

Title 115 - NEBRASKA DEPARTMENT OF ENVIRONMENTAL QUALITY

Chapter 1 - DEFINITIONS OF TERMS

001 "Agency" shall mean the Nebraska Department of Environmental Quality.

002 "Agency Director" shall mean the director of the Nebraska Department of Environmental Quality.

003 "Argument" shall mean the oral statement of the petitioner or any other party which explains his or her view of the facts and issue to be decided, the law applicable to the question presented, and the reasoning that connects the facts and law.

004 "Complaint" shall mean the initial document issued by the agency director and served upon an alleged violator or violators that specifies the provision of law, rule or regulation, or order alleged to be violated, the facts alleged to constitute a violation, and prescribes any necessary corrective action to be taken.

005 "Contested case" shall mean a proceeding before the agency in which the legal rights, duties, or privileges of specific parties are required by law or constitutional right to be determined after hearing before the agency.

006 "Council" means the Nebraska Environmental Quality Council.

007 "Declaratory order proceeding" shall mean a proceeding initiated by a petitioner seeking issuance of a binding order by the agency as to the applicability of specified circumstances to a statute, rule, regulation, or order within the primary jurisdiction of the agency.

008 "Ex parte communication" shall mean an oral or written communication which is not on the record in a contested case with respect to which reasonable notice to all parties was not given. Ex parte communication shall not include:

008.01 Communications which do not pertain to the merits of a contested case;

008.02 Communications required for the disposition of ex parte matters as authorized by law;

008.03 Communication in a rulemaking proceeding; and

008.04 Communications to which all parties have given consent.

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009 "Hearing officer" shall mean the person or persons conducting a hearing, contested case, or other proceeding pursuant to the Administrative Procedure Act, whether designated as the presiding officer, administrative law judge, or some other title designation.

010 "Intervenor(s)" shall mean persons, political subdivisions, corporations, organizations, or other entities who have or claim to have any interest, legal right, duty, privilege, or immunity, which would be directly affected by the agency's issuance of a binding declaratory order.

011 "Necessary party" shall mean a person who or an entity which has a specific interest in the applicability of the statute, rule, regulation, or order, as distinguished from a general interest such as may be the concern of the public at large. A necessary party is one which is or would be adversely affected in a legally cognizable way by the uncertainty sought to be resolved.

012 "Party(ies)" shall mean persons, political subdivisions, corporations, organizations, or other entities subject to the jurisdiction of the agency who are involved in a contested case, declaratory order proceeding, or other proceeding pursuant to the Administrative Procedure Act.

013 "Petition" shall mean the initial document filed in accordance with this title to initiate a contested case or declaratory order proceeding that sets forth a claim and request for agency action.

014 "Petitioners" shall mean a party or parties who have filed a petition with the agency in a contested case or declaratory order proceeding.

015 "Pleading" shall mean any written petition, answer, or motion used in any contested case or declaratory order proceeding before the agency as set forth in this Title.

016 "Respondent" shall mean a party or parties in a contested case whose legal rights, duties, or privileges are subject to petitioner's demands. The agency director shall be the respondent in cases involving appeals of agency decisions or actions.

Enabling Legislation: Neb. Rev. Stat. §84-901 et seq.; §81-1504(1)(7)(9)(13); §81-1507.

Legal Citation: Title 115, Ch. 1, Nebraska Department of Environmental Quality

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Chapter 2 - PETITION FOR DECLARATORY ORDER

001 Generally. A request for a declaratory order must be made by a petition that meets the requirements of Chapter 7.

002 Who may file. Any person may petition the agency for issuance of a declaratory order as to the applicability to specified circumstances of a statute, rule, regulation, or order which is within the primary jurisdiction of the agency.

003 When orders appropriate. A declaratory order may be requested on the applicability of a statute, rule, regulation, or order enforced by the agency. "Applicability" refers to the appropriateness of the relation of the law to the person, property, or state of facts, or its relevance under the circumstances given. It may include such questions as whether the law applies at all, to whom it applies, when it applies, how it applies, or which law applies. Considerations as to whether issuance of a declaratory order is appropriate include:

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

003.02 A declaratory order may be requested to obtain a determination of proposed conduct, not to obtain a determination of the effect of conduct that has already occurred.

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

003.04 A declaratory order may not be requested to obtain a declaration by the agency that a statute or regulation is unconstitutional or that a regulation of the agency is invalid.

003.05 A declaratory order may not be issued by the agency that would substantially prejudice the rights of a person who would be a necessary party and who does not consent in writing to the determination of the matter by a declaratory order proceeding.

004 Form of petition. A petition for declaratory order shall be in the form of either a pleading or letter which shall contain each of the following:

004.01 A caption which shall include:

004.01A The venue: BEFORE THE DEPARTMENT OF ENVIRONMENTAL QUALITY, STATE OF NEBRASKA;

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004.01B A heading specifying the subject matter and the name of the petitioner; and

004.01C The name of the pleading: PETITION FOR DECLARATORY ORDER.

004.02 Contents which shall include:

004.02A The name and address of the petitioner;

004.02B The name and address of all persons or entities, known to the petitioner, who may have a specific interest in the applicability of the statute, rule, regulation, or order or who may be adversely affected by the issue sought to be resolved by the petitioner.

004.02C The statute, rule, regulation, or order upon which the petitioner seeks issuance of a declaratory order;

004.02D A detailed statement of all of the material facts and specific circumstances which apply to petitioner's request for issuance of a declaratory order;

004.02E All propositions of law or contentions asserted by the petitioner;

004.02F A demand for the relief to which the petitioner alleges entitlement. The petition shall state the petitioner's position as to how the agency should rule and why the agency should rule in the manner requested; and

004.02G Any documents pertinent to the petition that the petitioner wishes to be considered by the agency.

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

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

004.05 Size and paper. The petition shall be made on white, letter-sized (8 ½ x 11 inch) paper.

004.06 Print. The petition shall be legibly typewritten, photostatically reproduced, printed, or handwritten. If handwritten, the petition must be written in ink. Only one side of a page shall contain any writing.

