

LCB File No. R129-08

PROPOSED REGULATION OF THE STATE ENGINEER

(This version replaces the initial agency draft posted on 5/27/2008)

CHAPTER 533

~~**[ADJUDICATION OF VESTED WATER RIGHTS;]**~~
APPROPRIATION OF PUBLIC WATERS

GENERAL PROVISIONS

NAC 533.010 is hereby amended to read as follows:

NAC 533.010 Scope; construction; deviation from requirements.

1. The provisions of this chapter:

(a) Govern the practice and procedure of hearings before the state engineer on protests against applications to appropriate water or to change the place of diversion, manner of use or place of use of an existing water right under NRS 533.365.

(b) ~~[Must]~~ **May** be liberally construed to secure the just, speedy and economical determination of all issues presented to the state engineer.

2. ~~[In special cases, w]~~ Where strict compliance is found to be impracticable or unnecessary, ~~[and affected person are give proper notice of any procedural changes,]~~ the state engineer may permit deviation from the provisions of this chapter.

NAC 533.020 is hereby repealed.

NAC 533.030 “Applicant” defined. “Applicant” means a person seeking to appropriate water or to change the place of diversion, manner of use or place of use of an existing water right by filing an appropriate application with the state engineer.

NAC 533.040 is hereby repealed.

NAC 533.050 “Party” defined. “Party” means an applicant or protestant.

NAC 533.060 is hereby amended to read as follows:

NAC 533.040 “Person presenting public comment” defined. “Person presenting public comment” means a person attending the hearing and expressing ~~[-~~

~~—1.] G[ge]neral support or opposition regarding a particular project proposal, *a comment on* the facts already in evidence or on ~~[the]~~ related public policy ~~[-or~~~~

~~—2.—An opinion regarding the adequacy of environmental documents relating to a particular project proposal.]~~

NAC 533.070 “Protest hearing” defined. “Protest hearing” means a hearing before the state engineer on a protest against an application to appropriate water or to change the place of diversion, manner of use or place of use of an existing water right.

NAC 533.080 is hereby amended to read as follows:

NAC 533.080 “Protestant” defined. “Protestant” means a person filing a protest in a timely manner with the state engineer against an application to appropriate water or to change the place of diversion, manner of use or place of use of an existing water right *or a successor-in-interest to a protestant as set forth in NRS 533.370.*

NAC 533.070 “State engineer” defined. “State engineer” has the meaning ascribed to it in NRS 533.015 and, for the purposes of this chapter, includes a person designated by the state engineer to preside over a protest hearing.

PRACTICE AND PROCEDURE IN PROTEST HEARINGS BEFORE STATE ENGINEER

NAC 533.100 is hereby repealed.

NAC 533.140 “Answers” will be moved to here and amended as identified below.

Chapter 533 of NAC is hereby amended by adding thereto a new section to read as follows:
Motions: General requirements.

1. Any request for an order by the state engineer concerning a matter subject of a protest hearing must be in writing unless made during a hearing. If a motion is made during a hearing, the motion may be written or oral. Oral motions must be timely made.

2. A motion must include citations of any authorities upon which the motion relies.

3. A written motion must be filed with the state engineer and served upon all parties of record.

4. The state engineer or hearing officer may direct that any motion made at a hearing must be reduced to writing and filed and served in accordance with this section.

5. A written motion, other than one made during a hearing, must be served not later than 14 days before the date set for hearing unless a different time is specified by the state engineer or hearing officer.

6. Any party against whom a motion is directed may file a response to the motion. The response must be in writing, unless the motion was orally made during the hearing.

7. A response to a written motion must be filed in the Office of the State Engineer no later than 5 business days after receipt of service of the motion

8. The party presenting the motion may file a written reply to the response, which must be served on all parties no later than 5 business days after receipt of service of the response.

9. Two copies of any motion, response or reply must be timely filed in the Office of the State Engineer.

NAC 533.180 “Hearings: Nature and objective” will be moved here as amended.

NAC 533.190 “Hearings: Location of; conduct of parties” will be moved here as amended.

NAC 533.200 “Hearings: Right to representation by attorney; role of attorney” will be moved here as amended.

NAC 533.120 “Designation of person to preside over hearing” will be moved here as amended.

