DRAFT AGENDA (11.6.2006)

Draft Agenda for Model State Administrative Procedure Act Drafting Committee (NCCUSL) meeting, November 17, 2006 to November 19, 2006, Chicago, Illinois.

Prepared by Professor Gregory L. Ogden, Reporter (2006-2007) with the guidance of Commissioner Fran Pavetti, Chair of the MSAPA Drafting Committee.

I. KEY ISSUES FOR CONFERENCE ADVICE AND GUIDANCE

1. Adoption of interpretive and policy statements using rulemaking procedure; Publication of interpretive and policy statements.

Should the MSAPA require interpretive and policy statements to be adopted as rules; and if not, should there be a requirements that they be published?

2. Codification of weight to be given to interpretive rules and policy statements on judicial review.

If interpretive and policy statements are not rules, but are required to be published, should the MSAPA address the weight to be given interpretive and policy statements on judicial review?

3. Mandatory adoption of agency precedent decisions as rules, or publication and indexing of decisions without adoption as rules.

Should the MSAPA require prior agency decisions of first impression on legal issues to be adopted as rules; or, if not required to be adopted as rules, should there be a requirement that such decisions be indexed and published?

4. Cost benefit analysis and rulemaking

Should cost-benefit analysis be required for all rules; or be limited to certain situations; and if limited, under what criteria?

5. Administrative rules editor or publisher

Should the act provide for an administrative rules editor, with the power to edit, for the publication, compilation, indexing, and public inspection of the rules or should the act provide for a publisher with limited power to edit?

6. Legislative veto power for agency rules

Should the Act contain a legislative veto power for agency rules?

7. Petition for rulemaking requirement for persons (non parties to agency rulemaking proceedings) seeking judicial review of rules adopted in proceeding.

Should the Act provide that, before a person who was not a party in an agency rulemaking proceeding seeks judicial review of a rule produced in that proceeding, that person must first petition the agency for rulemaking on the subject for which she seeks judicial review?

II. Scope and Organization of the MSAPA.

Q1. Should the MSAPA be organized with core provisions, and optional provisions, or should it retain the current organization, which addresses all of the major topics covered in typical state administrative procedure acts?

Q2. What is the purpose of, and benefits from, a core provision and optional provisions approach to the MSAPA revision?

Q3. What is the purpose of, and benefits from, the current organizational approach to the MSAPA revision?

Q4. What drawbacks are there to each approach?

Q5. Does the approach of core provisions, and optional provisions, fit today's legislative environment better, in which most states have an existing state administrative procedure act?

III. Agenda items based upon key issues for the annual meeting, the transcript of the reading of the draft act, Ken Hansen's comments, and the summary of written comments from Commissioners about the MSAPA July 2006 draft act at the annual meeting, July 2006.

ARTICLE 1 [General Provisions]

1. § 102(3)(B) Definition of Agency Action

MSAPA Draft Reference [**substantive**] [Page 4, Line 19]

Q1. Should the term failure to issue an order or rule be deleted from the definition of agency action?

[Comment from Commissioner McKay that this should be taken out of the definition.] [*Written Comment*] [Transcript, page 6 last two lines to page 7, lines 1 through 10] (substance of transcript comments: it is a mistake to consider agency failure to issue a rule as agency action, for which the agency can be taken to court. The definition is too open ended, agencies have limited resources, and agencies can not have a rule for everything, and it is better to use adjudication for incremental rulemaking anyway.)

2. Section 102(5) Disputed Case

A. Key Issue 1. § 102(5) Disputed Case and § 401.When Article Applies. Disputed Cases.

These two sections work together to define the right to a hearing. Section 102(5) defines a disputed case, and Section 401 makes the procedure of Article 4 adjudications applicable to disputed cases.

A disputed case is an adjudication in which the opportunity for an evidentiary hearing is required by law. Law is defined as federal or state constitution or statute, judicial decision, common law, rule of court, executive order, or rule or order of an agency.

