

**PROPOSED REGULATION OF THE
STATE ENVIRONMENTAL COMMISSION**

LCB File No. R126-19

September 17, 2020

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

AUTHORITY: §§1-23, NRS 445A.425, 445A.860 and 445A.880; §§24, 25 and 26, NRS 445A.425; §27, 28 and 29, NRS 445A.860 and 445A.880, §30 and 31, NRS 233B.050, 445A.425, 445A.860 and 445A.880; §§32-52, and 54-58, NRS 459.485 and 459.500; §§53 and 59, NRS 233B.050, 459.485 and 459.500.

A REGULATION relating to environmental protection; setting forth an informal process for certain persons to contest an action of the Division of Environmental Protection of the State Department of Conservation and Natural Resources; establishing certain provisions for disciplinary actions against operators of a plant for sewage treatment, operators of a public water system and certain consultants involved in consultation regarding various activities relating to hazardous substances; and providing other matters properly relating thereto.

Legislative Counsel’s Digest:

Existing law authorizes the State Environmental Commission to adopt regulations that require supervisors and technicians responsible for the operation and maintenance of plants for sewage treatment to be certified by the State Department of Conservation and Natural Resources. (NRS 445A.425) Existing law also requires the State Environmental Commission to adopt regulations for the certification of: (1) operators of a public water system; and (2) consultants involved in consultation regarding the response to and clean up of leaks of hazardous waste, hazardous material or a regulated substance from underground storage tanks, the clean up of spills or accidents or motor vehicle crashes involving hazardous waste, hazardous material or a regulated substance, or the management of hazardous waste. (NRS 445A.880, 459.500) **Sections 3-23 and 34-55** of this regulation set forth a process for disciplinary actions taken by the Division against these persons.

Sections 2 and 33 of this regulation sets forth an informal process for certain persons to contest an action taken by the Division of Environmental Protection of the Department, other than a disciplinary action.

Sections 4-7 and 35-38 of this regulation define certain terms.

Sections 8 and 39 of this regulation set forth certain grounds for disciplinary action against an operator of a plant for sewage treatment, an operator of a public water system and a consultant involved in consultation regarding various activities relating to hazardous substances.

Sections 9 and 41 of this regulation authorize, with limited exception, the Division to issue a notice of intent to take disciplinary action if the Division believes that an operator of a plant for sewage treatment, an operator of a public water system or a consultant involved in consultation regarding various activities relating to hazardous substances has engaged in any conduct that constitutes grounds for disciplinary action. In response to such a notice, **sections 9 and 41** require, with limited exception, such an operator or consultant, as applicable, to provide a response to the Division demonstrating why the Division should not proceed with the disciplinary action.

Sections 10 and 42 of this regulation provide that, under certain circumstances, the Division may immediately suspend the certificate of an operator of a plant for sewage treatment, an operator of a public water system or a consultant involved in consultation regarding various activities relating to hazardous substances.

Sections 11 and 43 of this regulation, require the Division to send a notice of hearing related to the disciplinary action to an operator of a plant for sewage treatment, an operator of a public water system or a consultant involved in consultation regarding various activities relating to hazardous substances.

Sections 6, 12, 37 and 44 of this regulation require the Administrator of the Division to appoint a hearing officer to oversee the hearing of the disciplinary action. **Sections 13-19 and 45-51** of this regulation set forth the requirements and procedures for the hearing.

Sections 20 and 52 of this regulation require: (1) the hearing officer to prepare recommendations for the Administrator; and (2) the Administrator to consider those recommendations and prepare written findings of fact, conclusions of law and his or her decision on the issues.

Sections 21 and 53 of this regulation provide that an operator of a plant for sewage treatment, an operator of a public water system or a consultant involved in consultation regarding various activities relating to hazardous substances may appeal the decision of the Administrator to the Commission. **Sections 22 and 54** of this regulation set forth the requirements and procedure of such an appeal before the Commission.

Sections 23 and 55 of this regulation set forth when a final order of the Administrator or Commission becomes effective if the Administrator or the Commission suspends or revokes a certificate of an operator of a plant for sewage treatment, an operator of a public water system or a consultant involved in consultation regarding various activities relating to hazardous substances.

Section 1. Chapter 445A of NAC is hereby amended by adding thereto the provisions set forth as sections 2 to 23, inclusive, of this regulation.

Sec. 2. 1. Any person who has reason to believe that an action taken by the Division pursuant to this section and NAC 445A.2855 to 445A.293, inclusive, other than a disciplinary action, is incorrect or based on inadequate knowledge may, within 10 business days after receiving notice of the action, request an informal discussion with the employee responsible for the action and the immediate supervisor of the employee.

2. If the informal discussion does not resolve the problem, the aggrieved person may, within 10 business days after the date scheduled for the informal discussion, submit a written request to the Administrator of the Division or the Administrator's designee for an informal conference. The informal conference must be scheduled for a date, place and time mutually agreed upon by the aggrieved person and the Administrator or the Administrator's designee, except that the informal conference must be held not later than 60 days after the date on which the Administrator or the Administrator's designee received the written request.

3. The determination of the Administrator of the Division or the Administrator's designee resulting from the informal conference cannot be appealed and is the final remedy available to the aggrieved person.

Sec. 3. As used in sections 3 to 23, inclusive, of this regulation, unless the context otherwise requires, the words and terms defined in sections 4 to 7, inclusive, of this regulation, have the meanings ascribed to them in those sections.

Sec. 4. "Administrator" means the Administrator of the Division or his or her designee.

Sec. 5. "Certificate" means a full, restricted or provisional certificate to operate a plant for sewage treatment issued pursuant to NAC 445A.2862 to 445A.293, inclusive, or a full, operator-in-training or provisional certificate to operate a public water system issued pursuant to NAC 445A.617 to 445A.652, inclusive.

Sec. 6. "Hearing officer" means a person appointed by the Administrator to preside over and make recommendations to the Administrator concerning any disciplinary action initiated by the Division pursuant to sections 3 to 23, inclusive, of this regulation.