NAC 533.150 “Withdrawal of protest: Procedure; stipulation regarding protest” will be moved here as amended.

NAC 533.160 “Prehearing discovery” Parties’ right conduct; state engineer’s right to order; admissibility at hearing” will be moved here as amended.

NAC 533.170 “Prehearing conferences: State engineer’s right to order; scope” will be moved here as amended.

NAC 533.340 “Consolidation” will be moved here

NAC 533.210 “Hearings: Permissible issues” will be moved here as amended.

NAC 533.310 “Hearings: Stipulations” will be moved here as amended.

NAC 533.230 “Hearings: Identification of witnesses” will be moved here as amended

NAC 533.280 “Hearings: Identification and exchange of exhibits” will be moved here as amended.

NAC 533.240 “Hearings: Oral testimony; oaths and affirmations” will be moved here as amended.

NAC 533.250 “Hearings: Written testimony” will be moved here as amended.

NAC 533.260 “Hearings: Admissibility and form of exhibits” will be moved here as amended.

Rules of Evidence. Pursuant to NRS 533.365, the technical rules of evidence do not apply at a protest hearing.

NAC 533.300 “Hearings: Administrative Notice” will be moved here as amended.

NAC 533.350 “Hearings: Order of Proceedings” will be moved here as amended.

NAC 533.360 “Hearings: Additional evidence” will be moved here as amended.

NAC 533.370 “Hearings: Interim order” will be moved here.

NAC 533.320 “Hearings: Continuances” will be moved here as amended.

NAC 533.330 “Hearings: Failure to appear” will be moved here as amended.

NAC 533.110 is hereby amended to read as follows:

NAC 533.110 Appearance of person presenting public comment.

1. ~~1. [A person presenting public comment must give notice that he intends to appear and present comment at a protest hearing by signing in at the hearing location before the hearing.~~

~~2.] A person presenting public comment:~~

- ~~(a) Will not be sworn in or otherwise asked to affirm the truth of his comments; and~~
- ~~(b) Shall not attempt to present facts into evidence during his comments.~~

~~[3] 2. The state engineer may [:(a)] limit the time allowed for public comment [and (b) allow questions to be addressed to a person presenting public comment].~~

NAC 533.120 is hereby amended to read as follows:

NAC 533.120 Designation of person to preside over hearing. If the state engineer designates a person to preside over a protest hearing, *if authorized by the state engineer*, the person so designated may make the ultimate ruling in the hearing ~~[unless otherwise limited by the state engineer].~~

NAC 533.130 is hereby repealed.

NAC 533.140 is hereby amended to read as follows:

NAC 533.140 Pleadings: Answers.

1. An applicant may, within 30 days after service of a notice of protest, file an answer to a protest filed against his application. ~~[The answer must be accompanied by the filing fee prescribed by NRS 533.435.]~~

2. ~~[An applicant filing such an answer shall, within 2 days after he files the answer, serve]~~
A copy of the answer *shall be served* upon the protestant who filed the protest to which the answer responds *on the same day it is filed in the Office of the State Engineer.*

NAC 533.150 is hereby amended to read as follows:

NAC 533.150 Withdrawal of protest: Procedure; ~~[consequences;] stipulation regarding protest.~~

1. A protestant may withdraw his protest by filing with the state engineer a written request for withdrawal of the protest at any time before the time scheduled for the protest hearing.

2. ~~[If the protestant withdraws his protest by filing his written request for withdrawal less than 72 hours before the time scheduled for the protest hearing:~~

~~(a) The protestant shall pay to the state engineer an amount equal to the costs associated with preparing to hold the hearing, as determined by the state engineer; and~~

~~(b) Unless more than one protest was filed against the application, the state engineer will proceed to act upon the application in the same manner as if no protest had been filed.]~~

The applicant and protestant may enter into a stipulation regarding the application and related protest. When signed and filed with the office of the state engineer, such a stipulation may be treated as a withdrawal of the protest. The filing of such a stipulation does not:

- (a) Make the state engineer a party to the agreement;
- (b) Establish a water right not previously acquired pursuant to law; or
- (c) Bind the state engineer or any other protestant not a party to the stipulation.

NAC 533.160 is hereby amended to read as follows:

NAC 533.160 Prehearing discovery: Parties' right to conduct; ~~[state engineer's right to order;]~~ admissibility at hearing.