This definition is less inclusive than the 1981 MSAPA, which presumptively created a right to a hearing whenever a person petitioned for it. This definition is broader than the 1961 MSAPA definition of "contested case," which was a proceeding in which the legal rights, duties, or privileges of a party were required by law to be determined by an agency after an

opportunity for hearing. In the 1961 MSAPA the term law was not defined, and the meaning of right, duty and privilege was the subject of extensive litigation. Courts in states that adopted the 1961 MSAPA created a large body of case law that identified those rights, duties or privileges that granted parties contested case status.

The present definition seeks to clarify those situations in which there is a right to a hearing under the MSAPA. Instead of a judicial search for a right, duty or privilege, the opportunity for a hearing must be created by law (broadly defined) or constitution. Unlike the 1981 MSAPA, this definition looks to a source outside the MSAPA to define when a hearing is required. This definition is consistent with the line of cases that identify constitutionally protected *interests* that occurred as part of the expansion of procedural due process beginning in the 1970's.

B. Key Issue 2.

Key Issue 2. Scope of evidentiary hearing required by law, mandated by statute, constitution, or other law, or determined by the broader approach of the 1981 MSAPA.

Should evidentiary hearings be required only when mandated by statute, constitution or other law, or should the conference adopt the broader approach of the 1981 MSAPA that requires an evidentiary hearing in almost all instances where an order is to be issued by the agency?

C. § 102(5) Definition of Disputed Case

MSAPA Draft Reference [**style**] [Page 5, Lines 2, and 3]

Q1. Should the language "disputed case" be used in place of the term "contested case" for the definition of an adjudicatory evidentiary hearing that is required by law? [*Discussion*] (the disputed case term is designed to indicate that the definition and scope of MSAPA hearings is different from the contested case term which is used in the 1981 MSAPA. However, the contested case term is familiar to ALJ's and others in states that follow the 1981 MSAPA.)

3. Section 102(10) (Guidance Documents)

MSAPA Draft Reference [**style**] [Page 5, Lines 14-17]

Q1. This definition is broad enough to include agency web pages. Is that the committee's intent?
[*Written Comments by Ken Hansen*]

4. § 102(20) Definition of Person

MSAPA Draft Reference [**substantive**] [Page 6, Line 18 and 19]

Q1. Should the bracketed language referring to public corporations and government entities and agencies be included in the definition or excluded?

[Comments of Commissioner Burton] [Transcript, page 7 lines 1 to 5 of last 8, and page 8, lines 1 to 5] (substance of transcript comments: Why was the bracketed language included? You should include that language without brackets, and without the last sentence of the definition.).

5. Section 102(20) (Person), 102(23) (Publisher)

MSAPA Draft Reference [**style**] [Page 6, Lines 21-22; and Page 7, Lines 8-12]

Q1. Should the note in each definition be moved to a comment ?
[Written Comments by Ken Hansen]
The "Note" (two occurrences) seems out of place within the text of the act. Rather, it seems to belong in a comment.

6. Section 102(26) (Rule)

MSAPA Draft Reference [substantive] [Page 7, Lines 19-20; See also Page 21, Lines 3-4; and Page 32, Line 13]

Q1. Should the definition of rule include the language “suspension of an existing rule”? "The term includes the amendment, repeal, or suspension of an existing rule.".

[Written Comments by Ken Hansen]
Based on this language, the committee has assumed that an agency as authority to suspend a rule. I do not believe that is clear, nor do I believe that is assumed in the states. What is the process for suspending a rule? The only entity explicitly authorized to suspend a rule under the draft is the legislative/independent committee in Section 705,
page 87, line 3. Does the committee really intend to call action by a legislative committee a "rule"?

7. § 102(28)(B) Definition of Signature

MSAPA Draft Reference [**substantive**] [page 8, lines 16 to 19]

Q1. Is there an error in the definition of signature?