Sec. 7. "Respondent" means a person who has been sent a notice of hearing pursuant to section 11 of this regulation.

Sec. 8. In addition to any other grounds for disciplinary action provided by statute or regulation, the Division may take disciplinary action against a holder of a certificate if the holder has:

- 1. Engaged in fraud or deceit in obtaining or attempting to obtain or renew a certificate;*
- 2. Cheated on any examination required to obtain or renew a certificate;*
- 3. Committed an act of gross negligence, incompetence or misconduct in the performance of his or her duties as a holder of a certificate;*
- 4. Violated any requirement for a holder of a certificate set forth in NAC 445A.2862 to 445A.293, inclusive, or NAC 445A.617 to 445A.652, inclusive, as applicable;*
- 5. Aided or abetted any person in the violation of any requirement for a holder of a certificate set forth in NAC 445A.2862 to 445A.293, inclusive, or NAC 445A.617 to 445A.652, inclusive, as applicable;*
- 6. Been convicted of or entered a plea of guilty or nolo contendere to any crime of which an essential element is dishonesty or which is directly related to any activity for which a certificate is required pursuant to NAC 445A.2862 to 445A.293, inclusive, or NAC 445A.617 to 445A.652, inclusive, as applicable;*

7. Provided services for which a certificate is required pursuant to NAC 445A.2862 to 445A.293, inclusive, or NAC 445A.617 to 445A.652, inclusive, as applicable, after the certificate has expired or been suspended or revoked;

8. Been disciplined by another state or territory, the District of Columbia, a foreign country, the Federal Government or any other governmental agency if at least one of the grounds for discipline is the same as or substantially similar to any grounds set forth in this section or NAC 445A.293 or 445A.646, as applicable;

9. Demonstrated disregard for the health and safety of the public and the environment;

10. Acted outside the rights and privileges of the certificate that the person holds;

11. Willfully made any false statement or failed to correct a false statement previously made to a governmental agency with regulatory authority that is material to the administration or enforcement of any statutory or regulatory provision to which the certificate applies; or

12. Failed to comply with an order issued by the Administrator.

Sec. 9. 1. *Except as otherwise provided in section 10 of this regulation, if the Division has cause to believe that a holder of a certificate has engaged in any action that constitutes grounds for disciplinary action, the Division may issue a notice of intent to take disciplinary action.*

2. A notice of intent to take disciplinary action issued pursuant to subsection 1 must:

(a) Be served on the holder by personal delivery or sent by certified mail at the mailing address identified on the most recent application for a certificate or application for renewal, as applicable; and

(b) Include, without limitation:

(1) A statement of the legal authority for the disciplinary action;

(2) The name and contact information of the employee of the Division to which the holder must send a response;

(3) A statement of the facts which support the decision of the Division to take disciplinary action; and

(4) Except as otherwise provided in subsection 5, a statement that the Division shall send a notice of hearing pursuant to section 11 of this regulation if the holder does not, within 10 business days after receipt of the notice issued pursuant to subsection 1, provide a written response that, to the satisfaction of the Division, clearly sets forth the reasons why the Division should not proceed with a hearing on the alleged grounds for disciplinary action.

3. Any response offered by the holder pursuant to subsection 2 must:

(a) Address each of the grounds for disciplinary action included in the notice issued by the Division pursuant to subsection 1; and

(b) Be delivered in person or sent by certified mail to the employee of the Division identified in the notice sent pursuant to subsection 2.

4. If the Division determines that the holder has provided a satisfactory response, the Division shall, not later than 10 business days after receiving such response:

(a) Terminate the disciplinary action; and

(b) Send a letter by certified mail to the holder informing him or her that the disciplinary action has been terminated.

5. If the holder has previously received a notice of intent to take disciplinary action pursuant to subsection 1 and the Division issues another notice within 2 years after the date of the first notice for a subsequent violation of the same statutory or regulatory provision, the holder may not submit a response to the Division pursuant to subsection 2 as to why the

Division should not proceed with the hearing on the alleged grounds for disciplinary action and the Division shall immediately send a notice of hearing pursuant to section 11 of this regulation.

Sec. 10. 1. *The Division may suspend a certificate without complying with the requirements of section 9 of this regulation if the Division finds that, based upon the evidence in the possession of the Division, the public health, safety or welfare imperatively requires emergency action and the immediate summary suspension of the certificate.*

2. If the Division summarily suspends a certificate pursuant to subsection 1, the Division shall provide notice of the summary suspension to the holder of the certificate by certified mail at the most recent mailing address identified on the application for a certificate or application for renewal, as applicable. The notice must include:

(a) The finding of the Division made pursuant to subsection 1;
(b) A statement of the legal authority for the disciplinary action; and
(c) A statement of the facts which support the position of the Division for the disciplinary action.

3. The Division shall hold a hearing on the summary suspension within 45 days after the date of the suspension unless the Division and the holder of the certificate mutually agree in writing to a longer period.

Sec. 11. 1. *The Division shall send a notice of hearing to the holder of a certificate if:*
(a) The holder does not provide a satisfactory response setting forth the reasons why the Division should not proceed with a hearing on the alleged grounds for disciplinary action pursuant to subsection 2 of section 9 of this regulation;

(b) The holder is not entitled to provide such a response pursuant to subsection 5 of section 9 of this regulation; or

(c) The Division has summarily suspended the certificate pursuant to section 10 of this regulation.

2. The notice of hearing must:

(a) State the nature, date, time and place of the hearing, which may be held at an office of the Division or any other place in this State designated in the notice;

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

(c) Include a reference to the particular sections of statutes and regulations involved;

(d) Include a short and plain statement of the matters asserted;

(e) Identify all witnesses and exhibits that the Division may offer to substantiate the grounds for disciplinary action;

(f) State the name and title of the hearing officer who will hear the matter;

(g) Include the date by which the holder must provide the information required by section 13 of this regulation;

(h) Include the requirements for motions set forth in section 14 of this regulation; and

(i) Be sent to the holder by certified mail at the mailing address identified on the most recent application for a certificate or application for renewal, as applicable.