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004.07 Attachments. Any documents attached to a petition shall be securely fastened to the pleading and shall meet the requirements of 004.05 and

004.06 above and, when possible, be reproduced on 8 ½ x 11 inch paper or placed in an 8 ½ x 11 inch envelope and clearly marked as an attachment to the petition.

004.08 The petition shall be subscribed and verified by the petitioner. If the petitioner is a corporation, political subdivision, or other entity, then the petition shall be subscribed and verified by a duly authorized agent of the petitioning entity.

004.09 Sample Petition. The petitioner may use the sample form of a petition in subsection 011 of this chapter. The petitioner may also prepare a reasonable facsimile of the sample form so long as the requirements of subsections 004 of this chapter are satisfied.

004.10 Written consents. The petitioner shall also attach to the petition any written consents obtained from any necessary party that the petition may be determined by use of a declaratory order proceeding.

005 Submission and service of a declaratory order petition.

005.01 The original petition for declaratory order shall be filed with the agency director by mail or in person during the agency's normal business hours.

005.02 The petition shall be deemed as filed when it is received by the agency. The agency shall date stamp all petitions upon receipt.

005.03 At the same time the petition is filed with the agency, the petitioner shall serve a copy of the petition, by certified mail, return receipt requested, on all necessary parties, including all persons, political subdivisions, corporations, organizations, or other entities who are known to have or claim any interest, legal right, duty, privilege, or immunity which would be directly affected by issuance of a declaratory order in this matter by the agency.

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006 Disposition of the petition.

006.01 Generally. Upon the filing of a petition, the agency director may consider the petition or delegate the matter to a designated hearing officer or agency employee to consider the petition and recommend a decision to the agency director. In reviewing the petition, the agency may do one or more of the following:

006.01A Require that additional information be submitted before the petition will be further considered;

006.01B Require a petitioner to provide notice to persons or entities who may be necessary parties and other persons that a request for a declaratory order has been filed with the agency;

006.01C Schedule a date, time, and location at which the petitioner and any other parties to the proceeding may make an oral presentation on the petition;

006.01D Consider the petition and any attachments without oral presentation.

006.02 Within 30 days after the petition is filed, the agency shall, in writing:

006.02A Issue an order declaring the applicability of the statute, regulation, rule, or order in question to the specified circumstances; or 006.02B Agree to issue an order by a specified time declaring the applicability of the statute, regulation, rule, or order in question to the specified circumstances; or

006.02B Agree to issue an order by a specified time declaring the applicability of the statute, regulation, rule, or order in question to the specified circumstances; or

006.02C Set the matter for specified proceedings as set forth in 006.01; or

006.02D Decline to issue a declaratory ruling, stating the reasons for the agency's decision.

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006.03 Notwithstanding subsection 006.02 of this chapter, the agency may determine at any time that it will not issue a declaratory order if issuance of an order under the circumstances would be contrary to subsection 009 of this chapter. The agency shall notify the petitioner and, if applicable, any intervenor or necessary party in writing when the agency determines not to issue a declaratory order.

007 Intervention. Intervention in a declaratory order proceeding shall be allowed if the requirements of Chapter 8, 001 and 002 are satisfied. The agency may invite any person or entity to file a petition for intervention.

008 Issuance of declaratory order.

008.01 The declaratory order shall be in writing and shall include the following:

008.01A The names of all parties to the proceeding upon which the order is based;

008.01B The facts upon which the order is based;

008.01C The statute, regulation, rule, or order at issue in the matter;

008.01D The agency's conclusion as to the applicability of the statute, regulation, rule, or order to the facts; and

008.01E The reasons relied upon by the agency to support its conclusions.

008.02 A copy of the declaratory order shall be served upon each party by certified mail, return receipt requested.

008.03 Effect of a declaratory order. A declaratory order shall have the same status and binding effect as any other order issued in a contested case.

009 Circumstances under which agency will not issue declaratory orders.

009.01 Grounds upon which the agency shall refuse to issue a declaratory order include, but are not limited to, the following:

009.01A The petition requests a declaratory order on a matter that is outside the scope of authority of the agency;

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009.01B The petition requests review or appeal of a decision made by the agency in a contested case;

009.01C The petition requests a declaratory order on the effect of past conduct;

009.01D An investigation for purposes of a formal adjudication, a contested case, or a petition to issue, amend, or repeal regulations is pending before the agency involving the petitioner on substantially the same or similar facts of issues raised in the petition;

009.01E The petition seeks a declaration that a statute or rule or regulation is unconstitutional or invalid;

009.01F The issue raised in the petition has been settled by a change in circumstances or other means so as to render moot the need for a declaratory order;

009.01G An order would substantially prejudice the rights of a person or entity who would be a necessary party and who does not consent in writing to the determination of the matter by a declaratory order proceeding;

009.01H An order would not resolve the controversy or uncertainty; or

009.01I The question posed or facts presented are insufficiently specific, overly broad, or are otherwise inappropriate as a basis upon which to decide the matter.

009.02 Grounds upon which the agency may determine to refuse to issue a declaratory order include, but are not limited to, the following:

009.02A Refusal is necessary to assure adequate allocation of agency resources are available for issuing rulings on petitions raising questions of greater urgency or significance;

009.02B The question presented is of such complexity that the agency has had insufficient opportunity or resources to develop a fully matured ruling;

009.02C The petitioner fails to submit any additional information requested by the agency or submits such information after the date established by the agency.

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010 Appeal. A declaratory order is subject to review in the manner provided for review of contested cases under the Administrative Procedure Act, Neb. Rev. Stat. §84-901 et seq. Specific procedures for appeal are set forth in Neb. Rev. Stat. §84-917.

011 Form of Petition for Declaratory Order

BEFORE THE NEBRASKA DEPARTMENT OF ENVIRONMENTAL QUALITY

In the matter of)	PETITION FOR
the application of [name])	DECLARATORY ORDER
)	

1. Petitioner's name and address;
2. The name and address of all persons who or entities which may have a specific interest in the applicability of the statute, rule, regulation, or order, or who may be adversely affected by the issue sought to be resolved;
3. All material facts and specific circumstances;
4. All rules of law which apply;
5. Petitioner's demand for relief;

DATED on this ____ day of _____, 20__.