1. Prehearing discovery is not a matter of right, but may be conducted in compliance with a stipulation between the parties.

~~[2. If the state engineer orders that a deposition be taken, he will notify the concerned parties at least 15 days before the date set for the deposition. The notice will set forth the name of the party to be deposed and the time, place and general subject matter on which the party will be deposed.]~~

~~3. No party may use testimony contained in a deposition in place of a witness's testimony during the hearing, except upon order of the state engineer and upon a showing of extreme circumstances preventing the witness from appearing at the hearing.]~~

NAC 533.170 is hereby amended to read as follows:

NAC 533.170 Prehearing conferences: ~~[State engineer's right to order;]~~ scope.

1. The state engineer may ~~[upon 15 days' notice to the parties,]~~ hold a prehearing conference to:

- (a) Formulate or simplify the issues involved in the proceeding;
- (b) ~~[Record]~~ **Obtain** admissions of fact or any stipulation of the parties;
- (c) Identify the witnesses and the subject matter of their expected testimony and ~~[if necessary,]~~ limit the number of witnesses, **if necessary**;
- (d) **Rule on any motions**;
- (e) Arrange for the exchange of:
 - (1) Proposed exhibits;
 - (2) Prepared testimony of experts;
 - (3) Lists of witnesses;
 - (4) Lists of exhibits; or
 - (5) Other materials the state engineer deems to be necessary;
- (f) Limit the time and scope of the examination of witnesses;
- (g) Establish an agenda for the hearing which is most suitable to the particular case, including the order in which parties will present their respective cases; and
- (h) Discuss and resolve other matters which may promote orderly conduct, expedite the hearing or achieve a settlement.

2. ~~[Unless otherwise ordered for good cause shown, [t]he failure of a party to attend a prehearing conference constitutes a waiver of any objection to the rulings made or agreement reached at the prehearing conference.~~

3. The rulings ~~[made by the state engineer,]~~ **action taken or** agreements made ~~[between the parties]~~ at a prehearing conference:

- (a) Will be made a part of the record;
 - (b) Control the course of subsequent proceedings unless modified by the state engineer;
- and
- (c) Are binding upon all parties.

4. In any proceeding, the state engineer may call all the parties together for a conference before the taking of testimony or may recess the hearing for such a conference to carry out the intent of this section.

NAC 533.180 Hearings: Nature and objective. ~~[A protest hearing will be conducted as a quasi-judicial proceeding with t]~~The objective of *a protest hearing is to* develop~~[ing]~~ an adequate record upon which the state engineer may rely to make a sound decision, without causing unnecessary delay and expense to participating parties or to the office of the state engineer.

NAC 533.190 is amended to read as follows:

NAC 533.190 Hearings: Location of; conduct of parties at.

1. Protest hearings will be held at the time and place designated by the notice of hearing. ~~[The state engineer will attempt to find a location which will accommodate the parties and optimize the resources of the office of the state engineer.]~~
2. Each party to a protest hearing, his counsel or other agent and any spectators shall conduct themselves in a respectful manner during the hearing. If a person conducts himself in a disrespectful manner, the state engineer may expel him from the hearing.

NAC 533.200 Hearings: Right to representation by attorney; role of attorney.

1. A party in a protest hearing may be represented by an attorney or other agent.
2. An attorney representing a party in a protest hearing must be an active member of the State Bar of Nevada or associated with an active member of the State Bar of Nevada.
3. An attorney or other agent representing a party will be recognized as fully controlling the case on behalf of the party.
4. Following the entry of an appearance by an attorney or other agent for a party, all notices, documents and orders thereafter served must be served upon the attorney or agent. Service on the attorney or agent constitutes, for all purposes, valid service upon the party represented.

NAC 533.330 is amended as follows:

NAC 533.330 Failure of party to appear. If a party fails to appear at ~~[the scheduled protest hearing and no continuance has been granted, the state engineer will hear the evidence of the witnesses who have appeared and will proceed to consider the matter and dispose of it on the basis of the evidence presented.]~~ *the time and place set for a prehearing conference or hearing without prior notification to the state engineer, the state engineer may dismiss that party and related protest.*

NAC 533.210 is hereby amended to read as follows:

NAC 533.210 Hearings: Permissible issues.

1. Issues to be considered during a hearing will be determined from the contents of the application and any protests. ~~[, and may include any issues that may arise under chapters 533 and 534 of NRS].~~
2. The state engineer may define or limit the issues to be considered. ~~[If new issues arise for the first time during the hearing, the state engineer may allow these issues to be pursued, if appropriate and relevant.]~~

NAC 533.220 Hearings: Reporting by court reporter; availability and costs of transcripts.

1. The state engineer will ensure that proceedings at hearings are reported by a certified court reporter.

2. The original and one copy of the transcript of the proceedings must be filed with the state engineer.
3. The applicant and the protestant shall bear equally the fees of the court reporter for:
 - (a) The appearance of the court reporter;
 - (b) The travel expenses of the court reporter; and
 - (c) Reporting and transcribing the portion of the transcript consisting of comments by the state engineer and the public.
4. The applicant and the protestant shall bear pro rata, based on the percentage of the transcript taken up by their own case, the fees of the court reporter for reporting and transcribing the portion of the transcript taken up by the applicant's and the protestant's case.
5. Any person may obtain a copy of a transcript prepared under this section by requesting such a copy from the Office of the State Engineer or the court reporter and upon payment of the actual cost of obtaining the copy from the court reporter.

NAC 533.230 is hereby amended to read as follows:

NAC 533.230 Hearings: Identification of witnesses.

~~[1.] Before the hearing, the state engineer may require the parties to identify the persons intending to offer **[direct oral]** testimony at the hearing. **[The state engineer will notify the parties of this requirement in any manner determined by the state engineer to give the parties notice of this requirement.**~~

~~—2. The state engineer will not require the advance identification of person who intends to offer rebuttal testimony.~~

~~—3. If a party fails to comply with a prehearing order to identify a witness and this failure results in prejudice to the opposing party, the state engineer may:~~

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

~~(b) Disregard any portion of the testimony.]~~

NAC 533.240 is hereby amended to read as follows:

NAC 533.240 Hearings: Oral testimony; oaths and affirmations.

1. All oral testimony of witnesses appearing on behalf of a party must be given under oath or affirmation. For the purposes of this section, public comment is not considered to be testimony.

2. A witness may give his oral testimony as his own narrative or his attorney or agent may direct his oral testimony.

3. ~~[A witness who gives his oral testimony under oath or affirmation must submit to cross-examination.]~~ *At the hearing, the applicant may cross-examine any protestant's opposing witness; however, protestants can not cross-examine each others witnesses.*

4. *If the state engineer or hearing officer determines that a witness lacks specific expertise, experience or direct knowledge to testify on the subject on which the witness is testifying, the state engineer may strike the testimony of the witness and dismiss the witness from testifying in the hearing.*

NAC 533.250 is hereby amended to read as follows:

NAC 533.250 Hearings: Written testimony.

1. When the particular facts of an application and protest indicate that many witnesses will appear at the hearing or that a considerable amount of technical testimony will be necessary, the

state engineer may require parties and witnesses to submit their testimony in written form before the hearing date.

2. If written testimony is submitted, the witness shall also appear at the hearing to:

(a) Affirm that his written testimony is true and correct and that he personally prepared it or directed its preparation; and

(b) Submit to cross-examination.

3. Written testimony will not be read into the record, but must be entered into evidence as an exhibit. The state engineer may, however, require a witness who has submitted written testimony to summarize it at the hearing.

~~[4. If written testimony is required, the state engineer will inform the parties of this requirement in any manner determined by the state engineer to give the parties notice of this requirement. The notice will also inform the parties of the related obligation to appear at the hearing.]~~

NAC 533.260 is hereby amended to read as follows:

NAC 533.260 Hearings: Admissibility ~~[and consideration]~~ of evidence; *relevancy*.

1. ~~[The state engineer will consider only:~~

~~(a) Oral or written testimony submitted under oath or affirmation;~~

~~(b) Facts of which administrative notice has been taken pursuant to NAC 533.300; and~~

~~(c) Facts or other information entered into the record by stipulation.]~~ *All evidence*

offered in a hearing, including the testimony of a witness must be relevant.

2. For the purposes of this section, evidence is relevant only if the evidence has a 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 without the evidence, and is directly related to the subject matter of the proceeding.*

3. The state engineer may exclude testimony that is irrelevant, incompetent or unduly repetitious by:

(a) Requesting a party to cease his line of examination or narrative; or

(b) Refusing to consider the testimony when making his final determination.