3. The Division shall attach to the notice of hearing a copy of each document identified as an exhibit pursuant to paragraph (e) of subsection 2.

4. Except as otherwise provided in subsection 3 of section 10 of this regulation, the hearing must be held not earlier than 30 days and not later than 60 days after the date the notice of hearing is sent pursuant to this section.

Sec. 12. *1. Before sending a notice of hearing pursuant to section 11 of this regulation, the Administrator shall appoint a hearing officer. The hearing officer:*

(a) Shall perform his or her duties in addition to his or her regularly assigned duties; and

(b) Shall not hear requests for variances from the requirements of any applicable regulation.

2. The Administrator may change the person appointed as hearing officer pursuant to subsection 1 for good cause shown.

Sec. 13. *1. Except as otherwise provided in subsection 2, not later than 5 days before the date of the hearing set forth in the notice of hearing sent pursuant to section 11 of this regulation, the respondent must provide the Division with written notice of the identity of each witness and any document that the respondent may offer in support of his or her position. The notice must include a copy of each document unless the document is in the possession or control of the Division.*

2. The respondent may supplement any documents provided pursuant to subsection 1 on or before the date of the hearing only if the respondent demonstrates that the supplemental documents could not reasonably be obtained and provided within the time required by subsection 1.

3. The hearing officer may exclude any witness or exhibit that is not timely provided pursuant to subsection 1.

Sec. 14. *1. All motions, unless made during a hearing, must be:*

(a) Made in writing;

(b) Served on all parties of record by mail as evidenced by a certificate of mailing; and

(c) Filed with the hearing officer at least 10 business days before the date of the hearing with the certificate of mailing for all parties of record.

2. Any response to a motion, other than a motion made at a hearing, must be:

(a) Made in writing;

(b) Served on all parties of record by mail as evidenced by a certificate of mailing; and

(c) Filed with the hearing officer within 7 business days after receipt of the motion with the certificate of mailing for all parties of record.

3. If a hearing is set to consider the character, alleged misconduct, professional competence or physical or mental health of a respondent, the respondent may move for any testimony and documents directly relevant to these facts to be declared confidential. Any such motion must demonstrate to the satisfaction of the hearing officer that this information is not subject to public disclosure pursuant to chapter 239 of NRS.

Sec. 15. 1. *A hearing officer may order the parties to file briefs with the hearing officer before a hearing.*

2. Any brief filed with a hearing officer must be accompanied by a certificate of mailing for all parties of record.

Sec. 16. 1. *A party may appear in person at a hearing or may be represented by an attorney.*

2. An attorney who represents a party at a hearing must be:

(a) Admitted to practice and in good standing before the highest court of any state of the United States; and

(b) If the attorney is not admitted to practice and in good standing before the Supreme Court of Nevada, associated with an attorney who is so admitted and in good standing.

Sec. 17. *A hearing officer may, in his or her discretion, either before or during a hearing, grant a continuance or recess.*

Sec. 18. *If:*

1. A respondent fails to appear at a hearing;

2. The hearing officer has not granted a continuance;

3. The Division offers proof that the respondent was given proper notice of the hearing;

and

4. The hearing officer makes a determination that the respondent was given proper notice of the hearing,

↳ the hearing officer may proceed to hear the case on its merits without the participation of the respondent.

Sec. 19. *1. At a hearing conducted pursuant to sections 3 to 23, inclusive, of this regulation:*

(a) The Division shall present witnesses and evidence first and the respondent may cross-examine the witnesses. The Division shall have an opportunity for redirect examination of the witnesses.

(b) After the Division has completed its presentation of witnesses and evidence, the respondent may present witnesses and evidence and the Division may cross-examine the witnesses. The respondent shall have the opportunity for redirect examination of the witnesses.

(c) After the respondent has completed his or her presentation of witnesses and evidence, the Division may present any rebuttal witnesses and evidence and respondent may cross-examine the witnesses.

(d) The hearing officer may question any witness, party, counsel or representative at any time.

2. The Division must establish that grounds for disciplinary action exist by a preponderance of the evidence.

3. The hearing must be recorded electronically and the electronic recording must be made available for inspection and copying at the expense of each party.

Sec. 20. *1. After the close of a hearing held pursuant to section 19 of this regulation, the hearing officer shall prepare written recommendations on the issues presented at the hearing and submit the recommendations to the Administrator within 30 days after the date on which the hearing concluded.*

2. The Administrator shall:

(a) Read the record, consider the recommendations of the hearing officer and adopt, modify or reject the recommendations;

(b) Based on a preponderance of evidence, issue written findings of fact, conclusions of law and his or her decision on the issues; and

(c) Serve on all parties of record by personal delivery or certified mail a copy of the decision and the accompanying findings of fact and conclusions of law within 45 days after the date on which the hearing concluded.

3. A decision issued by the Administrator pursuant to this section becomes final 30 days after the date of service unless the respondent files a timely notice of appeal to the State Environmental Commission pursuant to section 21 of this regulation.

Sec. 21. *1. A respondent may, within 10 business days after service of a decision issued by the Administrator pursuant to section 20 of this regulation, file a notice of appeal with the Commission.*

2. A notice of appeal filed pursuant to this section must be served on all parties by personal delivery or certified mail and must:

(a) Identify the decision from which the respondent appeals, the date on which the decision was issued and the basis for the appeal;

(b) State with particularity each point of law or fact which, in the opinion of the respondent, the Administrator overlooked or misconstrued;

(c) Identify the parts of the record that the respondent deems relevant to the appeal; and

(d) State each argument in support of the appeal that the respondent intends to present.

3. The Division may, not later than 15 business days after service of a notice of appeal, file with the Commission a response rebutting only the issues raised in the notice of appeal. Such a response may include identification of the parts of the record that the Division deems relevant to its response.

Sec. 22. *1. Upon the filing of a response to the notice of appeal pursuant to section 21 of this regulation or the expiration of the time for filing such a response, the Executive Secretary of the Commission shall schedule oral argument on the appeal for not later than 60 days after the notice of appeal was received, unless each party to the hearing waives the right to a hearing within the 60-day period in writing and for good cause shown.*

2. Oral argument before the Commission must be limited to 15 minutes for each party. The respondent must present his or her argument first but may reserve time for rebuttal following the presentation of argument by the Division. The Commission will consider only evidence which was submitted to the hearing officer and identified in the notice of appeal or the response to the notice of appeal.