VERIFICATION

STATE OF _____)
) ss.
COUNTY OF _____)

____[Print name]____, being first duly sworn, states that he/she is the petitioner/petitioner's agency in the above entitled matter; that he/she has read the foregoing Petition for Declaratory Order; and that the allegations of fact therein are true.

[Petitioner's signature]

SUBSCRIBED and sworn to before me on this __ day of _____, 20__.

NOTARY SEAL

Notary Signature

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Enabling Legislation: Neb. Rev. Stat. §§81-1504(1)(13); §84-909; §84-912.01.

Legal Citation: Title 115, Ch. 2, Nebraska Department of Environmental Quality

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Chapter 3 - PUBLIC RECORDS AVAILABILITY

001 Any person may examine public records maintained by the agency during the agency's business hours, make memoranda or abstracts from such records, or copies of such records, upon written request to the records manager of the agency for an appointment to view such records at its Lincoln office.

001.01 The request letter and its envelope should be marked "Records Request" and include the name, mailing address and day-time telephone number in the event the agency needs to contact the person.

001.02 The request should reasonably describe the records being sought and, whenever possible, include specific information about each record sought, such as the date, title or name, author, recipient, and subject matter. The agency does not conduct research to determine what records to provide.

001.03 If the request does not sufficiently describe the records to allow the agency to locate them, the agency may require additional information be provided.

001.04 A written request for copies of records shall be considered an agreement that the person requesting the copies will pay all applicable fees up to fifty dollars (\$50). Copies the cost of which are anticipated to exceed fifty dollars are subject to 003.02.

001.05 Records shall not be removed from the agency premises.

001.06 The agency will not provide copies of materials that are subject to copyright law.

002 Upon receipt of a written request for access to or copies of a public record, the agency will provide the requested record(s) for examination or copies as soon as practicable but no later than four business days after the written request is received except as provided in 002.01.

002.01 If the entire request cannot reasonably be fulfilled within four business days due to the significant difficulty or extensiveness of the request, the agency will notify the requestor in writing of the reasons for the delay, including the earliest practicable date for fulfilling the request, an estimate of the expected cost of any copies, and an opportunity for the requester to modify or prioritize the items within the request.

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003 Costs. Any person requesting photographic or other copies of public records must pay for the cost of reproduction in an amount determined by the agency to cover the actual cost of making the copies available.

003.01 Charges for sales tax, and postage if necessary, shall be assessed on all requests.

003.02 If the cost of copies is estimated by the agency's records management unit to cost more than fifty dollars (\$50), the agency may require the requester to furnish a deposit prior to fulfilling the request. Such deposit shall not exceed the estimated cost or fifty dollars (\$50), whichever is less. The balance of any deposit above actual costs shall be returned to the requester.

004 The agency will provide a certified copy of the agency's public records upon receipt of a written request and on payment of the applicable fees, including:

004.01 The fee shall be thirty cents per hundred words if the copy is typewritten, or the cost of copies under 003.

004.02 A fee of one dollar shall be charged for each certificate of the certifying officer.

004.03 Transcripts and other documents prepared and transcribed by a court reporter may be viewed but not copied. Arrangements for reproduction may be made with the court reporter.

005 The agency may withhold records in accordance with Neb. Rev. Stat. §84-712.05. Any reasonably segregable public portion of such record shall be provided upon request after deletion of the portions which may be withheld.

005.01 Any person denied a request for public records by the director or his or her designee shall receive a written response in accordance with Neb. Rev. Stat. §84-712.04.

005.02 Any person denied a request for public records may seek review in accordance with Neb. Rev. Stat. §84-712.03.

Enabling Legislation: Neb. Rev. Stat. §§84-712 et seq.; §25-1280.

Legal Citation: Title 115, Ch. 3, Nebraska Department of Environmental Quality

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Chapter 4 - CONFIDENTIALITY FOR TRADE SECRETS

001 Whenever the agency requests that a regulated entity furnish records or information which may be entitled to confidential treatment as trade secrets under Neb. Rev. Stat. §81-1527 or §84-712.05, the regulated entity may raise a claim of confidentiality for trade secrets at the time of submission of the record or information to the agency.

001.01 If no claim of confidentiality for trade secrets accompanies the record or information when it is received by the agency, the claim is waived and the material may be made available to the public by the agency without further notice to the submitting entity, unless the claimant establishes a just reason for the claim subsequent to submission of the record or information under 002.

001.02 The claimant shall certify the record or information by placing on or attaching at the time of submission a cover sheet with appropriate notice, reasons for asserting the claim, and language, such as trade secret, proprietary, or confidential.

001.03 The appropriate notice and reasons for asserting the claim shall include:

001.03A Certification that the record or information is entitled to confidentiality as a trade secret and that such claim has not expired by its terms, been waived, or withdrawn;

001.03B Description of reasonable measures the claimant has taken to protect the confidentiality of the information or record, and that it intends to continue to take such measures;

001.03C Assurance that the information or record is not, and has not been, reasonably obtainable without the claimant's consent by other persons (other than governmental bodies) by use of legitimate means; and

001.03D Reasons why or how disclosure of the information or record is likely to result in substantial harmful effects to the business's competitive position and what those harmful effects would be, why they should be viewed as substantial, and an explanation of the causal relationship between disclosure and such harmful effects.

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001.04 Allegedly confidential portions of otherwise non-confidential records and information should be clearly identified by the claimant and may be submitted separately to facilitate identification and handling by the agency. The agency may require the claimant to submit a separate copy of the record and information with the confidential portions omitted to facilitate requests for access by the public.

001.05 If the regulated entity desires confidential treatment only until a certain date or the occurrence of a certain event, the notice should so state.

002 If a confidentiality claim for trade secrets covering the record or information is received after the submission of the record or information itself is received, the agency will make such efforts as are administratively practicable to associate the late claim with copies of the previously-submitted information in the agency files, although the agency cannot assure that such efforts will be effective given the possibility of prior disclosure to the public.

003 For each claim the director or his or her designee shall determine whether the record or information relates to processes or methods entitled to protection as trade secrets.

