03 of these regulations.

003.04 When A Ruling May Be Requested. A petition for declaratory order may be filed at any time, except that when a declaratory order has been issued, or declined, the Department may refuse to issue a ruling on a subsequent petition covering substantially the same subject matter that is filed within one hundred twenty (120) calendar days.

003.05 Effect of Ruling. A declaratory order shall have the same status and binding effect as any other order issued in a contested case. Such an order is based upon unproven facts a petitioner furnishes to the Department. The actual existence of those facts generally would become an issue only in later administrative proceedings in which a party seeks to use a declaratory order as justification for that party's conduct. An order on the merits will not be binding if the facts are other than as represented and relied upon in issuing a declaratory order.

004 PETITION FOR DECLARATORY ORDER

004.01 Request. A request for a declaratory order must be made by petition that meets the requirements of subsections 004.02 and 004.03 of this section.

004.02 Form.

004.02A Pleading. A petition for declaratory order may be in the form of a pleading or letter which shall contain:

004. 02A1 A caption, which shall include:

**Title 184
Chapter 2**

004.02A1a The venue: BEFORE THE DEPARTMENT OF HEALTH, STATE OF NEBRASKA;

004.02A1b A heading specifying the subject matter and the name of the petitioner; and

004.02A1c The name of the pleading: PETITION FOR DECLARATORY RULING.

004.02A2 The statements required in 004.03 below.

004.02A3 The signature of the petitioner, or when represented by an attorney, the signature of the attorney.

004.02A4 The name and address of the petitioner, and when represented by an attorney, the name, address, telephone number, and bar number of the attorney.

004.02B Size and Paper. Petitions shall be made on white, letter-sized (8 1/2 x 11) paper of standard weight.

004.02C Print. Petitions shall be legibly typewritten, photostatically reproduced, printed, or handwritten. If handwritten, they must be written in ink. Only one side of a page shall contain any writing.

004.02D Attachments. Any documents attached to a petition shall be securely fastened to the pleading and shall meet the requirements of 004.02B and 004.02C for paper and print, 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.

004.03 Content. To be considered, a petition for declaratory order must meet the following requirements for content and substance.

004.03A Identification. The petition shall provide the name, address and day-time telephone number of the petitioner.

004.03B Statement of Facts. The facts surrounding the problem or question presented in the petition must be complete, specific and particularized to the problem or question.

MAR 1 1995

Title 184
Chapter 2

004.03C Nature of the Question. The petition must state the precise question for which a declaratory order is sought, which shall be as narrowly posed as the surrounding facts permit. The question shall identify the statute and/or rule and regulation applicable, or believed to be applicable, to the situation presented.

004.03D Statement of Position. The petition shall state the petitioner's position as to how the Department should rule and why the Department should rule in the manner requested.

004.03E Necessary Parties. The petition must identify by name and address all persons known to petitioner who may have a specific personal interest in the applicability of the statute, regulation or order or who may be adversely affected by the uncertainty sought to be resolved by the petitioner. The petitioner shall also attach any written consents to the determination of the matter requested by declaratory order proceeding that the petitioner has obtained from such persons.

004.03F Attachments. Any documents pertinent to the petition that the petitioner wishes to be considered in making a ruling must be attached to the petition.

004.03G Verification. 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.

004.04 Sample Petition. A petitioner may use the sample form of petition approved by the Department, a copy of which is attached as Attachment A to these regulations and made a part of these regulations by reference. A petitioner may also prepare his or her own petition, so long as it is a reasonable facsimile in form and meets the requirements of subsections 004.02 and 004.03.

004.05 Filing. A petition for declaratory order by the Department shall be filed in the office of the Director of Health. Filing may be accomplished by personal delivery or by mail. Filings will be received during regular office hours of the Department. Office hours are from 8:00 a.m. to 5:00 p.m., Monday through Friday, excluding state holidays. The mailing address for the Department is Department of Health, Third Floor, 301 Centennial Mall South, Lincoln, Nebraska 68509.

Title 184
Chapter 2

004.06 Number of Copies. In addition to the original petition, two (2) copies shall be delivered to the Department for Department use.

