

**ADOPTED REGULATION OF THE
STATE ENVIRONMENTAL COMMISSION**

LCB File No. R135-11

Effective May 30, 2012

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

AUTHORITY: §§1-9, NRS 233B.050.

A REGULATION relating to the rules of practice before the State Environmental Commission; authorizing the Commission to conduct a prehearing conference to address certain issues relating to a hearing before the Commission; requiring each party to a hearing before the Commission to provide every other party to the hearing with notice of certain witnesses and copies of certain exhibits; providing guidelines for the admission and consideration of evidence by the Commission at a hearing; establishing the grounds for an appeal to the Commission; requiring that a person filing a form 3 provide certain information; authorizing the Commission to dismiss certain hearing requests and appeals; authorizing the Commission to require the parties to a hearing to file certain briefs; providing for the filing, service and format of briefs ordered by the Commission; establishing the qualifications for an attorney who represents a party before the Commission; and providing other matters properly relating thereto.

Section 1. Chapter 445B of NAC is hereby amended by adding thereto the provisions set forth as sections 2 and 3 of this regulation.

Sec. 2. 1. *The Commission may, upon its own motion or a motion made by a party, conduct a prehearing conference to:*

(a) Formulate, simplify or limit the issues involved in a hearing;

(b) Obtain admissions of fact or any stipulation of the parties which will avoid unnecessary proof;

(c) Arrange for the exchange of proposed exhibits or prepared expert testimony;

- (d) Identify the witnesses and the subject matter of their expected testimony and, if necessary, limit the number of witnesses or the scope of their testimony;*
- (e) Rule on any pending prehearing motions or matters;*
- (f) Establish a schedule for the filing of motions or the submission of briefs; or*
- (g) Consider any other action or procedure which may expedite the orderly conduct and disposition of the proceedings or a settlement of the matter.*

2. Notice of a prehearing conference conducted pursuant to this section must be provided to each party. Unless otherwise ordered and for good cause shown, the failure of a party to attend a prehearing conference constitutes a waiver of any objection to any agreement reached or ruling made at the conference.

3. Any action taken or agreement reached at a prehearing conference:

- (a) Must be made a part of the record;*
- (b) Controls the course of subsequent proceedings, unless otherwise stipulated by each party with the consent of the Commission; and*
- (c) Except as otherwise provided pursuant to a stipulation entered pursuant to paragraph (b), is binding upon all parties, including, without limitation, any person that subsequently becomes a party to the proceedings.*

Sec. 3. 1. *Except as otherwise provided by an order of the Commission, each party to a hearing before the Commission shall, not later than 5 days before the hearing, provide to every other party:*

- (a) Notice of the identity of each person who intends to offer direct oral testimony at the hearing; and*

(b) A copy of each exhibit which the party intends to offer as evidence in support of the party's position.

2. The Commission will not require any party to provide notice of the identity of any person who intends to offer rebuttal testimony at a hearing before the Commission.

3. If a party fails to provide:

(a) Notice of the identity of a witness pursuant to paragraph (a) of subsection 1 and such failure results in prejudice to an opposing party, the Commission may:

(1) Refuse to allow the witness to testify; or

(2) Disregard any portion of the testimony of the witness.

(b) A copy of an exhibit pursuant to paragraph (b) of subsection 1 and such failure results in prejudice to an opposing party, the Commission may:

(1) Refuse to admit the exhibit into evidence; or

(2) Disregard the exhibit.

4. The Commission will not admit into evidence at a hearing any exhibit offered as evidence until each party at the hearing is provided the opportunity to examine the exhibit.

5. The Commission will not, at a hearing to affirm, modify or reverse an action of the Director pursuant to NRS 444.570, 445A.605 or 445B.360, consider evidence which was not submitted to the Department before the issuance of the decision or order which is the subject of the appeal unless:

(a) The Department allowed a period for public comment before the Director took the action; and

(b) The Commission determines that reasonable cause exists for the failure of a party to submit the evidence.

6. *The Commission may, if the basis of an appeal is an alleged irregularity in procedure by the Department which is not reflected in the record, consider evidence concerning the alleged irregularity in procedure.*

7. *The Commission will not consider any evidence, including, without limitation, the testimony of a witness, which:*

(a) Does not have the tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence; and

(b) Is not directly related to the subject matter of the proceeding.

Sec. 4. NAC 445B.875 is hereby amended to read as follows:

445B.875 1. As used in NAC 445B.875 to 445B.899, inclusive, *and sections 2 and 3 of this regulation*, unless the context otherwise requires, the words and terms defined in NAC 445B.877 to 445B.884, inclusive, have the meanings ascribed to them in those sections.