[Written Comment from Commissioner Pat Fry: There is an error in the definition of “signature.” It should be “logically associate with the record.”]

8. § 102(30) Definition of Written

MSAPA Draft Reference [**substantive**] [page 9, line 1]

Q1. Is the definition of the term written necessary?

[Transcript Page 8, lines 10 to 24] [Comments from Commissioner Burton: is the definition of the term “written” necessary, or is it irrelevant when the term record is also defined and used in the act? Response from Reporter Gedid: This is a standard definition, taken from UETA Act, and is designed to indicate that written includes hard copy or electronic medium.]

ARTICLE 2 [PUBLIC ACCESS TO AGENCY LAW AND POLICY]

1. Section 201 Comment 2nd paragraph

MSAPA Draft Reference [**style**] [Page 14, lines 20 to 22]

Q1. Does the wording of the first sentence in the second paragraph of the comment need to be reworded for accuracy?

[Written Comments by Ken Hansen]
Page 3: "The emergence of the Internet, which did not exist at the time of the last revision of the Act,...." This phrase is incorrect and needs to be reworded. The Internet began in 1969 under the name ARPANET. The name World Wide Web was coined in October 1990. Texas and Utah began using the Internet in 1994 to provide access to administrative rules.

ARTICLE 3 [RULEMAKING; ADOPTION AND EFFECTIVENESS OF RULES]

MSAPA Draft References
1. Section 301(c), [style], [Page 19, lines 11,12]
2. Section 302(a), [style],[Page 20, line 10]
3. Section 303(a),(b), [style],[Page 21, lines 26 and 31]
4. Section 304(a),(b), [style],[Page 22, lines 24, 25, Page 23, line 7]
5. Section 306 (a) through (e), [style],[Page 25, lines 9, 13, 15, 18, and 20]
and
6. Section 308(a) [style], [Page 27, line 4]
[**style**]

Q1. Does the use of different terminology for proposed rules, and notice of proposed rules create confusion?

[Written Comments by Ken Hansen]
Throughout: "notice of proposed rule adoption" or "proposed rule" or "notice of the proposed adoption of a rule" The committee has used different terms to refer to the same thing. This creates confusion. I suggest that we use "notice of proposed rule" and "proposed rule" throughout.

ARTICLE 4 [ADJUDICATION]

1. § 402 (b) Presiding Officer

MSAPA Draft Reference [**style**] [Page 38, lines 8 to 11]

Q1. Should the term agency head be bracketed as well as the term one or more members of an agency head so that it is clear that agency head can be an individual and one or more members of an agency head?

[Transcript, Page 11, lines 1 to 7] , [Comments from Commissioner Davies]

2. § 402 (e) Disqualification of Presiding Officer

MSAPA Draft Reference [substance] [Page 38, lines 19,20]

Q1. Should the presiding officer have an affirmative duty to disclose potential conflicts including inter alia dealings by officer and his family with the agency?

Q2. Should the presiding office have a duty to disclose financial interests or similar matters so that the parties will know that they might have a ground for disqualification?

[Transcript, Page 12, line 4 to 10], [Comments of Commissioner De Giusti]

3. § 402 (f) Disqualification of Presiding Officer

MSAPA Draft Reference [substantive] [Page 38, lines 21 to 23, and page 39, lines 1 to 3]

Q1. Is it sufficiently clear enough in the text that a written request for disqualification with the grounds must be made before the taking of evidence, and upon any later discovery of information containing disqualification grounds, the written request for disqualification must be made promptly after such discovery?

[Written comments: lengthy note from first reading.]

4. § 402 (g) Disqualification of Presiding Officer

MSAPA Draft Reference [**substantive**] [Page 39, lines 4 to 9]

Q1. Should the challenged presiding officer decide whether or not to grant the petition for disqualification, or should that petition be decided by a chief ALJ, or other presiding judge, whenever possible?