004.07 Reception of Petition. The Department shall stamp all petitions and other filings relating to a declaratory order action as "RECEIVED" and with the date of filing. Filings received after regular office hours shall be stamped as received the following work day.

004.08 Request for Receipt. Request may be made for a receipt for any filing made. Request may be made by letter or verbally. The request must be accompanied by an extra copy of the document for stamping and return, and if return is to be by mail, a stamped, self-addressed envelope.

004.09 Service of Petition. At the same time 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 Department.

005 CONSIDERATION AND DISPOSITION OF PETITIONS

005.01 Process Generally. Upon the filing of a petition, the Director may consider the petition for him/herself, refer a petition to an appropriate licensing or governing board, or delegate the matter to a designated hearing officer, board, or to a Department employee to consider the petition and recommend a decision to the Director.

005.01A In reviewing a petition, the Department may, in its discretion do one or more of the following:

005.01A1 Require that additional information be submitted before the petition will be considered.

005.01A2 Require petitioner to provide notice to persons who may be necessary parties and other persons of the pendency of the proceeding;

005.01A3 Schedule a date, time and location at which the petitioner and any other parties may make an oral presentation on the petition.

MAR 1 1995

Title 184
Chapter 2

005.01A4 Consider the petition and any attachments without oral presentation.

005.01B Within thirty (30) days after receipt of a petition, the Department shall in writing:

005.01B1 Set the matter for specified proceedings as described in 005.01A

005.01B2 Decline to issue a declaratory order on the merits of the petition; or

005.01B3 Issue a declaratory order.

005.01B4 Agree to issue a declaratory order by a specified time.

Notwithstanding this section, the Department 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 005.11 of these regulations. The Department shall notify the petitioner and, if applicable, any intervenor or necessary party in writing when the Department determines not to issue a declaratory order.

005.01C If the Department has not issued a declaratory order within sixty (60) days after receipt of a petition therefor, the petition shall be deemed to have been denied.

005.01D Decisions: By Whom Made. Decisions on petitions may be made:

005.01D1 Only by the Director, when the decision is to issue an order on the merits on behalf of the Department;

005.01D2 By a designee of the Director, when the decision is not to issue an order on the merits on behalf of the Department;

005.01D3 By a requisite number of members of a board, when a petition seeks a declaratory order about statutes or regulations that are within the sole authority of a board of the Department to implement by regulations or otherwise; or

**Title 184
Chapter 2**

005.01D4 By both the Director and a board, when they have joint authority to adopt regulations to implement or interpret the law for which an order is sought.

Either the Director or the designated representative may call upon other staff of the Department to provide technical or legal advice as needed to make or to recommend a determination.

005.02 Additional Information. If, upon review of the petition, additional information is determined by the Department to be needed to consider the petition, the Department shall notify the petitioner of the nature of the information to be submitted. The request may be made in writing or verbally, but if made verbally, must be confirmed to writing and signed by the person making the request. Department review shall be made within fifteen (15) days of the filing of the petition. The petitioner shall have five (5) days from the receipt of the verbal or written request in which to submit the requested information. The information must be given in writing and be signed by the petitioner. The request and response will be made part of the official record of the proceeding.

005.03 Intervention. Persons who qualify for intervention and file timely petitions for intervention may intervene in proceedings for declaratory orders. The Department may, at its discretion, invite any person or entity to file a petition for intervention.

005.03A When. The Department shall grant a petition for intervention if all of the following are satisfied.

005.03A1 The petition is submitted in writing to the Director or designee, with copies mailed to all parties named in the Director's notice of the hearing, no later than twenty-five (25) days after the filing date of the petition to permit consideration prior to disposition as provided by 005.01B. After the period specified in 005.01B intervention may be allowable:

005.03A1a upon motions made not less than five (5) days prior to any proceedings scheduled; or

005.03A1b upon motions made not more than forty-five (45) days after filing of the petition when the matter is still under consideration;

whichever is earlier.

Title 184
Chapter 2

005.03A2 The petition states 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.