003.01 In making such determination which shall be on the record, the director shall consider whether:

003.01A The claimant has asserted a business confidentiality claim which has not expired by its terms, nor been waived nor withdrawn;

003.01B The claimant has satisfactorily shown that it has taken reasonable measures to protect the confidentiality of the information or record, and that it intends to continue to take such measures;

003.01C The information or record is not, and has not been, reasonably obtainable without the business' consent by other persons (other than governmental bodies) by use of legitimate means (other than discovery based on a showing of special need in a judicial or quasi-judicial proceeding);

003.01D No statute specifically requires disclosure of the information or record; and

003.01E The claimant has satisfactorily shown that disclosure of the information or record is likely to cause substantial harm to the business's competitive position.

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004 Whenever the director or his or her designee preliminarily determines that records or information required to be submitted to the agency are not entitled to confidential treatment as trade secrets, a written explanation of the reasons for such determination shall be furnished to the claimant, who shall be afforded an opportunity to comment before a final decision is made.

004.01 Notice of such determination shall be sent by certified mail to the claimant specifying a reasonable time allowed for comments.

004.02 Failure to furnish timely comments shall be considered a waiver of the claim.

005 Notice of the final decision denying a claim for confidential treatment of records or information as trade secrets shall be provided to the claimant in writing by certified mail. The agency will make the record or information available to the public on the tenth day after the date of the claimant's receipt of the written notice of denial of its claim.

006 The director may not withhold records as confidential if they have been disclosed in an open court, open administrative proceeding, open meeting or disclosed by the department in its duties.

Enabling Legislation: Neb. Rev. Stat. §§81-1527; §84-712.05.

Legal Citation: Title 115, Ch. 4, Nebraska Department of Environmental Quality

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Chapter 5 - PUBLIC HEARINGS

001 This chapter contains minimum requirements for public hearings for:

001.01 Permit decisions which by statute or other agency regulations must provide public notice, public review and comment, and an opportunity to request a public hearing before making a final permit decision. More specific requirements in other agency titles may apply.

001.02 Fact-finding hearings required by statute or regulation.

002 To the extent provided by statute or other agency regulations authorizing public hearings for proposed permit decisions, any person may submit written comments on the proposed permit decision and may request a public hearing, if no hearing has already been scheduled. A request for a public hearing shall be in writing and shall state the nature of the issues proposed to be raised in the hearing.

003 If the director or his or her designee tentatively decides to issue or modify a permit, a draft permit shall be prepared. The draft permit shall be:

003.01 Accompanied by a statement of basis described in 005;

003.02 Based on the administrative record described in 006;

003.03 Publicly noticed as described in 007; and

003.04 Made available for public review and comment.

004 If the director or his or her designee tentatively decides to deny or revoke a permit, the tentative decision shall be:

004.01 Accompanied by a statement of the basis and reasons for the revocation described in 005;

004.02 Based on the administrative record described in 006;

004.03 Publicly noticed as described in 007; and

004.04 Made available for public review and comment.

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005 A statement of basis shall be prepared for every draft permit decision. A statement of basis shall briefly describe the authority and reasons for the conditions of the draft permit or in the case of permit denial or revocation, reasons supporting the tentative decision.

006 The administrative record for a tentative permit decision shall consist of:

006.01 The application, if required, and any supporting data furnished by the applicant;

006.02 The draft permit or notice of intent to deny the application or to revoke the permit;

006.03 The statement of basis;

006.04 Other documents contained in the supporting file for the draft permit.

007 The agency shall give public notice of tentative permit decisions by publication in a daily or weekly newspaper having general circulation in the area affected by the permit.

007.01 The public notice shall contain the following minimum information:

007.01A Name and address of the agency;

007.01B Name and address of the permittee or permit applicant and, if different, of the facility or activity regulated by the permit;

007.01C A brief description of the business conducted at the facility or activity described in the permit application or the draft permit;

007.01D Name, address and telephone number of a person from whom interested persons may obtain further information or copies of documents; and

007.01E A brief description of the comment procedures and the time and place of any hearing that will be held, including a statement of procedures to request a hearing unless a hearing has already been scheduled.

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008 The agency shall hold a public hearing whenever the director or his or her designee finds, on the basis of requests, a significant degree of public interest in the tentative permit decision exists. The director or his or her designee may also hold a public hearing at his or her discretion, whenever such hearing might clarify one or more issues involved in the permit decision. The director may appoint a hearing officer to conduct the hearing.

008.01 The agency shall provide public notice of the hearing as specified in 007.

008.02 In addition to the general public notice describe in 007, the public notice of a hearing shall contain the following information:

008.02A Date, time, and place of the hearing, which shall be held in the area affected unless another location is specifically required; and

008.02B A brief description of the nature and purpose of the hearing, including the applicable rules and procedures.

009 All persons, including applicants, who believe any condition of a draft permit is inappropriate or that the director's tentative decision to deny an application or revoke a permit is inappropriate, must raise all reasonably ascertainable issues and submit all reasonably available arguments supporting their position by the close of the public comment period, including any public hearing. Any supporting materials which are submitted shall be included in full unless they are part of the administrative record in the same proceeding or consist of State or Federal statutes and regulations or other generally available reference materials.

010 Upon conclusion of the public hearing the hearing officer, if one was appointed, shall forward the transcript or recording of the hearing and any other evidence to the director for a final decision. Any final decision made by the director shall be governed by the standards set forth in the Nebraska Administrative Procedure Act, Neb. Rev. Stat. §84-901 et seq. and applicable statutory and regulatory authority of the agency.

011 The director or his or her designee shall base final permit decision on the administrative record described in this section which shall consist of:

011.01 The administrative record for the tentative permit decision described in 006;

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011.02 All comments received during the public comment period;

011.03 The tape or transcript of any hearings held;

011.04 Any written materials submitted at such a hearing;

011.05 Any response to comments prepared by the agency; and

011.06 The final permit or permit decision.

012 The final decision to issue a permit may be reviewed by the district court in a proceeding instituted by filing a petition in error pursuant to Neb. Rev. Stat. §25-1901 and Neb. Rev. Stat. §84-917.