3. The Commission may affirm, reverse or modify the decision of the Administrator or remand the case to the Administrator. The Commission will issue a written decision on the appeal.

4. Unless the Commission remands a case to the Administrator, the decision of the Commission is a final decision in a contested case. Any person aggrieved by such a decision is entitled to judicial review pursuant to NRS 233B.130.

Sec. 23. *If a final order issued by the Administrator or the Commission temporarily suspends or permanently revokes a certificate:*

1. The final order must not become effective and the certificate must not be suspended or revoked until 30 days after the date of issuance of the final order.

2. Within 5 business days after the date on which the final order is issued, the holder of the certificate shall notify his or her place of employment as a holder of the certificate of the revocation or suspension of the certificate and the date on which the revocation or suspension becomes effective.

3. Until the date on which the revocation or suspension of the certificate is effective, the holder of the certificate may continue to engage in any lawful activity otherwise authorized or permitted pursuant to this chapter or chapter 445A of NRS.

Sec. 24. NAC 445A.2855 is hereby amended to read as follows:

445A.2855 As used in NAC 445A.2855 to 445A.293, inclusive, *and section 2 of this regulation*, “experience in operating” means having been actively engaged in the operation and maintenance activities of a plant for sewage treatment.

Sec. 25. NAC 445A.286 is hereby amended to read as follows:

445A.286 The provisions of NAC 445A.2855 to 445A.293, inclusive, *and section 2 of this regulation* do not apply to:

1. A package plant for sewage treatment with a capacity of 5,000 gallons or less per day; or
2. Any other plant for sewage treatment, including, without limitation, a septic system, with a capacity of 10,000 gallons or less per day.

Sec. 26. NAC 445A.293 is hereby amended to read as follows:

445A.293 ~~The~~ *1. If the Division determines that an applicant for a full, restricted or provisional certificate as an operator of a plant for sewage treatment has engaged in any conduct set forth in subsection 3, the* Division may deny an application for a certificate as an operator of a plant for sewage treatment. ~~for suspend~~

2. If the Division determines that a holder of a full, restricted or provisional certificate as an operator of a plant for sewage treatment has engaged in any conduct set forth in subsection 3 or section 8 of this regulation, the Division may:

- (a) Suspend or revoke a full certificate ~~provisional certificate or restricted certificate~~;*
- (b) Place the holder of the certificate on probation for a specified period of time; or*
- (c) Take any other disciplinary action against the holder of the certificate deemed appropriate by the Division.*

3. The Division may take action pursuant to subsection 1 or 2 if the applicant or holder of the certificate:

~~11.~~ (a) In applying for or obtaining a certificate, has submitted to the Division any application, document, record, report or affidavit, or any information in support thereof, which is false or fraudulent;

~~12.~~ (b) Is grossly negligent, incompetent or has committed misconduct in the performance of his or her duties as an operator of a plant for sewage treatment;

~~13.~~ (c) Has demonstrated disregard for the health and safety of the public and the environment;

~~14.~~ (d) Has acted outside the rights and privileges of the grade for which he or she holds a certificate;

~~15.~~ (e) Has been convicted of a violation of any federal law or law of any state relating to water quality, including, without limitation, the Clean Water Act, 33 U.S.C. §§ 1251 et seq.;

~~16.~~ (f) Has been convicted of ~~1a.~~, *or entered a plea of guilty or nolo contendere to, any* felony or other crime involving moral turpitude, dishonesty or corruption;

~~17.~~ (g) Has willfully made to a governmental agency with regulatory authority any false statement, *or failed to correct a false statement previously made*, which is material to the administration or enforcement of any provision of this chapter or chapter 445A of NRS;

~~18.—Has failed to renew his or her certification;~~

(h) Continues to work as an operator of a plant for sewage treatment after his or her certificate has expired or been suspended or revoked; or

~~19.~~ (i) Has violated, attempted to violate, assisted or abetted in the violation of or conspired to violate any provision of this chapter or chapter 445A of NRS.

4. *Any disciplinary action taken by the Division against the holder of a certificate for conduct set forth in subsection 3 or section 8 of this regulation, must be taken pursuant to the provisions of sections 3 to 23, inclusive, of this regulation.*

5. *Any disciplinary action taken pursuant to this section and sections 3 to 23, inclusive, of this regulation is separate from and may be in addition to any other civil or criminal action provided by statute or regulation.*

Sec. 27. NAC 445A.646 is hereby amended to read as follows:

445A.646 ~~{He}~~ 1. *If the Division determines that an applicant for a full certificate, provisional certificate or certificate as an operator-in-training has engaged in any conduct which is grounds for disciplinary action set forth in subsection 3, the Division may deny an application for a certificate . ~~{or suspend}~~*

2. *If the Division determines that a holder of a full certificate, provisional certificate or certificate as an operator-in-training has engaged in any conduct which is grounds for disciplinary action set forth in subsection 3 or section 8 of this regulation, the Division may:*

(a) *Suspend or revoke an operator's ~~{full}~~ certificate ~~{, provisional certificate or certificate as an operator-in-training if he or she: —1.}~~ ;*

(b) *Place the holder of a certificate on probation for a specified period of time; or*

(c) *Take any other disciplinary action against the holder of a certificate deemed appropriate by the Division.*

3. *The Division may take action pursuant to subsection 1 or 2 if the applicant or holder of the certificate:*

(a) In applying for or obtaining a certificate, has submitted to the Division any application, document, record, report or affidavit, or any information in support thereof, which is false or fraudulent;

~~12.1~~ (b) Is grossly negligent, incompetent or has committed misconduct in the performance of his or her duties as an operator of a public water system;

~~13.1~~ (c) Has demonstrated disregard for the health and safety of the public;

~~14.1~~ (d) Has acted outside the rights and privileges of his or her classification for which he or she holds a certificate;