005.03A3 The Department determines that the interests of justice and the orderly and prompt conduct of the proceedings will not be impaired by allowing the intervention. The Department 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.

005.03B Conditions. If a petitioner qualifies for intervention, the Department may impose conditions upon the intervenor's participation in the proceedings, either at the time that intervention is granted or at any subsequent time. Conditions may include:

005.03B1 Limiting the intervenor's participation to designated issues in which the intervenor has a particular interest demonstrated by the petition;

005.03B2 Limiting the intervenor's participation to briefing or other procedures so as to promote the orderly and prompt conduct of the proceedings; and

005.03B3 Requiring two or more intervenors to combine their presentation(s) and other participation in the proceedings.

005.03C Order on Intervention. The Department shall issue an order granting or denying each pending petition for intervention, specifying any conditions and briefly stating the reasons for the order:

005.03C1 On or before the thirtieth day following the filing of the petition for declaratory order when intervention is sought under 005.03A1.

Title 184
Chapter 2

005.03C2 Within twenty-four hours after a petition for intervention is sought under 005.03A1a or 005.03A1b, as applicable.

The Director or designee may modify the order at any time, stating the reasons for the modification. The Director or designee shall promptly give notice of an order granting, denying, or modifying intervention to the petitioner for intervention and to all parties.

005.04 Oral Presentation (Argument), When. Oral argument shall be had only on specific order of the Department on its own motion or upon motion by petitioner or other party. Request may be made in the petition. If opportunity for oral argument is granted, argument shall be scheduled to be held 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 with a notice of the date, time and place for oral argument not less than five (5) days in advance of the scheduled date. Service shall be made by certified mail, return receipt requested. Oral argument may be conducted either in person or by telephone conference or with the approval of the Department, by other electronic means that may be technically feasible, subject to agreement considering cost and responsibility for payment.

005.05 Oral Presentation, Procedure. Oral presentation will be made before the representative of the Department authorized to render or to recommend a decision or before a hearing officer.

005.05A The Department representative or hearing officer shall:

005.05A1 Identify the proceeding and introduce himself or herself;

005.05A2 Ask the petitioner and any other parties or their representatives to identify themselves for the record;

005.05A3 Hear the oral presentation of the petitioner and any other parties; and

005.05A4 Close the proceedings.

005.05B At the declaratory order proceeding, agency staff shall have the right to present oral argument.

Title 184
Chapter 2

005.05C The Department representative or hearing officer conducting the proceeding may ask questions during or after the presentation(s).

005.05D Oral presentation shall not exceed forty-five (45) minutes per party in duration unless additional time is granted by the Department representative or hearing officer.

005.05E Parties may make oral presentation on their own behalf or be represented by an attorney.

005.05F A court reporter shall be present to record the presentation(s).

005.06 Brief. A petitioner may submit a written argument, or brief, in support of the petition at time of filing without leave of the Department. The Department may require a brief or may grant opportunity to submit a brief after filing upon application by any party. If required or granted, the parties shall submit the brief according to the date set by the Department. A brief must meet the requirements of 004.02 in form.

005.07 Decision, When. The Department shall act on a petition within sixty (60) days of the date of the filing of a petition.

005.08 Decision, Form. The decision may be made in the form of a pleading or letter.

005.09 Decision, Content. The decision may consist of a declaratory order on the merits of the petition or a refusal to rule on the merits. When the decision is a refusal to rule, the decision shall contain the reasons for its action. Decisions consisting of a declaratory order shall contain:

005.09A The names of all parties to the proceeding on which it is based;

005.09B The particular facts on which it is based; and

005.09C The statute, regulations, rule or order at issue in the matter;

005.09D The Department's conclusion as to the applicability of the statute, regulations, rule, or order to the facts;

005.09E The Department's conclusion as to the legal effect or result of applying the statute, regulations, rule, or order to the facts; and

**Title 184
Chapter 2**

005.09F The reasons for the conclusions reached.

005.10 Decision, Service. The petitioner, and any other party, or if represented, their attorneys, shall be served with a copy of the decision by certified mail, return receipt requested.