4. Evidence may be admitted if it is the type commonly relied upon by reasonable and prudent persons in the conduct of their affairs. When a hearing is expedited, any part of the evidence may be received in written form.

NAC 533.270 is hereby repealed.

Chapter 533 of NAC is hereby amended by adding thereto a new section to read as follows:
NAC 533. Rebuttal evidence.

1. If the state engineer authorizes rebuttal evidence, the party may offer in its rebuttal only rebuttal evidence that directly explains, counteracts or disproves facts offered into evidence by other parties of record. The party may not offer any other evidence in its rebuttal.

NAC 533.280 is hereby amended to read as follows:

NAC 533.280 Hearings: Identification and exchange of exhibits.

1. The state engineer may require in advance of the hearing:

(a) Identification of each exhibit that a party intends to use ~~[to support or illustrate a particular position]~~; and

(b) Exchange of exhibits between certain designated parties. ~~[If applicable, the state engineer will notify the parties of this requirement in any manner determined by the state engineer to give the parties notice of this requirement.]~~

2. If a party fails to comply with a prehearing order to identify or exchange exhibits ~~[and the lack of notice would result in prejudice to the opposing party]~~, the state engineer may refuse to accept the exhibit into evidence.

NAC 533.290 is hereby amended to read as follows:

NAC 533.290 Hearings: Admissibility and form of exhibits.

1. Exhibits that will be introduced as evidence must be:

(a) In a form that is readily reproducible; and

(b) On paper that is 8 1/2 by 11 inches or that may be folded to that size, *unless otherwise permitted by the state engineer.*

(c) In any readily reproducible form permitted by the state engineer.

2. Larger charts, maps, drawings or other materials will not be introduced into evidence but may be used for demonstrative purposes.

3. ~~[Parties must give each other an opportunity to review each other's exhibits before the state engineer will accept them into evidence.]~~

~~4.]~~ An original and one copy of each exhibit that is offered into evidence must be submitted to the state engineer. ~~[or presiding officer.]~~

4. If relevant evidence is included in a written or printed statement, book or document of any kind, containing other material not relevant and not intended to be put into evidence, the statement, book or document containing the other matter may not be received or admitted in whole. Counsel or other parties offering the evidence or exhibit shall present, in convenient and proper form for filing, a copy of the relevant portions.

NAC 533.300 is hereby amended to read as follows:

NAC 533.300 Hearings: Administrative notice. The state engineer may take administrative notice of or accept into evidence by reference to their contents:

1. Files and records of the office of the state engineer;

2. Public records that have been prepared by other governmental agencies;

3. Facts of which judicial notice may be taken by the courts of this state; and

4. Technical or scientific matter that:

(a) Has been generally accepted by the relevant scientific community; and

(b) Is within the field of expertise of the Office of the State Engineer.

5. *The expertise, technical competence and specialized knowledge of the agency may be utilized in the evaluation of evidence.*

NAC 533.310 Hearings: Stipulations.

1. With the approval of the state engineer, the parties may stipulate to any fact in issue, either by a written stipulation introduced into evidence as an exhibit or by an oral statement entered in the record.

2. Such a stipulation is binding only upon the parties to the stipulation and is not binding on the state engineer.

3. The state engineer may require proof by independent evidence of the stipulated facts.

NAC 533.330 Hearings: Continuances.

1. A party may request that the state engineer continue a protest hearing to a later date by submitting a request for continuance to the state engineer at least 5 working days before the date set for the hearing.
2. The state engineer will notify the other parties of any request for continuance and accept any responses to the request by the other parties.
3. After considering the request and any responses, the state engineer may grant or deny the request.
4. The state engineer may reset a hearing which has previously been continued only if he gives at least 15 days' notice to all parties.

NAC 533.340 Hearings: Consolidation.

1. The state engineer may consolidate two or more proceedings if it appears that the issues are substantially the same and the interests of the parties will not be prejudiced by the consolidation.
2. The state engineer will determine the order in which the parties introduce their evidence and the general procedure to be followed during the course of a consolidated hearing.
3. The state engineer will apportion the costs of a consolidated hearing among the parties responsible for the costs.