013 In accordance with Neb. Rev. Stat. §81-1507(3), any person who is denied a permit or had a permit revoked or modified may request a contested case under Chapter 7 of this title by filing a petition with the director within 30 days after receipt of notice of the permit decision.

014 The agency shall conduct fact-finding hearings in accordance with the statute or regulation authorizing the hearing. At a minimum, the agency shall:

014.01 Publish notice of the hearing, including:

014.01A Date, time, and place of the hearing, which shall be held in the area affected unless another location is specifically required, and

014.01B A brief description of the nature and purpose of the hearing, including the applicable rules and procedures.

015 Rulemaking hearings before the Environmental Quality Council shall be conducted in accordance with Neb. Rev. Stat. §81-1505(17) and the Administrative Procedure Act.

016 Strict rules of evidence and procedure shall not apply in fact-finding hearings. The director or a hearing officer appointed by the director shall admit and consider all relevant testimony and evidence having probative value in connection with the subject of the hearing.

017 No person shall be required to be sworn or take an oath prior to presenting any evidence, which may be oral or written.

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018 The hearing officer shall among other things, open the proceedings, enter into the record the public notice given for the hearing, receive testimony, accept and properly mark exhibits, make a record of the hearing, and conduct such other related duties as necessary. Unless the final decisionmaker is presiding at the hearing, the hearing officer shall have no power, acting alone, to take any action involving a final determination from the hearing.

Enabling Legislation: Neb. Rev. Stat. §81-1504(1)(9)(11)(13); §81-1505; §81-1505(17); §81-1507(3); §84-901 et seq.

Legal Citation: Title 115, Ch. 5, Nebraska Department of Environmental Quality.

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Chapter 6 - VOLUNTARY COMPLIANCE

001 The director shall make every effort to obtain voluntary compliance through warning, conference, or any other appropriate means prior to initiating enforcement proceedings, except that such requirement shall not be construed to alter enforcement duties or requirements of the director and the department.

Enabling Legislation: Neb. Rev. Stat. §81-1510(1)

Legal Citation: Title 115, Ch. 6, Nebraska Department of Environmental Quality

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Chapter 7 - CONTESTED CASES

001 Commencement of a contested case.

001.01 The contested case begins with the filing of a complaint or petition and request for a hearing, if applicable.

001.02 The parties to a contested case shall be the petitioner or person by whom a contested case is brought and the respondent or person against whom a contested case is brought.

001.03 A party may appear on his or her own behalf in a contested case proceeding or may be represented by an attorney or other representative as permitted by law.

001.04 The pleadings in a contested case may include a petition, complaint, answer, reply, notice, motion, stipulation, objection or order or other formal written document filed in a proceeding before an agency. Any pleading filed in a contested case shall meet the following requirements:

001.04A The pleading shall contain a heading specifying the name of the agency and the title or nature of the pleading, state material factual allegations, and state concisely the action the agency is being requested to take, contain the name and address of the petitioner, and shall be signed by the party filing the pleading, or when represented by an attorney, the signature of the attorney. Attorneys shall include their address, telephone number and bar number. The initial petition shall also contain the name and address of the respondent.

001.04B All pleadings shall be made on white, letter-sized (8 ½ x 11 inch) paper and shall be legibly typewritten, photostatically reproduced, printed or handwritten. If handwritten, a pleading must be written in ink.

001.05 All pleadings shall be filed with the agency at its Lincoln office. Filing may be accomplished by personal delivery or mail and will be received during regular office hours of the agency. The date of filing of an initial petition shall be the date first received during the regular business hours of the agency.

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001.06 The agency shall serve a copy of any complaint on each respondent listed in the complaint personally or by certified mail. Written proof of such service shall be filed with the agency. Each respondent who chooses to file a responsive pleading must do so within 20 days from the date of service.

001.07 All pleadings subsequent to the initial complaint or petition shall be served by the party filing such pleading upon all attorneys of record or other representatives of record and upon all unrepresented parties. Service shall be made personally or by first-class or certified mail. Written proof of such service shall be filed with the agency.

001.08 Unless state law provides that a hearing is not required, a hearing date shall be set by the agency in accordance with statutory requirements. A written notice of the time and place of hearing and the name of the hearing officer, if known, shall be served by the agency upon all attorneys of record or other representatives of record and upon all unrepresented parties. The notice must include proof of such service and will be filed with the agency.

001.09 In computing time prescribed or allowed by this chapter or by any applicable statute in which the method of computing time is not specifically provided, days will be computed by excluding the day of the act or event and including the last day of the period. If the last day of the period falls on a Saturday, Sunday, or state holiday, the period shall include the next working day.

002 Hearing officer; criteria.

002.01 The agency director may conduct a contested case hearing or designate a hearing officer to conduct the hearing on his or her behalf and submit a recommended decision to the director.

002.02 A person who has served as investigator, prosecutor, or advocate in a contested case or in its prehearing stage may not serve as hearing officer or assist or advise a hearing officer in the same proceeding except as provided in subsection 002.04.

002.03 A person who is subject to the authority, direction, or discretion of one who has served as investigator, prosecutor, or advocate in a contested case or in its prehearing stage may not serve as hearing officer or advise a hearing officer in the same proceeding except as provided in subsection 002.04.

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002.04 If all parties consent, a person who has served as, or who is subject to the authority, direction, or discretion of one who has served as investigator, prosecutor, or advocate in a contested case or in its prehearing stage may assist a hearing officer in the preparation of orders.

002.05 A person may serve as hearing officer at successive stages of the same contested case.

003 Participation in Proceedings. Prehearing Procedures.

003.01 A hearing officer may determine whether a prehearing conference will be conducted. If a prehearing conference is not held, a hearing officer for the hearing may issue a prehearing order, based on the pleadings, to regulate the conduct of the proceedings.

003.01A The Director initiates an action involving such person; If a prehearing conference is conducted:

003.01A1 The hearing officer shall promptly notify the agency of the determination that a prehearing conference will be conducted. The agency may assign another hearing officer for the prehearing conference; and

003.01A2 The hearing officer for the prehearing conference shall set the time and place of the conference and give reasonable written notice to all parties and to all persons who have filed written petitions to intervene in the matter. The agency shall give notice to other persons entitled to notice.

003.01A3 The notice shall include the following:

003.01A3(a) The names and mailing addresses of all parties and other persons to whom notice is being given by the hearing officer;

003.01A3(b) The name, official title, mailing address, and telephone number of any counsel or employee who has been designated to appear for the agency;

003.01A3(c) The official file or other reference number, the name of the proceeding, and a general description of the subject matter;

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003.01A3(d) A statement of the time, place, and nature of the prehearing conference;

003.01A3(e) A statement of the legal authority and jurisdiction under which the prehearing conference and the hearing are to be held;

003.01A3(f) The name, official title, mailing address, and telephone number of the hearing officer for the prehearing conference;

003.01A3(g) A statement that a party who fails to attend or participate in a prehearing conference, hearing, or other stage of a contested case or who fails to make a good faith effort to comply with a prehearing order may be held in default under the Administrative Procedure Act; and

003.01A3(h) Any other matters that the hearing officer considers desirable to expedite the proceedings.

003.01B The person files a request to be made a party to the proceeding and meets the requirements of Neb. Rev. Stat. §25-328; The hearing officer shall conduct a prehearing conference, as may be appropriate, to deal with such matters as exploration of settlement possibilities, preparation of stipulations, clarification of issues, rulings on identity and limitation of the number of witnesses, objections to proffers of evidence, determination of the extent to which direct evidence, rebuttal evidence, or cross-examination will be presented in written form and the extent to which telephone, television, or other electronic means will be used as a substitute for proceedings in person, order of presentation of evidence and cross-examination, rulings regarding issuance of subpoenas, discovery orders, and protective orders, and such other matters as will promote the orderly and prompt conduct of the hearing. The hearing officer shall issue a prehearing order incorporating the matters determined at the prehearing conference.

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003.01C The Director grants a request to be made a party to a pending proceeding following consideration of: The hearing officer may conduct all or part of the prehearing conference by telephone, television, or other electronic means if each participant in the conference has an opportunity to participate in, to hear, and, if technically feasible, to see the entire proceeding while it is taking place.

003.02 Discovery in contested cases.

003.02A The hearing officer or a designee, at the request of any party or upon the hearing officer's own motion, may issue subpoenas, discovery orders, and protective orders in accordance with the rules of civil procedure except as may otherwise be prescribed by law. Subpoenas and orders issued under this subsection may be enforced by the district court.

003.02B Any prehearing motion to compel discovery, motion to quash, motion for protective order or other discovery-related motion shall:

003.02B1 Quote the interrogatory, request, question, or subpoena at issue, or be accompanied by a copy of the interrogatory, request, subpoena or excerpt of a deposition;

003.02B2 State the reasons supporting the motion;

003.02B3 Be accompanied by a statement setting forth the steps of efforts made by the moving party or his or her counsel to resolve by agreement the issues raised and that agreement has not been achieved; and

003.02B4 Be filed with the agency. The moving party must serve copies of all such motions to all parties to the contested case.

003.02C Other than is provided in the previous subsection, discovery materials need not be filed with the agency.

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003.03 Continuances. The hearing officer may, in his or her discretion, grant extensions of time or continuances of hearings upon the hearing officer's own motion or at the timely request of any party for good cause shown. A party must file a written motion for continuance which states in detail the reasons why a continuance is necessary and serve a copy of the motion on all other parties.

003.03A Good cause. Good cause for an extension of time or continuance may include, but is not limited to, the following:

003.03A1 Illness of the party, legal counsel or witness;

003.03A2 A change in legal representation; or

003.03A3 Settlement negotiations are underway.

003.04 Amendments.

003.04A A petition may be amended at any time before an answer is filed or is due if notice is given to the respondent or his or her attorney. In all other cases, a petitioner must request permission to amend from the hearing officer.

003.04B A hearing officer may, in his or her discretion, also allow the filing of supplemental pleadings alleging facts material to the case occurring after the original pleadings were filed. A hearing officer may also permit amendment of pleadings where a mistake appears or where amendment does not materially change a claim or defense.

003.05 Informal disposition. Unless otherwise precluded by law, informal disposition may be made of any contested case by stipulation, agreed settlement, consent order, or default.

004 Conducting a contested case hearing.

004.01 Order. At the discretion of the hearing officer, the hearing may be conducted in the following order:

004.01A The hearing is called to order by the hearing officer. Any preliminary motions, stipulations or agreed orders are entertained.

004.01B Each party may be permitted to make an opening statement. Opening statements take place in the same order as the presentation of evidence.

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004.01C Presentation of evidence.

004.01C1 Evidence will be received in the following order:

004.01C1(a) Evidence is presented by the petitioner;

004.01C1(b) Evidence is presented by the respondent;

004.01C1(c) Rebuttal evidence is presented by the petitioner; and

004.01C1(d) Surrebuttal evidence is presented by the respondent.

004.01C2 With regard to each witness who testifies, the following examination may be conducted:

004.01C2(a) Direct examination conducted by the party who calls the witness;

004.01C2(b) Cross-examination by the opposing party;

004.01C2(c) Redirect examination by the party who called the witness; and

004.01C2(d) Recross-examination by the opposing party.

004.01D After the evidence is presented, each party may have opportunity to make a closing argument. Closing arguments shall be made in the same order as the presentation of evidence. The hearing officer may request that the parties submit brief in lieu of closing arguments.

004.02 Evidence.

004.02A In contested cases an agency or hearing officer may admit and give probative effect to evidence which possesses probative value commonly accepted by reasonably prudent persons in the conduct of their affairs and may exclude incompetent, irrelevant, immaterial and unduly repetitious evidence.

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004.02B Any party to a formal hearing before an agency, from which a decision may be appealed to the courts of this state, may request that the agency be bound by the rules of evidence applicable in district court by delivering to the agency at least three days prior to the holding of the hearing a written request therefore. Such request shall include the requesting party's agreement to be liable for the payment of costs incurred thereby and upon any appeal or review thereof, including the cost of court reporting services which the requesting party shall procure for the hearing.

004.02C Documentary evidence may be received in the form of copies of excerpts or incorporated by reference.

004.02D All evidence including records and documents in the possession of the agency of which it desires to avail itself shall be offered and made a part of the record in the case. No factual information or evidence other than the record shall be considered in the determination of the case.