005.11 Refusal to Rule, Grounds

005.11A Grounds upon which the Department shall refuse to issue a declaratory order include, but are not limited to, the following:

005.11A1 The petitioner fails to submit any additional information requested or submits such information after the due date;

005.11A2 The petition requests a declaratory order on a matter that is outside the scope of authority of the Department;

005.11A3 The petition requests review or appeal of a decision made by the Department in a contested case;

005.11A4 The petition requests a declaratory order on the effect of past conduct or current conduct;

005.11A5 An investigation for purposes of formal adjudication, contested case, or a petition to issue, amend, or repeal regulations is pending before the Department involving the petitioner or substantially the same or similar facts or issues raised in the petition;

005.11A6 The petition seeks a declaration that a statute or rule and regulation is unconstitutional or invalid;

005.11A7 The issue raised has been definitely settled by a change in circumstances or other means so that the need for a ruling has terminated.

005.11A8 An order 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.

MAR 1 1995

Title 184
Chapter 2

005.11A9 An order may affect the rights or duties of a class or classes of persons so that a declaratory process is unmanageable or the issues should be addressed through rulemaking or adjudication.

005.11B The types of grounds upon which the Department may determine to refuse to issue a declaratory order, may include, but are not limited to, the following:

005.11B1 Refusal is necessary to assure adequate allocation of Department resources available for issuing rulings on petitions raising questions of greater urgency or significance;

005.11B2 Less than one hundred twenty (120) calendar days has elapsed since a declaratory ruling was issued or declined on any petition covering substantially the same subject matter.

005.11B3 The question presented is of such complexity that the Department has had insufficient opportunity or resources to develop a fully matured opinion;

005.11B4 The issue raised requires analysis of so many complex factors that it is unmanageable outside of a full-scale adjudication;

005.11B5 A ruling would not resolve the controversy or uncertainty;

005.11B6 The question posed or facts presented are insufficiently specific, overbroad, or are otherwise inappropriate as a basis on which to decide;

005.11B7 The issue raised turns on peculiar facts which cannot be predicted or adequately described in advance.

006 APPEAL

006.01 Right of Review. A declaratory order is subject to review in the manner provided in the Administrative Procedure Act, Neb. Rev. Stat. §84-917, for contested cases.

006.02 Stay. The taking of an appeal does not stay the enforcement of a binding decision. The Department or a court of competent jurisdiction may stay action upon application by the appealing party.

APPROVED
FEB 28 1995
[Signature]

Title 184
Chapter 2

006.03 Record. Within thirty (30) days after service on the Department of a petition on appeal, or such time as the court may allow, the Department shall prepare and transmit to the appropriate court a certified transcript of the proceedings before it. The record in a declaratory order action shall consist of, as applicable:

006.03A The petition and attachments to the petition;

006.03B Any request for additional information and the response of the petitioner;

006.03C The notice of oral argument;

006.03D The brief of the petitioner or any other party;

006.03E The transcribed record of oral presentation(s) made before the Department;

006.03F Motions, requests or correspondence by or between the petitioner or any other party and Department pertaining to the petition; and

006.03G The declaratory order appealed from.

006.04 Costs. The Department shall charge the appealing party with the reasonable direct cost for preparation of the record or require the party to advance the cost of preparation in all cases except when the party is not required to pay a filing fee to the court. The Department may require payment or bond prior to transmittal of the record.

FILED
SECRETARY OF STATE
MAR - 1 950 12326

APPROVED

FEB 28 1995

Benjamin Nels
BENJAMIN NELSON
GOVERNOR

14

Amendments
APPROVED
DON STENBERG
ATTORNEY GENERAL

SEP 14 1994
BY *Lynn A. Melon*
Assistant Attorney General

3. That consents to determining the issues in this petition by a declaratory order proceeding are attached:

4. That the question for which a declaratory order is sought is:

5. That a declaratory order on this question is requested based on the following factual situation:

6. That petitioner asks the Department to make a order finding that:

7. The reasons that the Department should rule as requested are:

