

PROPOSED REGULATION OF THE STATE ENVIRONMENTAL COMMISSION

LCB File No. R135-11

SEC File No P2011-08

EXPLANATION – Matter in *italics* is new; matter in brackets ~~omitted material~~ is material to be omitted.

AUTHORITY: §1, NRS 445B.200 and 233B.050

A REGULTION relating to the Rules of Practice of the State Environmental Commission

Section 1. NAC 445B.875 Definitions. (NRS 233B.050) is hereby amended as follows:

1. As used in NAC 445B.875 to 445B.899, inclusive, unless the context otherwise requires, the words and terms defined in NAC 445B.877 to 445B.884, inclusive, have the meanings ascribed to them in those sections.

2. The meanings ascribed to words not included in NAC 445B.877 to 445B.884, inclusive, are in accordance with applicable sections of NAC governing air quality, water pollution or solid waste management and of chapters 444, 445A, 445B *and 459* of NRS.

Section 2. NAC 445B.890 Request for hearing. (NRS 233B.050) is hereby amended as follows:

1. *Unless otherwise provided in the applicable statute or regulation forming the basis of the appeal,* ~~Any~~ any person requesting a hearing before the Commission concerning a final decision of the Department may do so by filing a request, within 10 days after notice of the action of the Department, on Form 3* with the State Environmental Commission, 901 South Stewart Street, Suite 4001, Carson City, Nevada 89701-5249.

2. *An appeal to the Commission must be based upon one or more of the grounds set*

forth in subsection 3 of NRS 233B.135.

3. The Form 3 request shall include:

(a) A statement of the legal authority and jurisdiction under which the hearing is to be held;

(b) A reference to the particular sections of NRS and NAC allegedly violated, including reference to the subsection(s) of NRS 233B.135(3) allegedly violated; and

(c) A brief statement of the factual matters supporting the basis for the alleged violations set forth in subsection (b).

Failure of the person requesting the hearing to fully complete the Form 3 may be grounds for dismissal of the appeal by the Commission.

*(See adopting agency for form.)

Section 3. NAC 445B.891 Notice of hearing. (NRS 233B.050) is hereby amended as follows:

1. The Secretary of the Commission will schedule a hearing to be held within 20 days after receipt of the request for a hearing or an order to appear before the Commission, *unless waived in writing by the parties.*

2. All of the parties must be notified by certified mail of the date thereof which must be no less than 5 days after the date of notification. The notice must include:

(a) A statement of the time, place and nature of hearing;

(b) A statement of the legal authority and jurisdiction under which the hearing is to be held;

(c) A reference to the particular sections of NRS and NAC allegedly violated, *including reference to the subsection(s) of NRS 233B.135(3) allegedly violated;* and

(d) A brief and concise statement of the *factual* matters ~~[asserted or the issues involved]~~ *supporting the basis for the alleged violations set forth in subsection (c).*

Section 4. NAC 445B.8925 Briefs (NRS 233B.050) is hereby amended as follows:

1. The Commission may, upon its own motion or a motion by a party, order ~~[briefs to be filed before or after a hearing]~~ *the parties in a contested matter to prepare briefs* and shall prescribe the period during which the briefs must be filed. *Briefs may consist of an opening brief, a response brief, and a reply brief. Unless otherwise directed by the Commission, briefing shall be submitted as follows:*

(a) The opening brief shall be filed by the party requesting the hearing and shall not exceed 20 pages in length.

(b) The response brief shall be filed by the Department and any intervenor in the matter and shall not exceed 20 pages in length.

(c) The reply brief shall be filed by the party requesting the hearing and shall not exceed 5 pages in length. The Commission shall consider only those portions of the reply that address directly matters set forth in the response briefs.

(d) Each brief must be accompanied by an acknowledgement of service or a certificate of service for all parties.

(e) The Commission may, upon its own motion or a motion by another party, order additional briefs to be filed before or after a hearing.

2. *All briefs shall be on white paper of standard quality and 8½ by 11 inches in size. Papers shall be typewritten or prepared by some other means that will produce clear and permanent copies equally legible to printing. Type must be 12-point type size. The lines on each page shall be double-spaced, except that descriptions of real property may be single-*

spaced. All quotations of more than 50 words shall be indented and single-spaced. Pages shall be numbered consecutively at the bottom

3. Briefs may be served by electronic mail or facsimile.

Section 5. NAC 445B.8927 Prehearing conference is hereby added as follows:

1. The Commission may, upon its own motion or a motion by a party, hold a prehearing conference to simplify or limit the issues, obtain admissions of fact or any stipulation of the parties which will avoid unnecessary proof, arrange for the exchange of proposed exhibits or prepared expert testimony, identify the witnesses and the subject matter of their expected testimony and limit, if necessary, the witnesses or evidence or both, consider the necessity of any motions to be filed by the parties and set forth a briefing schedule for their submission, and consider other matters that may expedite orderly conduct and disposition of the proceedings or a settlement of the matter.

2. Notice of any prehearing conference must be provided to all parties of record. Unless otherwise ordered for good cause shown, the failure of a party of record to attend a prehearing conference constitutes a waiver of any objection to the agreements reached or rulings made at the conference.

3. The action taken and the agreements made at the prehearing conference:

(a) Must be made a part of the record; and

(b) Control the course of subsequent proceedings, unless otherwise stipulated by each party with the consent of the Commission.

Section 6. NAC 445B.893 Panels to conduct certain hearings; decision of panel. is hereby amended to read as follows:

1. Three or more members of the Commission constitute a proper panel, where appropriate, in accordance with NRS 445A.610 and 445B.350, and a majority of those present must concur in any decision. The decision will be in writing and is a public record.

2. *In issuing its decision to affirm, modify or reverse any action taken by the Department in accordance with NRS 444.570(2)(c), NRS 445A.605, and NRS 445B.360, the Commission shall not consider evidence which was not submitted to the Department prior to issuance of the decision or order that is the subject of the appeal.*

3. *In cases concerning alleged irregularities in procedure before the Department that are not shown in the record, the Commission may receive evidence concerning the irregularities.*

Section 7. NAC 445B.8935 is hereby added as follows:

Hearings: Identification of witnesses, exhibits, and evidence.

1. *Unless otherwise directed by the Commission in a prehearing scheduling order, at least five days before the hearing, the parties will identify the persons intending to offer direct oral testimony at the hearing. The parties need not identify persons who intend to offer rebuttal testimony.*

2. *If a party fails to identify a witness and this failure results in prejudice to the opposing party, the Commission may:*

(a) Refuse to allow that witness to testify; or

(b) Disregard any portion of the testimony.

3. *Unless otherwise directed by the Commission in a prehearing scheduling order, at least five days before the hearing, the parties will identify and exchange with the other party or parties each exhibit that a party intends to use to support or illustrate a particular position.*

4. If a party fails to identify and exchange exhibits within the required time frame, and the lack of notice would result in prejudice to the opposing party, the Commission may refuse to accept the exhibit into evidence.

5. At the hearing, parties must give each other an opportunity to review each other's exhibits before the Commission will accept them into evidence.

6. All evidence offered in a hearing, including, without limitation, the testimony of a witness, must be relevant. For the purposes of this section, evidence is relevant if the evidence:

(a) Has any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence; and

(b) Is directly related to the subject matter of the appeal.

Section 8. NAC 445B.894 is hereby amended to read as follows:

1. Upon good cause shown, the Commission may vacate and reset the time of hearing.

2. Upon good cause shown, the Commission may transfer the place of hearing to a more appropriate location, taking into consideration the convenience and fairness to the witnesses and the parties.

3. Unless otherwise provided by law, informal disposition may be made by all involved parties at any time of any contested case or matter.

4. The Commission shall dismiss an appeal for want of prosecution on motion of any party or on the Commission's own motion and after due notice to the parties, whenever the appellant has failed for one year after the appeal is filed to bring such appeal to hearing, except where the parties have stipulated in writing that the time may be extended.

Section 9. NAC 445B.895 Appearance of parties; procedure at hearing. is hereby amended to read as follows:

1. The parties may appear in person and may be represented by ~~feounsel~~ *an attorney. An attorney who appears before the Commission in a contested case must be an active member in good standing of the State Bar of Nevada or associated with such a member of the State Bar of Nevada.*

2. All testimony must be given under oath and recorded verbatim pursuant to the provisions of NAC 445B.897.

~~[2.]~~ 3. The Commission:

- (a) Will determine the order of the presentation of evidence; and
- (b) May limit the time and scope of the examination of witnesses and disallow repetitive testimony.

~~[3.]~~ 4. Hearings are open to the public until such time as confidential information, within the meaning of *chapters 445A, 445B and 459* of NRS, applicable sections of this chapter or chapters 445A *and 459* of NAC, is admitted to the record, at which time the hearing will be closed.