~~15.1~~ (e) Has been convicted of a violation of any federal law or law of any state relating to water quality, including, but not limited to, the Safe Drinking Water Act, 42 U.S.C. §§ 300f et seq.;

~~16.1~~ (f) Has been convicted of ~~1a1~~, *or entered a plea of guilty or nolo contendere to, any* felony or other crime involving moral turpitude, dishonesty or corruption;

~~17.1~~ (g) Has willfully made to an employee of the Division or any health authority any false statement, *or failed to correct a false statement previously made*, which is material to the administration or enforcement of any provision of this chapter or chapter 445A of NRS;

~~18.— Has failed to renew his or her certification;~~

(h) Continues to act as an operator after his or her certificate has expired or been suspended or revoked; or

~~19.1~~ (i) Has violated, attempted to violate, assisted or abetted in the violation of, or conspired to violate any provision of this chapter or chapter 445A of NRS.

4. Any disciplinary action taken by the Division against the holder of a certificate for conduct set forth in subsection 3 or section 8 of this regulation must be taken pursuant to the provisions of sections 3 to 23, inclusive, of this regulation.

5. Any disciplinary action taken pursuant to this section and sections 3 to 23, inclusive, of this regulation is separate from and may be in addition to any other civil or criminal action provided by statute or regulation.

Sec. 28. NAC 445A.647 is hereby amended to read as follows:

445A.647 The Division shall send a written notice of ~~[the denial of an application for or the suspension or revocation]~~ *intent to take disciplinary action against the holder* of a certificate pursuant to ~~[the requirements set forth in NAC 439.300 to 439.395, inclusive.]~~ *section 9 of this regulation for any conduct which is grounds for disciplinary action set forth in NAC 445A.646 or section 8 of this regulation.*

Sec. 29. NAC 445A.652 is hereby amended to read as follows:

445A.652 1. Any person who has reason to believe that an action taken by the Division pursuant to NAC 445A.617 to 445A.652, inclusive, ~~[has been]~~ *other than a disciplinary action* *is* incorrect or based on inadequate knowledge may, within 10 business days after receiving notice of the action, request an informal discussion with the employee responsible for the action and the immediate supervisor of the employee.

2. If the informal discussion does not resolve the problem, the aggrieved person may, within 10 business days after the date scheduled for the informal discussion, submit a written request to the Administrator of the Division or the Administrator's designee for an informal conference. The informal conference must be scheduled for a date, place and time mutually agreed upon by the aggrieved person and the Administrator or the Administrator's designee, except that the

informal conference must be held no later than 60 days after the date on which the Administrator or the Administrator's designee receives the written request.

3. The determination of the Administrator of the Division or the Administrator's designee resulting from the informal conference cannot be appealed and is the final remedy available to the aggrieved person.

Sec. 30. Chapter 445B of NAC is hereby amended by adding thereto a new section to read as follows:

The provisions of NAC 445B.875 to 445B.899, inclusive, do not apply to the appeal of a disciplinary action taken by the Division of Environmental Protection of the Department pursuant to the provisions of sections 3 to 23, inclusive, or sections 34 to 55, inclusive, of this regulation.

Sec. 31. NAC 445B.877 is hereby amended to read as follows:

445B.877 **1.** "Appellant" means any person:

~~1.~~ ~~Who~~ **(a)** *Except as otherwise provided in subsection 2, who* requests a hearing before the Commission, pursuant to chapter 278, 444, 444A, 445A, 445B, 459, 486A or 519A of NRS or the Commission's regulations concerning the control of air or water pollution or the management of solid waste; or

~~2.~~ **(b)** Whose appearance before the Commission is required by:

~~(a)~~ **(1)** The Director;

~~(b)~~ **(2)** An authorized representative of the Director; or

~~(c)~~ **(3)** A person who is designated by or pursuant to a county or city ordinance or a regional agreement or regulation to enforce local ordinances or regulations for the control of air pollution.

2. The term does not include a person who appeals a decision of the Administrator of the Division of Environmental Protection pursuant to section 21 or 53 of this regulation.

Sec. 32. Chapter 459 of NAC is hereby amended by adding thereto the provisions set forth as sections 33 to 55, inclusive, of this regulation.

Sec. 33. 1. *Any person who has reason to believe that an action taken by the Division pursuant to NAC 459.970 to 459.9729, inclusive, other than a disciplinary action, is incorrect or based on inadequate knowledge may, within 10 business days after receiving notice of the action, request an informal discussion with the employee responsible for the action and the immediate supervisor of the employee.*

2. If the informal discussion does not resolve the problem, the aggrieved person may, within 10 business days after the date scheduled for the informal discussion, submit a written request to the Administrator of the Division or the Administrator's designee for an informal conference. The informal conference must be scheduled for a date, place and time mutually agreed upon by the aggrieved person and the Administrator or the Administrator's designee, except that the informal conference must be held not later than 60 days after the date on which the Administrator or the Administrator's designee received the written request.

3. The determination of the Administrator of the Division or the Administrator's designee resulting from the informal conference cannot be appealed and is the final remedy available to the aggrieved person.

Sec. 34. *As used in sections 34 to 55, inclusive, of this regulation, unless the context otherwise requires, the words and terms defined in sections 35 to 38, inclusive, of this regulation, have the meanings ascribed to them in those sections.*

Sec. 35. *“Administrator” means the Administrator of the Division or his or her designee.*

Sec. 36. *“Certificate” means a certificate issued pursuant to NAC 459.970 to 459.9729, inclusive.*

Sec. 37. *“Hearing officer” means a person appointed by the Administrator to preside over and make recommendations to the Administrator concerning any disciplinary action initiated by the Division pursuant to sections 34 to 55, inclusive, of this regulation.*

Sec. 38. *“Respondent” means a person who has been sent a notice of hearing pursuant to section 43 of this regulation.*

Sec. 39. *In addition to any other grounds for disciplinary action provided by statute or regulation, the Division may take disciplinary action against a holder of a certificate if the holder has:*

- 1. Engaged in fraud or deceit in obtaining or attempting to obtain or renew a certificate;*
- 2. Cheated on any examination required to obtain or renew a certificate;*
- 3. Committed an act of gross negligence, incompetence or misconduct in the performance of his or her duties as a holder of a certificate;*
- 4. Violated any requirement for a holder of a certificate or aided or abetted any person in the violation of any requirement for the holder of a certificate set forth in NAC 459.970 to 459.9729, inclusive;*
- 5. Violated any requirement or aided or abetted any person in the violation of any requirement of NAC 445A.226 to 445A.22755, inclusive, 445C.010 to 445C.390, inclusive, 459.970 to 459.9729, inclusive or 459.9921 to 459.99938, inclusive for services performed under the direction or control of a holder of a certificate;*

6. Been convicted of or entered a plea of guilty or nolo contendere to any crime of which an essential element is dishonesty or which is directly related to any activity for which a certificate is required pursuant to NAC 459.970 to 459.9729, inclusive;

7. Provided services for which a certificate is required pursuant to NAC 459.970 to 459.9729, inclusive, after the certificate has expired or been suspended or revoked;

8. Been disciplined by another state or territory, the District of Columbia, a foreign country, the Federal Government or any other governmental agency if at least one of the grounds for discipline is the same as or substantially similar to any grounds set forth in this section or NAC 459.9729;

9. Demonstrated disregard for the health and safety of the public and the environment;

10. Acted outside the rights and privileges of the certification that the person holds;

11. Willfully made any false statement to a governmental agency with regulatory authority, or failed to correct a false statement previously made, that is material to the administration or enforcement of NAC 445A.226 to 445A.22755, inclusive, 445C.010 to 445C.390, inclusive, 459.970 to 459.9729, inclusive or 459.9921 to 459.99938, inclusive, regarding services performed under the direction or control of the holder of a certificate; or

12. Failed to comply with an order issued by the Administrator.

Sec. 40. 1. *If the Division determines that a holder of a certificate has not performed in accordance with the standards set forth in NAC 459.9729 or has engaged in conduct described in section 39 of this regulation, the Division may take the following disciplinary actions pursuant to sections 34 to 55, inclusive of this regulation:*

(a) Revoke the certificate;

(b) Suspend the certificate;

- (c) Place the holder of the certificate on probation for a specified period of time; or*
- (d) Any other disciplinary action deemed appropriate by the Division.*

2. Any disciplinary action taken pursuant to sections 34 to 55, inclusive, of this regulation is separate from and may be in addition to any other civil or criminal action provided by statute or regulation.

Sec. 41. *1. Except as otherwise provided in section 42 of this regulation, if the Division has cause to believe that a holder of a certificate has engaged in any action that constitutes grounds for disciplinary action, the Division may issue a notice of intent to take disciplinary action.*

2. A notice of intent to take disciplinary action issued pursuant to subsection 1 must:

(a) Be sent to the holder of the certificate by certified mail at the most recent mailing address identified on the application for a certificate or application for renewal, as applicable; and

(b) Include, without limitation:

(1) A statement of the legal authority for the disciplinary action;

(2) The name and contact information of the employee of the Division to which the holder must send a response;

(3) A statement of the facts which support the decision of the Division to take disciplinary action; and

(4) Except as otherwise provided in subsection 5, a statement that the Division shall send a notice of hearing pursuant to section 43 of this regulation if the holder does not, within 10 business days after receipt of the notice issued pursuant to subsection 1, provide a written

response that, to the satisfaction of the Division, clearly sets forth the reasons why the Division should not proceed with a hearing on the alleged grounds for disciplinary action.

3. Any response offered by the holder pursuant to subsection 2 must:

(a) Address each of the grounds for disciplinary action included in the notice issued by the Division pursuant to subsection 1; and

(b) Be delivered in person or sent by certified mail to the employee of the Division identified in the notice sent pursuant to subsection 2;

4. If the Division determines that the holder of a certificate has provided a satisfactory response, the Division shall, not later than 10 business days after receiving such response:

(a) Terminate the disciplinary action; and

(b) Send a letter by certified mail to the holder informing him or her that the disciplinary action has been terminated.

5. If the holder has previously received a notice of intent to take disciplinary action pursuant to subsection 1 and the Division issues another notice within 2 years after the date of the first notice for a subsequent violation of the same statutory or regulatory provision, the holder may not submit a response to the Division pursuant to subsection 2 as to why the Division should not proceed with the hearing on the alleged grounds for disciplinary action and the Division shall immediately send a notice of hearing pursuant to section 43 of this regulation.

Sec. 42. 1. *The Division may suspend a certificate without complying with the requirements of section 41 of this regulation if the Division finds that, based upon the evidence in the possession of the Division, the public health, safety or welfare imperatively requires emergency action and the immediate summary suspension of the certificate.*

2. If the Division summarily suspends a certificate pursuant to subsection 1, the Division shall provide notice of the summary suspension to the holder of the certificate by certified mail at the most recent mailing address identified on the application for a certificate or application for renewal, as applicable. The notice must include:

- (a) The finding of the Division made pursuant to subsection 1;*
- (b) A statement of the legal authority for the disciplinary action; and*
- (c) A statement of the facts which support the position of the Division for the disciplinary action.*

3. The Division shall hold a hearing on the summary suspension within 45 days after the date of the suspension unless the Division and the holder of the certificate mutually agree in writing to a longer period.

Sec. 43. *1. The Division shall send a notice of hearing to the holder of the certificate if:*

- (a) The holder does not provide a satisfactory response setting forth the reasons why the Division should not proceed with a hearing on the alleged grounds for disciplinary action pursuant to subsection 2 of section 41 of this regulation;*
- (b) The holder is not entitled to provide such a response pursuant to subsection 5 of section 41 of this regulation; or*
- (c) The Division has summarily suspended the certificate pursuant to section 42 of this regulation.*

2. The notice of hearing must:

- (a) State the nature, date, time and place of the hearing, which may be held at an office of the Division or any other place in this State designated in the notice;*

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

(c) Include a reference to the particular sections of statutes and regulations involved;

(d) Include a short and plain statement of the matters asserted;

(e) Identify all witnesses and exhibits that the Division may offer to substantiate the grounds for disciplinary action;

(f) State the name and title of the hearing officer who will hear the matter;

(g) Include the date by which the holder for a certificate must provide the information required by section 45 of this regulation;

(h) Include the requirements for motions set forth in section 46 of this regulation; and

(i) Be served on the holder by certified mail at the most recent mailing address identified on the application for a certificate or application for renewal, as applicable.