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

Sec. 5. NAC 445B.890 is hereby amended to read as follows:

445B.890 1. Any person ~~requesting~~ *aggrieved by a final decision of the Department may, not later than 10 days after notice of the action of the Department, appeal the decision by filing a request for* a hearing before the Commission ~~concerning a final decision of the Department may do so by filing a request, within 10 days after notice of the action of the Department,]~~ *on a* form 3* with the State Environmental Commission, 901 South Stewart Street, Suite 4001, Carson City, Nevada 89701-5249.

2. An appeal of a final decision of the Department must be based upon one or more of the following grounds:

(a) The final decision was in violation of any constitutional or statutory provision;

(b) The final decision was in excess of the statutory authority of the Department;

(c) The final decision was made upon unlawful procedure;

(d) The final decision was affected by other error of law;

(e) The final decision was clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; or

(f) The final decision was arbitrary or capricious or characterized by abuse of discretion.

3. A form 3 which is submitted to the Commission pursuant to subsection 1 must include, without limitation:*

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

(b) A reference to each paragraph of subsection 2 which provides a basis for the appeal and a reference to each provision of law allegedly violated; and

(c) A brief and concise statement of the facts which provide the basis for the appeal.

4. The Commission may dismiss any request for a hearing to appeal a final decision of the Department if the person requesting the hearing fails to submit a completed form 3 with his or her request.*

**(See adopting agency for form.)*

Sec. 6. NAC 445B.891 is hereby amended to read as follows:

445B.891 1. The Secretary of the Commission will schedule a hearing to be held within 20 days after receipt of the request for a hearing or an order to appear before the Commission [H]

unless each party to the hearing waives the right to a hearing within the 20-day period in writing or on the record before the Commission.

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

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

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

(c) A reference to ~~the particular sections~~ *each paragraph of subsection 2 of NAC 445B.890 which provides a basis for the appeal and a reference to each provision* of ~~NRS and NAC~~ law allegedly violated; and

(d) A brief and concise statement of the ~~matters asserted or the issues involved.~~ *facts which provide the basis for the appeal.*

Sec. 7. NAC 445B.8925 is hereby amended to read as follows:

445B.8925 1. The Commission may, upon its motion or a motion by a party, order ~~briefs to be filed before or after a hearing and shall prescribe the period during which the briefs must be filed.~~

~~—2.— Each brief must be accompanied~~ *the parties to a hearing to file an opening brief, a response brief and a reply brief.*

2. *Except as otherwise provided by an order of the Commission, if the Commission orders the parties to a hearing to file briefs pursuant to subsection 1:*

(a) *The party which requested the hearing shall file an opening brief which does not exceed 20 pages in length.*

(b) The Department and any other intervening party shall file a response brief which does not exceed 20 pages in length.

(c) The party which requested the hearing shall file a reply brief which does not exceed 10 pages in length. The Commission will consider only those portions of the reply brief which address directly matters or issues set forth in the response brief filed pursuant to paragraph (b).

3. The Commission may, upon its own motion or a motion by another party, order briefs to be filed before or after a hearing in addition to any briefs which the Commission orders pursuant to subsection 1.

4. The Commission will, for each brief which is ordered pursuant to this section, prescribe the period by which the briefs must be filed with the Commission and served on all parties.

5. Except as otherwise provided by subsection 6, each brief which is filed and served pursuant to an order of the Commission must be:

(a) Presented on white paper of standard quality and 8 1/2 inches by 11 inches in size;

(b) Typewritten or prepared in a manner that produces clear and permanent copies equivalent in legibility to printing;

(c) In 12-point font;

(d) Double-spaced, except that descriptions of real property may be single-spaced and quotations of more than 50 words must be indented and single-spaced;

(e) Paginated sequentially at the bottom of each page; and

(f) Accompanied by [an] a certificate or acknowledgment of service or a certificate of mailing for all parties.

6. A brief which is ordered by the Commission pursuant to this section may be served on any other party by United States mail, electronic mail or facsimile.

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

445B.894 1. Upon good cause shown, the Commission may vacate and reset the time of hearing.

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

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

4. The Commission may, after providing notice to each party, dismiss an appeal for want of prosecution on the motion of any party or on the motion of the Commission if the party filing the appeal has failed to bring the appeal to hearing within 1 year after filing the appeal with the Commission unless the parties have stipulated in writing to extend the period during which the hearing must take place.

Sec. 9. NAC 445B.895 is hereby amended to read as follows:

445B.895 1. The parties may appear in person and may be represented by ~~counsel~~ *an attorney.*

2. An attorney who represents a party before the Commission in a contested case must be an active member of and in good standing with the State Bar of Nevada or associated with such a member.

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

~~[2.]~~ 4. The Commission:

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

~~[3.]~~ 5. Hearings are open to the public until such time as confidential information, within the meaning of chapter *445A*, 445B *or 459* of NRS or applicable sections of this chapter or chapter 445A *or 459* of NAC, is admitted to the record, at which time the hearing will be closed.