004.02E A hearing officer or designee may administer oaths and issue subpoenas in accordance with the rules of civil procedure except as may otherwise be prescribed by law. Subpoenas and orders issued under this subsection may be enforced by the district court.

004.02F An agency shall give effect to the rules of privilege recognized by law.

004.02G An agency may take official notice of cognizable facts and in addition may take official notice of general, technical, or scientific facts within its specialized knowledge and the rules and regulations adopted and promulgated by the agency.

004.02G1 Parties shall be notified either before or during the hearing or by reference in preliminary reports or otherwise of materials so noticed.

004.02G2 Parties shall be afforded an opportunity to contest facts so noticed.

004.02G3 The record shall contain a written record of everything officially noticed.

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004.02H An agency may utilize its experience, technical competence and specialized knowledge in the evaluation of the evidence presented to it.

004.03 Conducting the hearing by electronic means. The hearing officer may conduct all or part of the hearing by telephone, television, or other electronic means if each participant in the hearing has an opportunity to participate in, to hear, and, if technically feasible, to see the entire proceeding while it is taking place.

004.04 Official record.

004.04A The agency shall prepare an official record, which shall include testimony and exhibits, in each contested case, but it shall not be necessary to transcribe the record of the proceedings unless requested for purpose of rehearing or appeal, in which event the transcript and record shall be furnished by the agency upon request and tender of the cost of preparation.

004.04B An agency shall maintain an official record of each contested case under the Administrative Procedure Act for at least four years following the date of the final order.

004.04C The agency record shall consist only of the following:

004.04C1 Notices of all proceedings;

004.04C2 Any pleadings, motions, requests, preliminary or intermediate rulings and orders, and similar correspondence to or from the agency pertaining to the contested case;

004.04C3 The record of the hearing before the agency, including all exhibits and evidence introduced during such hearing, a statement of matters officially noticed by the agency during the proceeding, and all proffers of proof and objections and rulings thereon; and

004.04C4 The final order.

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004.04D As provided in Chapter 9, the hearing officer or agency head, or employee who is or may reasonably be expected to be involved in the decision making process of the contested case who receives or who makes or knowingly causes to be made an ex parte communication shall make the appropriate filings which shall be included in the official record of the contested case.

004.04E Except to the extent that the Administrative Procedure Act or another statute provides otherwise, the agency record shall constitute the exclusive basis for agency action in contested cases under the act and for judicial review thereof.

004.05 Costs. All the costs of a formal hearing shall be paid by the party or parties against whom a final decision is rendered.

005 Decision and order in a contested case.

005.01 Every decision and order adverse to a party to the proceeding, rendered by an agency in a contested case, shall be in writing or stated in the record and shall be accompanied by findings of fact and conclusions of law.

005.02 The decision and order should include:

005.02A The name of the agency and name of the proceeding;

005.02B The time and place of the hearing;

005.02C The names of all the parties or their attorneys who entered an appearance at the hearing;

005.02D The findings of fact consisting of a concise statement of the conclusions upon each contested issue of fact;

005.02E The conclusions of law consisting of the applications of the controlling law to the facts found and the legal results arising therefrom; and

005.02F The order consisting of the action taken by the agency as a result of the facts found and the legal conclusions arising therefrom.

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005.03 Parties to the proceeding shall be notified of the decision and order in person or by mail. A copy of the decision and order and accompanying findings and conclusions shall be delivered or mailed upon request to each party or his or her attorney of record.

006 Appeals.

006.01 Any person aggrieved by a final decision in a contested case is entitled to judicial review under the Administrative Procedure Act or to resort to such other means of review as may be provided by law.

006.01A If parties question the accuracy of such facts or special knowledge, the hearing officer may require the department to produce an expert witness on the subject. Parties may cross-examine and take exception to such testimony.

006.02 Parties desiring to appeal an agency decision must file a petition for review in the district court of the county where the agency action is taken within thirty days after the service of the final decision by the agency. The thirty day period for appeal commences to run from the date of mailing of the notice of order and decision to the parties or their attorneys of record. Service of the petition and summons must be made in accordance with Nebraska law.

006.03 Unless otherwise provided by statute, the procedures of Neb. Rev. Stat. §84-917 govern the procedure for taking an appeal.

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007 Form of Petition for Contested Case

BEFORE THE NEBRASKA DEPARTMENT OF ENVIRONMENTAL QUALITY

THE CASE OF _____) Case No. _____
[Insert name of the Petitioner(s)]) (assigned by the agency)
)
) PETITION FOR
) CONTESTED CASE
) (or other appropriate
) designation of pleading)

Substance of pleading, including:

Petitioner's name and address;

All material facts and specific circumstances;

All rules of law which apply;

Petitioner's request for a hearing and demand for relief.

Submitted by,

Signature of pleader
Name of pleader
Address of pleader
Telephone number of pleader

Enabling Legislation: Neb. Rev. Stat. §84-909; §§84-913- 84-919; §81-1507.

Legal Citation: Title 115, Ch. 7, Nebraska Department of Environmental Quality

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Chapter 8 - INTERVENTION IN A CONTESTED CASE

001 Intervention in a contested case shall be allowed when the following requirements are met:

001.01A A petition for intervention must be submitted in writing to the director, hearing officer or designee at least five days before the hearing. Copies must be mailed by the petitioner for intervention to all parties named in the hearing officer's notice of the hearing;

001.01B The petition must state facts demonstrating that the petitioner's legal rights, duties, privileges, immunities, or other legal interests may be substantially affected by the proceeding or that the petitioner qualifies as an intervenor under any provision of law; and

001.01C The director, hearing officer or designee must determine that the interests of justice and the orderly and prompt conduct of the proceedings will not be impaired by allowing intervention.

002 The director, hearing officer or designee may grant a petition for intervention at any time upon determining that the intervention sought is in the interests of justice and will not impair the orderly and prompt conduct of the proceedings.