NAC 533.350 Hearings: Order of proceedings. The state engineer has full discretion in each case to determine the order in which the parties introduce their evidence and the general procedure to be followed during the course of each protest hearing. The presentation will ordinarily be in the following order:

1. The state engineer will call the proceeding to order and announce the matter to be heard.
2. ~~[/del>~~
3. ~~[/del>~~
4. The state engineer will inquire as to whether the parties are represented by counsel or other agent.
5. The state engineer will offer the exhibits of the state engineer into evidence. Any party may then object to that evidence.
6. The ~~[/del> *state engineer may offer the parties the opportunity to* make opening statements which briefly summarize what their proposed testimony and exhibits are intended to establish. Opening statements must not contain evidence. ~~[/del>~~~~
7. The ~~[/del> *parties* shall ~~[/del> present their cases in chief *in the order established by the state engineer and* which includes:
 - (a) Testimony, either by his own narrative or by direct examination conducted by his attorney or agent;
 - (b) Cross-examination;
 - (c) Redirect examination; and
 - (d) Recross-examination ~~[/del>. The same order of examination will be followed for each witness ~~[/del> *Question to clarify a point or correct a mistake may be allowed at any time.*~~~~~~~~

8. The state engineer or his staff may question ~~[the protestant, the applicant and]~~ any ~~[of their]~~ witnesses *during the course of their testimony*.

9. After all testimony and comments have been received on behalf of the applicant and protestant, the state engineer will admit into evidence, subject to objection *and ruling*, any *remaining* exhibits that have not already been admitted during *the course of* the hearing. The state engineer may rule on the admissibility of a questioned exhibit after hearing arguments or he may take the objections under submission and announce the ruling on admissibility as part of the final decision.

10. *At his discretion* ~~[T]~~the state engineer may allow ~~[permit]~~ closing statements ~~[from the protestants, followed by one from the applicant,]~~ that briefly summarize~~[s]~~ the points respectively made *during the hearing*. ~~[in the case in chief. Cross-examination regarding the contents of a closing statement will not be allowed.]~~

11. ~~[Interested persons and persons presenting public comment may present their respective comments. The state engineer may examine any interested person or person presenting public comment.]~~ *Public comment will usually be taken at the end of the hearing; however, the state engineer may vary the time for taking public comment if warranted.*

12. The state engineer may indicate whether legal briefs must be filed. If the filing of briefs is ordered, he will ~~[state]~~ *indicate* the subjects to be addressed and the schedule for the submission. Briefs ordered under this subsection must be filed in the Office of the State Engineer and must be accompanied by an acknowledgment or an affidavit showing service on the other parties.

13. Unless the state engineer orders otherwise, the state engineer will close the record of the hearing, take the matter under submission and rule as provided in ~~[subsection 4 of]~~ NRS chapters 533 and 534~~[533.370]~~.

NAC 533.360 Hearings: Additional evidence. At any time during or after the protest hearing, the state engineer may order the presentation of further evidence on any issue. The state engineer may authorize any party to file within a fixed time after the hearing additional specific documentary evidence to become part of the record.

NAC 533.370 Hearings: Interim order. At any time during the protest hearing process, the state engineer may issue an appropriate interim order.

Chapter 533 of NAC is hereby amended by adding thereto a new section to read as follows:
NAC 533.375 Petitions for reconsideration or rehearing. Petitions for reconsideration or rehearing will not be accepted. The method for appeal of a decision of the state engineer is set forth in NRS 533.450.

NAC 533.380 Petition to adopt, amend or repeal regulation on practice and procedure of protest hearing.

1. If a person desires to petition the state engineer, pursuant to NRS 233B.100, to adopt, amend or repeal a regulation regarding the practice and procedure of protest hearings, he must submit such a petition in writing and include a statement of the petitioner's interest, the nature of the request, the reasons for the request, relevant data, argument for the request and such other matters as the petitioner believes may be helpful to the state engineer in determining the proper action to take in the matter. The petition must be signed by or on behalf of the petitioner and filed in the office of the state engineer.

2. If a petition requests the adoption of a proposed regulation, it must also include the full text of the proposed regulation.

3. If a petition requests the amendment or repeal of an existing regulation, it must also include a copy of the regulation or that portion of the regulation in question and the suggested amendment.