3. The Division shall attach a copy of each document identified as an exhibit pursuant to paragraph (e) of subsection 2 to the notice.

4. Except as otherwise provided in subsection 3 of section 42 of this regulation, the hearing must be held not earlier than 30 days and not later than 60 days after the date the notice of hearing is sent pursuant to this section.

Sec. 44. 1. *Before sending a notice of hearing pursuant to section 43 of this regulation, the Administrator shall appoint a hearing officer. The hearing officer:*

(a) Shall perform his or her duties in addition to his or her regularly assigned duties; and

(b) Shall not hear requests for variances from the requirements of any applicable regulation.

2. The Administrator may change the person appointed as hearing officer pursuant to subsection 1 for good cause shown.

Sec. 45. 1. Except as otherwise provided in subsection 2, not later than 5 days before the date of the hearing set forth in the notice of hearing sent pursuant to section 43 of this regulation, the respondent must provide the Division with written notice of the identity of each witness and any document that the respondent may offer in support of his or her position. The notice must include a copy of each document unless the document is in the possession or control of the Division.

2. The respondent may supplement any documents provided pursuant to subsection 1 on or before the date of the hearing only if the respondent demonstrates that the supplemental documents could not reasonably be obtained and provided within the time required by subsection 1.

3. The hearing officer may exclude any witness or exhibit that is not timely provided pursuant to subsection 1.

Sec. 46. 1. All motions, unless made during a hearing, must be:

(a) Made in writing;

(b) Served on all parties of record by mail as evidenced by a certificate of mailing; and

(c) Filed with the hearing officer at least 10 business days before the date of the hearing with the certificate of mailing for all parties of record.

2. Any response to a motion, other than a motion made during a hearing, must be:

(a) Made in writing;

(b) Served on all parties of record by mail as evidenced by a certificate of mailing; and

(c) Filed with the hearing officer within 7 business days after receipt of the motion with the certificate of mailing for all parties of record.

3. If a hearing is set to consider the character, alleged misconduct, professional competence or physical or mental health of respondent, the respondent may move for any testimony and documents directly relevant to these facts to be declared confidential. Any such motion must demonstrate to the satisfaction of the hearing officer that this information is not subject to public disclosure pursuant to chapter 239 of NRS.

Sec. 47. 1. A hearing officer may order the parties to file briefs with the hearing officer before a hearing.

2. Any brief filed with a hearing officer must be accompanied by a certificate of mailing for all parties of record.

Sec. 48. 1. A party may appear in person at a hearing or may be represented by an attorney.

2. An attorney who represents a party at a hearing must be:

(a) Admitted to practice and in good standing before the highest court of any state of the United States; and

(b) If the attorney is not admitted to practice and in good standing before the Supreme Court of Nevada, associated with an attorney who is so admitted and in good standing.

Sec. 49. A hearing officer may, in his or her discretion, either before or during a hearing, grant a continuance or recess.

Sec. 50. If:

1. A respondent fails to appear at a hearing;

2. The hearing officer has not granted a continuance;

3. *The Division offers proof that the respondent was given proper notice of the hearing;*
and

4. *The hearing officer makes a determination that the respondent was given proper notice of the hearing,*

↳ the hearing officer may proceed to hear the case on its merits without the participation of the respondent.

Sec. 51. 1. *At a hearing conducted pursuant to sections 34 to 55, inclusive, of this regulation:*

(a) The Division shall present witnesses and evidence first and the respondent may cross-examine the witnesses. The Division shall have an opportunity for redirect examination of the witnesses.

(b) After the Division has completed its presentation of witnesses and evidence, the respondent may present witnesses and evidence and the Division may cross-examine the witnesses. The respondent shall have the opportunity for redirect examination of the witnesses.

(c) After the respondent has completed his or her presentation of witnesses and evidence, the Division may present any rebuttal witnesses and evidence and respondent may cross-examine the witnesses.

(d) The hearing officer may question any witness, party, counsel or representative at any time.

2. *The Division must establish that grounds for disciplinary action exist by a preponderance of the evidence.*

3. *The hearing must be recorded electronically and the electronic recording must be made available for inspection and copying at the expense of each party.*

Sec. 52. 1. *After the close of a hearing held pursuant to section 51 of this regulation, the hearing officer shall prepare written recommendations on the issues presented at the hearing and submit the recommendations to the Administrator within 30 days after the date on which the hearing concluded.*

2. *The Administrator shall:*

(a) *Read the record, consider the recommendations of the hearing officer and adopt, modify or reject the recommendations;*

(b) *Based on a preponderance of evidence, issue written findings of fact, conclusions of law and his or her decision on the issues; and*

(c) *Serve on all parties of record by personal delivery or certified mail a copy of the decision and the accompanying findings of fact and conclusions of law within 45 days after the date on which the hearing concluded.*

3. *A decision issued by the Administrator pursuant to this section becomes final 30 days after the date of service unless the respondent files a timely notice of appeal to the State Environmental Commission pursuant to section 53 of this regulation.*

Sec. 53. 1. *A respondent may, within 10 business days after service of a decision issued by the Administrator pursuant to section 52 of this regulation, file a notice of appeal with the Commission.*

2. *A notice of appeal filed pursuant to this section must be served on all parties by personal delivery or certified mail and must:*

(a) Identify the decision from which the respondent appeals, the date on which the decision was issued and the basis for the appeal;

(b) State with particularity each point of law or fact which, in the opinion of the respondent, the Administrator overlooked or misconstrued;

(c) Identify the parts of the record that the respondent deems relevant to the appeal; and

(d) State each argument in support of the appeal that the respondent intends to present.