[Transcript, Page 10, lines 18 to 47], [Comments of Commissioner Berg]

[Basic Point: multiple judge offices, or central panel offices often have a chief judge, who can decide these matters instead of the sitting judge who is being challenged]

5. § 402 (h)(1) Disqualification of Presiding Officer

MSAPA Draft Reference [**substantive**] [Page 39, lines 6 to 9]

Q1. Should the governor appoint a substitute presiding officer if the original presiding office is an elected official, or should there be a substitute appointed presiding officer to replace the elected official?

[Transcript, Page 11, lines 32 to end], [Comments of Commissioner Winkelman]

[Basic Point: Appointment of a substitute elected official by the governor is a complex and time consuming process of the agency head if the agency head is a member of the Governor's cabinet. This appointment procedure is awkward for agency heads that are department heads of executive agencies.]

6. § 402 Presiding Officer (hearing officer leaves after hearing but before decision)

MSAPA Draft Reference [substantive] [Pages 38, and 39**]**

Q1. Should a provision be added that specifically addresses the problem that can be created when one hearing officer hears the case, and then leaves or dies or resigns or retires and another hearing officer is assigned to make the decision?

Q2. Should there be a right to a new hearing before the second hearing officer, or is it enough that the second hearing officer can reach a decision based on the record of the hearing before the first hearing officer?

[Transcript, Page 11, lines 12 to 29], [Comments of Commissioner McKay]

[Basis Point: when a hearing officer leaves and another takes their place before the decision is made, do the parties have a right to a new hearing, or to present evidence to the new hearing officer, or can the new HO decide the case based on the existing record.]

7. § 403(c). Disputed Case Procedure (governing procedure)

MSAPA Draft Reference [**substantive**] [Page 40, lines 7, 8]

Q1. Should the term "governing procedure" be defined specifically in the act?

[Transcript Page 16] [Comment of Commissioner Burton]

8. § 403(d) (1). Disputed Case Procedure (exclusion of evidence)

MSAPA Draft Reference [**substantive**] [Page 40, lines 9 to 17]

Q1. Admissibility of Evidence. The first sentence provides a standard for admissibility of evidence without the need for following the rules of evidence. This serves as a protection for unrepresented parties. The standard is further amplified in the comment, which provides a definition of the phrase "unduly repetitious."

Q2. Should the term "must" be replaced with the term "may" so that the presiding officer has discretion as to whether to exclude evidence, and the abuse of discretion standard of judicial review will be applicable to challenges to a presiding officer's decision to exclude or not exclude evidence?

[Transcript, Page 14, lines 19 to end], [Comments of Commissioners Nelson, and Thurbon]

Q3. Should the term “must exclude evidence” be replaced by the language “shall have discretion to exclude evidence so that the presiding office has flexibility to admit useful evidence?

[Transcript, Page 14, lines 19 to end], [Comments of Commissioners Nelson, and Thurbon]

Q4. Should the bracketed language with the legal residuum rule be deleted?

[Transcript, Page 16, lines 3 to 11], [Comments of Commissioner Bilken]

Q5. Should the language “statutory grounds” be changed to reflect the statutory codification of evidence rules in many states?

[Transcript, Page 17, lines 5 to 11], [Comments of Commissioner Concannon]

Q6. Does the term “objectionable” mean the same thing as the standards in the first sentence (e.g., immaterial, irrelevant, unduly repetitious) or does it mean something greater or lesser?

[Transcript, Page 17, lines 15 to 22], [Comments of Commissioner Wilborn]

Q7. Should the language of subsection (d)(1) be rewritten to clarify the difference between mandatory exclusion and permissive exclusion of evidence?

[Transcript, Page 17, lines 29 to 40], [Comments of Commissioner Berg]

9. § 403(d) (2). Disputed Case Procedure (objections to evidence)

MSAPA Draft reference [**substantive**] [Page 40, line 18]

Q1. Timing of objection. Objection to the admissibility of evidence may be made up to conclusion of hearing. Should the objection be required when the evidence is offered?

[Several comments from Commissioners that objections should be made when evidence is offered]

Q2. Should the time to object to evidence be before the conclusion of the hearing, or at the time the evidence is offered?

[Transcript, Page 15, lines 32 to 39], [Comments of Commissioner Thurbon]

10. § 403(d) (5). Disputed Case Procedure (official notice)

MSAPA Draft Reference [**substantive**] [Page 41, lines 7 to 14]

Q1. Should it read "official notice" instead of "judicial notice" and "officially" not "judicially" wherever it appears? Also, the word "record" should not be confused with "hearing record" throughout the act.

Q2. Should the last sentence of the section giving the parties the opportunity to contest judicially noticed facts before the decision is announced (including the unless clause) be deleted?

[Written Comments]

11. § 403(e). Disputed Case Procedure (filing offers of settlements)

MSAPA Draft Reference [**style**] [Page 41, lines 17 to 22]

Q1. Should the section use the term "settlement agreements" instead of "offers of settlement"?

[Transcript, Page 18, last twelve lines], [Comments of Commissioner DeGiusti]

Q2. Should the term "original" (subsection (e), line 6) be used in this setting with electronic records? [Comment: See UETA. The concept of "original" makes no sense in the electronic context. Is there any reason to require "originals"? If so, a cross reference to UETA and E-Sign (15 U.S.C. Section 7004), at least in the comments, should be included.]

[Written comments]

12. § 403(g). Disputed Case Procedure (electronic hearings (telephonic)

MSAPA Draft Reference [**substantive**] [Page 42, lines 6 through 9]

Q1. All or part of a hearing may be conducted electronically, including by telephone. Is this too broad?

[Several comments from Commissioners that holding of telephonic hearings should require consent of all parties]

13. § 403(k). Disputed Case Procedure (written decision)

MSAPA Draft reference [**substantive**] [Page 42, lines 21, 22]

Q1. Does the E-Sign Act, 15 U.S.C. Section 7004 require you to permit (not require) electronic orders?

[Written Comment: Commissioner Jack Burton is correct.]

Q2. Should the language "the decision in a disputed case must be in writing" be changed to "in a record" to reflect computer technology, the use of electronic orders by federal judges, and not limit the agencies to pen and paper technology?

[Transcript, Page 16], [Comments of Commissioner Burton]

Q3. Should the language of this section be changed to permit decisions to be issued and maintained in electronic form?

[Written comment]

14. § 403(m). Disputed Case Procedure (agency disputed case rules)

MSAPA Draft Reference [**substantive**] [Page 43, lines 3 to 5]

Q1. Should the language of this section be changed to delete "equivalent to or" so that the text reads "may include provisions more protective of the rights of persons?

[Transcript, Page 18], [Comments of Commissioner DeLiberato]

15. § 409(a). Ex Parte Communications

MSAPA Draft Reference [substantive] [Page 51, Lines 20 thorugh 25]

A. Key Issue 1. Post hearing ex parte communication between agency decision makers and agency staff, disclosure to parties, and parties opportunity to respond .

With respect to post hearing ex parte communications between the agency decision maker and agency staff, what if any disclosure of the ex parte communication should be required to the parties? Also, what if any opportunity should be allowed for a party to respond to the disclosed communication?

B. Key Issue 2. § 409(b). Ex Parte Communications rule: application to agency heads that communicate with agency staff about technical or scientific matters.

MSAPA Draft Reference [substantive] [Page 51 line 26 to page 52, line 9]

Q1. The presiding officer may not receive communications from any person on an issue in the case unless all parties participate. However, if the presiding officer is the agency head, he or she may communicate with agency staff for an explanation of the technical or scientific basis of, or technical or scientific terms in, the evidence, if the term is not a central, contested issue in the case and if the agency staff member meets the criteria in 409(1) (A) and (B). Also, the staff advice must be made part of the record, and parties given an opportunity to respond. Various remedies are given if a violation of Section 409 occurs.

C. Comments on the draft language of Section 409(a) Ex Parte Communications

MSAPA Draft Reference [**substantive**] [Page 51, lines 21 to 25]

Q1. Should the language "while a disputed case is pending" be replaced by a clearer and more definite measuring standard for this period of time? Can the term "pending" lead to differences of opinion?

Q2. Should the term "person" in subsection (a) have the same meaning (that is, include government agencies within the definition) as the definition of terms in Section 102(20) in a state that includes government agencies within the scope of the term "person"?

Q3. Should this definition of persons in Section 409 (a) include the lawyers in the attorney general's office who advise administrative agencies, and might both advise the prosecuting agency, and the central panel agency adjudicating the matter? Should person be limited to individuals, natural human beings, and exclude legal entities?

Q4. Should the ex parte communications rules be based on the ex parte contacts ethics rules that are applicable to judges in the court systems of states?

[Written Comments from commissioners]

15. § 409(b). Ex Parte Communications

MSAPA Draft Reference [style] [Page 51, Lines 20 to 25; Page 53, line 11 to 13]

Q1. Is the term "ministerial" a commonly clear term to apply?

[Written comments received from commissioners and faxed to Reporter by Commissioner Pavotti]

16. § 409(c), (d)(2). Ex Parte Communications

MSAPA Draft Reference [**style**] [Page 52, lines 5 to 9, lines 15 to 17]

Q1. Should the term "oral" be used instead of the term "verbal"?

Q2. Should the term "verbal" be replaced with the language "oral or in a record that is not written"? [Comment from Commissioner Jack Burton].

Q3. [**(c) only**)] Should technical or scientific information from agency staff that is communicated to agency heads be introduced in the record through ex parte advice, or should this be presented only by testimony of witnesses' introduced into the record of the proceeding?

Q4. [**(c) only**)] Should the language "from an employee or representative of an agency" be added after the word "advice" in the first sentences of sub section (c)?

Q5. Should the term "advice" in subsection (c) and the term communication in subsection (b) be harmonized? Do these two terms mean the same thing? [Page 51, lines 26 to 29]

Q6. Should there be an exception in Section 409 (b) for legal advice given to the presiding officer from a person authorized by law to give that advice (such as legal counsel to the presiding officer)? [Page 51, lines 26 to 29]

17. § 409(d)(1)(2). Ex Parte Communications (scope of communication put on the record)

MSAPA Draft Reference [**substantive**] [Page 52, lines 10 to 17]

Q1. Should all communications be included in the record?

[Written Comment: Do not confine to written communications. See Section 409(e)(1) (change sheet). Here I disagree with Jack Burton. If the advice is in the record, it should be part of the record of the proceedings (Commissioner Pat Fry).]

18. § 409(d)(2). Ex Parte Communications (memorandum of verbal communications

MSAPA Draft Reference [**Style**] [Page 52, lines 15 to 17]

Q1. Should subsection (d)(2) include the added language "and make part of the record" after the term "prepare" in (d)(2)?

[Written comment]

19. § 410(d)(2). Intervention

MSAPA Draft Reference [**substantive**] [Page 53, lines 28 to 31, Page 54 lines 1 to 10]

Q1. Should the standards for intervention be the same as for standing under Section 506?

ARTICLE 5 [JUDICIAL REVIEW]

1. § 506. Standing

MSAPA Draft Reference [substantive] [Page 69, lines 10 to 13]

Q1. Standing. This section adopts a general description of standing. The "person aggrieved or otherwise affected" language has become a term of art around which courts have built a considerable body of case law. The approach of this section leaves the courts free to continue development of this concept. Is the term "otherwise affected" too broad? Should the standard be limited to "aggrievement?"

Q2.Should standing in Section 508(1) be limited to persons upon whom standing is conferred by statute, or should it include common law standing?

Q3. Should the term "otherwise" be deleted from the language of subsection (2)?

Q4. Should the terms "otherwise aggrieved" be deleted from the language of subsection (2)?

Q5. Should the standing law in section 410 be similar to the standing law governing courts in the state?

Q6. Should the standing law in Section 410 codify statutory standing and common law standing, but not extend standing law beyond those two concepts?

Q7. Should the standing law in Section 410 include standing conferred by agency regulations, and court rules?

[Questions based on transcript comments and questions]

2. § 507. Exhaustion of Administrative Remedies

MSAPA Draft Reference [**substantive]** [Page 69, lines 29 to 30, Page 70, lines 1 to 16]

Q1. The new material in this section is in Subsections (c) and (d) and pertain to rulemaking only. Subsections (c) and (d) are entirely new. They permit a person who did not participate in a rulemaking proceeding to appeal the rule without exhausting administrative remedies. However, before doing so, the party that is challenging the rule must petition the agency to initiate rulemaking in order to resolve or cure the issues that the petitioner is challenging, and disclose that petition and the agency action on it to the court.

Q2. Should subsections (a), and (b) include reference to specific state statutes that require the filing of a petition for reconsideration, or other specific exhaustion requirements beyond those included in the language of subsections (a)(, and (b)?

Q3. Should the petition requirement in subsection (d) for non parties to rulemaking proceedings be retained when it may be difficult for persons to ascertain what issues were raised and considered in the rulemaking proceeding?

Q4. Should the language of subsection (c) be changed so that persons challenging rules based on lack of constitutionality or lack of statutory authority (facial challenges) be required to have participated in the rulemaking proceeding as a condition of seeking judicial review of that rule ?

Q5. Should subsection (c) be clarified to provide that it applies to rulemaking proceedings in which the terms of the rule were modified after the notice period?

Q6. Should subsections (c), and (d) be deleted so that challengers to rules must have participated in the rulemaking proceeding?

[Questions based upon transcript comments and questions]

3. § 508. Agency Record on Judicial Review; Exception

MSAPA Draft Reference [**substantive**] [Page 71, lines 7 to 11]

Q1. Is the term "manifest injustice" too difficult to apply without a definition? Drafters of UMA had difficulty with it.

Q2. Should evidence outside the record of the proceeding be permitted to be considered when persons are challenging the constitutionality of agency action?

[written comments]

4. § 509. Scope of Review (Alternatives 1 and 2)

MSAPA Draft Reference [**substantive**] [Page 71, lines 28 to 32, Page 72, lines 1 to 22, Page 73, lines 1 to 22, and Page 74, lines 1 to 22].

Q1. The drafting committee is divided on the approach to take to scope of review, and has put two alternative versions of scope before the annual meeting for guidance. Alternative 1 is general and would leave considerable discretion to the courts. Alternative 2 is a detailed approach that some commentators and a few states have adopted. The second and third paragraphs of the note following the text of the section give some of the major arguments for each alternative. Alternative 2 is the longest version of scope that research has disclosed. There are versions available that are longer than alternative 1, but considerably shorter than alternative 2.

Q2. Should there be introductory language that precedes the list of factors in Alternative 2?

Q3. [Alternative 2, Subsection (3), line 16] should the introductory clause read "..has been prejudiced by the agency action…". (delete review….following)?

Q4. Should Alternative 2 be dropped or put into the comments given the major policy changes reflected in alternative 2 for states that have existing law provisions based on the 1961 act?

Q5 Should Alternative 1 be retained as the only judicial review standards provision given that it is similar to most states existing judicial review standards law?

Q6. Should the terms “material error” be added to modify the term prejudiced in subsection (3)?

Q7. Should subsection (a)(3)(F)(ii) [alternative 2] and (b) delete the language “cited by any party” so that reviewing courts can consider evidence in the whole record whether or not cited by any party?

Q8. Should Section 509 include provisions governing intervention at the judicial level that are similar to the intervention provisions at the administrative level codified in Section 410?