Permanent Regulation - Filing Statement

Rules of Practice, State Environmental Commission (SEC)

Legislative Review of Adopted Regulations as Required
by Administrative Procedures Act, NRS 233B.066 & 233B.0603.10(f)

State Environmental Commission (SEC) LCB File No: R135-11

Petition R135-11: This regulation updates NAC 445B.875 to NAC 445B.895, which is the section in the Nevada Administrative Code (NAC) that governs the practices before the State Environmental Commission (Commission) in contested cases as allowed under NRS 233B.121. The regulation is designed to reduce the time and resources needed to conduct appeals by the Commission. The regulation clarifies a standard of review, defines procedures for briefs, addressing the admission of evidence during appeal hearings, and requires attorneys to be licensed in Nevada or associated with a Nevada licensed attorney (i.e., as is required in state court litigation) to ensure attorneys are knowledgeable of administrative hearing procedures defined under NRS 233B. Overall, the proposed regulation will streamline the appeal process for all parties, including Nevada business.

1. A description of how public comment was solicited, a summary of public response and an explanation of how other interested persons may obtain a copy of the summary.

On February 7, 2012 the Commission's staff conducted a public workshop on LCB's Proposed Draft Regulation R135-11. The regulation, dated January 30, 2012 was presented to the public through a video-conferenced workshop conducted in Carson City and Las Vegas. The regulatory workshop notice and agenda were published in statewide newspapers, distributed to Nevada's public libraries, and made electronically available to individuals on the SEC mailing lists. The regulatory workshop was attended by representatives from Nevada industry including NV Energy, the Nevada Mining Association and Jungo Land & Investments as well as representatives from the Nevada Attorney General's Office and members of the Commission.

Following the workshops, the SEC held a formal regulatory hearing on February 15, 2012. The hearing was held in Reno at the Nevada Dept. of Wildlife, 1100 Valley Road. A public notice and agenda for the regulatory hearing was posted at the meeting location, at the State Library in Carson City, and at the Offices of the Division of Environmental Protection in Carson City and Las Vegas. Copies of the agenda, the public notice, and the proposed permanent regulation were also made available to all public libraries throughout the state as well as to individuals on the SEC mailing lists.

The public notice for the permanent regulation was published in the Las Vegas Review Journal and Reno Gazette Journal newspapers once a week for three consecutive weeks prior to the SEC regulatory hearing. Other information about this regulation was made available on the SEC website at: http://sec.nv.gov/main/hearing_0212.htm

2. The number of persons who attended the SEC Regulatory Hearing:

- (a) Attended February 15, 2012 hearing: 30 (approx.)
- (b) Testified on this Petition at the hearing: 5*
- (c) Submitted to the agency written comments: 1

* At the February 15 hearing, the regulation was presented to the Commission by the Commission's Counsel, Ms. Rese Marie Reynolds. Verbal comments presented to the Commission on the regulation were given by the following individuals.

- Thomas Woodworth, Council for NV Energy (also provided a written comment)
- Allen Biegia, Nevada Mining Association
- Dan Galpern, Sierra Club
- Debbie Lenard, Council for Jungo Land & Investments
- Jasmine Mehta, Nevada Attorney General's Office

3. A description of how comment was solicited from affected businesses, a summary of their response, and an explanation of how other interested persons may obtain a copy of the summary.

Comments were solicited at the public workshops and at the February 15 Commission hearing as noted in number 1 above.

4. If the regulation was adopted without changing any part of the proposed regulation, a summary of the reasons for adopting the regulation without change.

Several non-substantive proposed changes were made to the LCB Proposed Draft Regulation at both the workshop and at the Commission hearing noted in number 1 above. Those changes were delineated on a revised proposed agency draft regulation R135-11, which was subsequently adopted by the Commission and submitted to LCB along with this filing statement. A cover letter to LCB was also included with this filing statement that detailed each proposed change to the regulation adopted by the Commission.

5. The estimated economic effect of the adopted regulation on the business which it is to regulate and on the public.

This regulation will not have an immediate or long-term adverse economic impact on the public or the business community.

6. The estimated cost to the agency for enforcement of the adopted regulation.

There will be no additional costs to the agency for enforcement of the proposed regulation.

7. A description of any regulations of other state or government agencies which the proposed regulation overlaps or duplicates and a statement explaining why the duplication

or overlapping is necessary. If the regulation overlaps or duplicates a federal regulation, the name of the regulating federal agency.

This regulation does not duplicate any other federal, state or local regulation.

8. If the regulation includes provisions which are more stringent than a federal regulation, which regulates the same activity, a summary of such provisions.

The regulation is not more stringent than any federal regulation or guidance.

9. If the regulation provides a new fee or increases an existing fee, the total annual amount the agency expects to collect and the manner in which the money will be used.

The regulation does not address fees.