

Title 115 - NEBRASKA DEPARTMENT OF ENVIRONMENTAL QUALITY

Chapter 1 - ADOPTION OF MODEL RULES

001 For any proceeding before the agency to which the Administrative Procedures Act, Neb. Rev. Stat. §84-901 et seq. is made applicable by statute, the following Model Rules of Agency Procedure promulgated as Title 53 NAC by the Nebraska Attorney General, are incorporated by reference except as specifically indicated.

001.01 53 NAC Chapter 1 - Negotiated Rulemaking.

001.02 53 NAC Chapter 2 - Petition for Rulemaking.

001.03 53 NAC Chapter 3 - Procedures Governing Declaratory Orders.

001.04 53 NAC Chapter 4 - Rules of Procedure for Hearings in Contested Cases Before an Agency.

001.04A When the action before the agency is initiated by an administrative order or permit decision issued by the director under Neb. Rev. Stat. §81-1507, the petition and request for a contested case hearing must be filed within thirty days of receipt of the administrative order or permit decision in accordance with Neb. Rev. Stat. §81-1507. The contested case proceeding commences on the filing of a petition and request for a contested case hearing by the recipient of the administrative order or permit decision.

001.04B When the action before the agency is initiated by an emergency order issued by the director in accordance with Neb. Rev. Stat. §81-1507, the emergency order is effective immediately and the filing of a petition and request for a contested case hearing does not stay its effectiveness in cases involving appeals of agency decisions or actions.

Enabling Legislation: Neb. Rev. Stat. §81-1507 §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 - 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 should 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 should 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 are to 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 is to 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 will determine whether sufficient information has been provided to support the claim that the record or information relates to processes or methods are entitled to protection as trade secrets.

003.01 In making such determination, the director will 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

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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.

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 will be furnished to the claimant, who will be afforded an opportunity to comment before a final decision is made.

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

004.02 Failure to furnish timely comments will 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 will 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.

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Chapter 3 - PUBLIC HEARINGS

001 Unless more specific requirements in other agency Titles apply, this chapter contains minimum requirements for public hearings for:

001.01 Permit decisions which by statute or other agency regulations provide for public notice, public review and comment, and an opportunity to request a public hearing before making a final permit decision.

001.02 Fact-finding hearings afforded 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 is to 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 will 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 will 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 will be prepared for every draft permit decision. A statement of basis will 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 will 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 Unless more specific requirements in other agency Titles apply, the agency will provide public notice of tentative permit decisions by placing the notice on the agency webpage for a minimum of thirty days or 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 will 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 a 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 will 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 will contain the following information:

008.02A Date, time, and place of the hearing, which will 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 proposed 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 are to 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 will 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 this title by filing a petition with the director within thirty days after receipt of notice of the permit decision.

014 Unless more specific requirements in other agency Titles apply, the agency will 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 will 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 will be conducted in accordance with Neb. Rev. Stat. §81-1505(17) and the Administrative Procedure Act.

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

017 No person will 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 will 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 will 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.

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EPA Rulemakings

CFR: 40 C.F.R. 52.1420(c)
FRM: 86 FR 26843 (5/18/21)
PRM: 86 FR 14856 (3/19/21)
State Submission: 9/24/2020
State Proposal: 3/4/19 EQC approved 4/3/19
State Final: effective 7/24/2019
APDB File: NE-105; EPA-R07-OAR-2021-0171
Description: These proposed changes consolidate five chapters into a single chapter by removing duplicative language and incorporating by reference model rules of agency procedure promulgated by the Attorney General for agency use in accordance with the Administrative Procedure Act. The proposed revisions also update language; renumber chapters; and make minor wording changes.

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.