3. The Division may, not later than 15 business days after service of a notice of appeal, file with the Commission a response rebutting only the issues raised in the notice of appeal. Such a response may include identification of the parts of the record that the Division deems relevant to its response.

Sec. 54. 1. Upon the filing of a response to the notice of appeal pursuant to section 53 of this regulation or the expiration of the time for filing such a response, the Executive Secretary of the Commission shall schedule oral argument on the appeal for not later than 60 days after the notice of appeal was received, unless each party to the hearing waives the right to a hearing within the 60-day period in writing and for good cause.

2. Oral argument before the Commission must be limited to 15 minutes for each party. The respondent must present his or her argument first but may reserve time for rebuttal following the presentation of argument by the Division. The Commission will consider only evidence which was submitted to the hearing officer and identified in the notice of appeal or response to the notice of appeal.

3. The Commission may affirm, reverse or modify the decision of the Administrator or remand the case to the Administrator. The Commission will issue a written decision on the appeal.

4. Unless the Commission remands a case to the Administrator, the decision of the Commission is a final decision in a contested case. Any person aggrieved by such a decision is entitled to judicial review pursuant to NRS 233B.130.

Sec. 55. *If a final order issued by the Administrator or the Commission temporarily suspends or permanently revokes a certificate:*

1. The final order must not become effective and the certificate must not be suspended or revoked until 30 days after the date of issuance of the final order.

2. Within 5 business days after the date on which the final order is issued, the holder of the certificate shall notify his or her place of employment as a holder of the certificate of the revocation or suspension of the certificate and the date on which the revocation or suspension becomes effective.

3. Until the date on which the revocation or suspension of the certificate is effective, the holder of the certificate may continue to engage in any lawful activity otherwise authorized or permitted pursuant to this chapter or chapter 459 of NRS.

Sec. 56. NAC 459.970 is hereby amended to read as follows:

459.970 As used in NAC 459.970 to 459.9729, inclusive, *and section 33 of this regulation*, unless the context otherwise requires, the words and terms defined in NAC 459.97002 to 459.9716, inclusive, have the meanings ascribed to them in those sections.

Sec. 57. NAC 459.9718 is hereby amended to read as follows:

459.9718 The provisions of NAC 459.970 to 459.9729, inclusive, *and section 33 of this regulation*, other than the provisions which impose requirements on providers of approved underground storage tank training programs, do not apply to:

1. Services provided by an employee of a business or public agency relative to the hazardous waste management, release investigation or response or underground storage tank management responsibilities of his or her employer, exclusively, while acting in the course of that employment.

2. Services provided by an employee of a public agency with the responsibility of regulatory enforcement, emergency response, or protection of public health, welfare or the environment, while acting in the course of that employment.

3. Services provided by a person who is a transporter of hazardous waste that are:

(a) Designated as the specific responsibility of the transporter of hazardous waste under the applicable state or federal regulations; and

(b) Necessary to perform the service of transportation of hazardous waste in accordance with the applicable state or federal regulations.

4. Services provided by a person under contract at a federal facility, while acting within the scope of that contract.

5. Services provided by a person that are requested by a state agency or political subdivision of the State if fees are not charged for those services.

6. Services provided by a public utility to its customers if incidental to the services ordinarily provided by the utility.

Sec. 58. NAC 459.9729 is hereby amended to read as follows:

459.9729 1. Each holder of a certificate issued by the Division pursuant to the provisions of NAC 459.970 to 459.9729, inclusive ~~H~~, *and section 33 of this regulation:*

(a) Shall provide services which are ethical, meet the current standards of the profession and which comply with federal, state and local regulations concerning hazardous substances or underground storage tanks.

(b) Is responsible for the work of other persons he or she employs or supervises.

(c) Shall have a copy of his or her certificate at the location where the holder of a certificate is supervising work. Upon the request of the Division, client or potential client, a holder of a certificate shall present the certificate for inspection.

(d) Shall make a written report to the facility owner or operator, within 24 hours, upon the discovery of a release of a hazardous substance or the existence of an unregistered underground storage tank and advise that facility owner or operator of any applicable reporting requirements.

(e) Shall report to the Division the discovery of a release of a hazardous substance which presents an imminent and substantial hazard to human health, public safety or the environment as soon as possible after the holder of a certificate has knowledge of a release.

(f) Shall secure the services of a qualified person to perform any part of his or her job which requires a level of service or skill which he or she is not qualified to provide.

(g) Shall make complete prior disclosures to his or her clients or potential clients of potential conflicts of interest or other circumstances which could influence his or her judgment or the quality of the services the holder of a certificate provides.

(h) Shall not falsify or misrepresent his or her education or experience, the degree of responsibility for prior assignments or the complexity of prior employment or business, relevant factors concerning employers, employees, associates or joint ventures or past accomplishments.

(i) Shall maintain a written record of each project requiring certification for 3 years after the project is completed. The Division may inspect those records during normal business hours and will establish requirements concerning the information which must be included in the records.

2. In addition to the requirements of subsection 1, a provider of an approved underground storage tank training program shall provide to each Class A operator and Class B operator a record in paper or electronic format which includes the information described in 40 C.F.R. § 280.245(b), as that section existed on November 2, 2016.

3. ~~Certification may be suspended, revoked or denied for renewal if~~ *If* the Division determines that the ~~certificate~~ holder *of a certificate* has not performed in accordance with the standards described in this section ~~+~~, *the Division may take disciplinary action against the holder of the certificate pursuant to sections 34 to 55, inclusive, of this regulation.*

Sec. 59. NAC 459.9995 is hereby amended to read as follows:

459.9995 1. ~~Any~~ *Except for the appeal of decision in a disciplinary action initiated by the Division pursuant to sections 34 to 55, inclusive, of this regulation, any* person who requests a hearing before the State Environmental Commission concerning a final decision of the State Department of Conservation and Natural Resources pursuant to chapter 459 of NRS 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. The provisions of NAC 445B.875 to 445B.899, inclusive, apply to a hearing of the State Environmental Commission requested pursuant to subsection 1.

*(See adopting agency for form.)