003 If a petitioner qualifies for intervention, the director, hearing officer or designee may impose conditions upon the intervenor's participation in the proceedings, either at the time that intervention is granted or at any subsequent time. Those conditions may include:

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

003.02 Limiting the intervenor's use of discovery, cross-examination, and other procedures so as to promote the orderly and prompt conduct of the proceedings; and

003.03 Requiring two or more intervenors to combine their presentation of evidence and argument, cross-examination, discovery, and other participation in the proceedings.

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004 The director, hearing officer or designee, at least 24 hours before the hearing, shall issue an order granting or denying each pending petition for intervention, specifying any conditions and briefly stating the reasons for the order.

004.01 The director, hearing officer or designee may modify the order at any time, stating the reasons for the modification.

004.02 The director, hearing officer or designee shall promptly give notice of an order granting, denying, or modifying intervention to the petition for intervention and to all parties.

Enabling Legislation: Neb. Rev. Stat. §81-1507; §81-1509; §84-909; §84-912.02.

Legal Citation: Title 115, Ch. 8, Nebraska Department of Environmental Quality

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Chapter 9 - EX PARTE COMMUNICATIONS PROHIBITED

001 Prohibitions; when applicable. The prohibitions found in this chapter shall apply beginning with the time notice of hearing in a contested case is given.

002 Prohibitions; to whom applicable.

002.01 Parties and public. No party in a contested case or other person outside the agency having an interest in the contested case shall make or knowingly cause to be made an ex parte communication to the hearing officer or to an agency head or employee who is or may reasonably be expected to be involved in the decisionmaking process of the contested case.

002.02 Persons in decisionmaking roles. No hearing officer or agency head or employee who is or may reasonably be expected to be involved in the decisionmaking process of the contested case shall make or knowingly cause to be made an ex parte communication to any party in a contested case or other person outside the agency having an interest in the contested case.

002.03 Investigators. No agency head or employee engaged in the investigation or enforcement of a contested case shall make or knowingly cause to be made an ex parte communication to a hearing officer or agency head or employee who is or may reasonably be expected to be involved in the decisionmaking process of the contested case.

003 Disclosure of contacts. The hearing officer or agency head or employee who is or may reasonably be expected to be involved in the decisionmaking process of the contested case who receives or who makes or knowingly causes to be made an ex parte communication covered by this chapter shall file in the record of the contested case:

003.01 All such written communications;

003.02 Memoranda stating the substance of all such oral communications; and

003.03 All written responses and memoranda stating the substance of all oral responses to all the ex parte communications.

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003.04 The filing shall be made within two working days of the receipt or making of the ex parte communication. Notice of the filing, with an opportunity to respond, shall be given to all parties of record.

003.05 Filing and notice of filing shall not be considered on the record and reasonable notice for purposes of the definition of ex parte communication.

Enabling Legislation: Neb. Rev. Stat. §84-909; §84-914.

Legal Citation: Title 115, Ch. 9, Nebraska Department of Environmental Quality

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Chapter 10 -PETITION FOR RULEMAKING

001 Rule Making Petition.

001.01 Petition. Any person may petition the Council requesting the promulgation, amendment, or repeal of a rule or regulation.

001.02 Form. The petition shall:

001.02A Be clearly designated as a petition for a rules change;

001.02B In the case of a proposed new rule or amendment of an existing rule, shall set forth the desired rule in its entirety;

001.02C In the case of a petition for the repeal of an existing rule, such shall be stated and the rule proposed to be repealed shall either be set forth in full or shall be referred to by agency rule number;

001.02D Describe the reason for the rules change.

001.02E Include an address and telephone where the petitioner can be reached during regular work hours; and

001.03 Be signed by:

001.03A The petitioner or his or her attorney in which case the attorney shall also state his or her address and telephone number; or

001.03B A duly authorized officer of the petitioner, if petitioner is a corporation or other legal entity.

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002 Petition consideration and disposition.

002.01 Within 60 days after submission of a petition, the Council shall:

002.01A Deny the petition in writing, stating the reasons therefore; or

002.01B Initiate rulemaking or regulationmaking proceedings before the Council in accordance with the Administrative Procedure Act.

002.01C If otherwise lawful, adopt a rule or regulation.

Enabling Legislation: Neb. Rev. Stat. §84-909; §84-907.08.

Legal Citation: Title 115, Ch. 10, Nebraska Department of Environmental Quality

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EPA Rulemakings

CFR: 40 C.F.R. 52.1420(c)
FRM: 83 FR 42592 (8/23/18)
PRM: 83 FR 25977 (6/5/18)
State Submission: 8/28/2014
State Proposal: 1/30/04 EQC approved 3/5/04
State Final: effective 6/8/2004
APDB File: NE-93; EPA-R07-OAR-2018-0307
Description: Specifically, the changes to chapters 1, 2, 7, 8, 9 and 10 conform regulatory language to the Attorney General's model rules. Revisions to chapters 3 and 5 better describe the procedures already in place by practice for obtaining public records and public hearings on permit decisions or fact-finding hearings that are required by law. Revisions to chapter 4 clarify the procedures for asserting a claim of confidentiality trade secrets. Finally, chapter 11 is being deleted from title 115 because it is duplicative and found in chapter 33 of title 129.

CFR: 40 C.F.R. 52.1420(c)(41)
FRM: 60 FR 372 (01/04/95)
PRM: 60 FR 418 (01/04/95)
State Submission: 2/16/94
State Proposal: Unknown
State Final: 8/08/93
APDB File: NE-31
Description: EPA updated the version of Title 115 as part of the overall recodification of the Nebraska rules.

CFR: 40 C.F.R. 52.1420(c)(37)
FRM: 54 FR 21059 (5/16/89)
PRM: None
State Submission: 6/15/88
State Proposal: 2/5/88
State Final: 6/5/88
APDB File: NE-21
Description: EPA added Title 115, Rules of Practice and Procedure, to the SIP by this action. The state eliminated: (1) the previous rules pertaining to variances which were contained in Rules 6 and 7 of the original SIP [and later in Rule 16—see 40 C.F.R. 52.1420(c)(13)]; and (2) the release of emissions data to the public which the EPA originally approved as Rule 22 [see 40 C.F.R. 52.1420(c)(13)]; these items are now covered by Title 115.

Difference Between the State and EPA-Approved Regulation

None.