

Legal Notice of Rule Making
Nebraska Department of Transportation
Public Hearing
Friday, August 24, 2018, 1:00 - 3:00 PM
Nebraska Department of Transportation
Central Headquarters Bldg., Rm. 103
1500 Highway 2, Lincoln, Nebraska



The Nebraska Department of Transportation (NDOT) has commenced rule making and will hold a public hearing concerning the repeal of the following regulations:

- **17 NAC 7** - Practice and Procedure for Hearings in Contested Cases
- **407 NAC 1** - Hearing Practice and Procedure of the Department of Roads
- **408 NAC 2** - Roadside Trees, Shrubs, Bushes and Vines
- **411 NAC 6** - Snowmobiles on State Highways
- **413 NAC 1** - Consultant Services
- **428 NAC 5** - Hearing Practice and Procedure of the Board of Public Roads
Classifications and Standards

NDOT completed a detailed review of its rules and regulations by directive of the Governor's Executive Order 17-04; the above regulations were determined to be unnecessary, outdated, or both. NDOT may issue guidance documents covering some of the subject matter these regulations relate to if determined necessary.

Interested persons are invited to attend the public hearing. Comments and recommendations may be presented orally or in writing at the hearing. They may also be mailed, faxed, or e-mailed prior to the hearing until the public comment date close (September 3, 2018). Pre-hearing and post-hearing comments should be directed in writing to NDOT's Public Hearings Officer, Tony Bui, P.O. Box 94759, Lincoln, Nebraska 68509-4759; tony.bui@nebraska.gov; voice telephone (402) 479-4994, TDD telephone (402) 479-3834, fax (402) 479-3989. Comments may also be posted online through the Secretary of State's website (see below).

The proposed changes to the regulations may be viewed, downloaded, or commented on at: www.sos.state.ne.us/rules-and-regs/regtrack ("Agency": Transportation). To obtain a free paper copy of the proposed changes, the Proposed Regulation Policy Pre-Review Checklists, or the Fiscal Impact Statements, contact NDOT's Government Affairs Office at PO Box 94759,

Lincoln, Nebraska 68509-4759; erich.strack@nebraska.gov; voice telephone (402) 479-4324, TDD telephone (402) 479-3834, fax (402) 479-3758. Copies may be viewed or picked up in person at the NDOT Director's Office, 1500 Highway 2, Lincoln, NE.

NDOT will make every reasonable accommodation to provide an accessible meeting facility for all persons. Appropriate provisions for the hearing and visually challenged or persons with limited English proficiency (LEP) will be made if NDOT is notified by August 17, 2018. Notification should be submitted to Tony Bui, Public Hearings Officer (see contact information above).

This notice is provided pursuant to the Administrative Procedure Act.

RULE & REGULATION PRELIMINARY FISCAL IMPACT STATEMENT

AGENCY:	Nebraska Department of Transportation		
TITLE:	428	PREPARED BY:	Erich Strack
CHAPTER:	5	DATE PREPARED:	May 23, 2018
SUBJECT:	Hearing Practice and Procedure of the Board of Public Roads Classifications and Standards	TELEPHONE:	402-479-4324

TYPE OF FISCAL IMPACT:

	STATE AGENCY	POLITICAL SUBDIVISION	REGULATED PUBLIC
No Fiscal Impact	X	X	X
Increased Costs			
Decreased Costs			
Increased Revenue			
Decreased Revenue			
Indeterminable			

PROVIDE AN ESTIMATED COST AND DESCRIPTION OF IMPACT:

State Agency	
Political Subdivision	
Regulated Public	

IF INDETERMINABLE, EXPLAIN WHY:

SEP 27 03 01 06 37

Title 428 - BOARD OF PUBLIC ROADS CLASSIFICATIONS AND STANDARDS

Chapter 5 - Hearing Practice and Procedure of the Board of Public Roads Classifications and Standards

001 HEARING PROCEDURE FOR THE PROMULGATION, AMENDMENT OR REPEAL OF THE RULES AND REGULATIONS OF THE BOARD OF PUBLIC ROADS CLASSIFICATIONS AND STANDARDS

001.01 An informal public hearing shall be held to consider promulgation, amendment or repeal of any Rule or Regulation of the Board unless waived by the Governor.

001.02 Notice as to time and place of the hearing shall be published in a newspaper of general circulation in the State at least twenty days in advance of the hearing.

001.03 Any party who desires a continuance shall, immediately upon receipt of notice of hearing, or as soon thereafter as facts requiring such continuance come to his/her knowledge, notify the Board's Office in writing, by letter or telegram of said desire, stating in detail the reasons why such continuance is necessary. Any such party may be required to submit affidavits in support of such request. For good cause shown, the Board may grant a continuance, and may at any time order a continuance on the Board's own motion. Only under exceptional circumstances will requests for continuance of a hearing be considered unless submitted on or before the seventh day prior to the date set for hearing.

001.04 The hearing shall be held at the Department of Roads Building, Central Complex, South Junction U.S. 77 and N-2, Lincoln, Nebraska, and/or at such other location as may be deemed advisable.

001.05 All hearings will be recorded and transcribed, in summary, for record.

001.06 A petition for the promulgation, amendment or repeal of any Board Rule or Regulation shall state the precise wording of the proposed Rule or addition, or the precise wording of the present Regulation to be deleted or repealed, shall state briefly the reasons for such promulgation, amendment or repeal and shall state the name and address of the petitioner. One original written request shall be required and shall be presented to the Board's Secretary who shall furnish a copy to each Board Member and all known interested persons. The Board shall consider the petition within sixty days of receipt. The Board may, at any time, set a date for a hearing for the promulgation, amendment or repeal of any Rule or Regulation.

001.07 Failure of any petitioner to appear at the time and place set for hearing unless otherwise allowed by the Board on good cause shown, will be deemed sufficient grounds for the Board to dismiss the petition.

001.08 The chairperson of the hearing shall be a member of the Board and shall have the power to adjust the procedure of the hearing to meet special circumstances.

001.09 Those members of the Board and staff present shall be available to answer questions concerning the changes in the Rules and Regulations.

APPROVED

PAUL L. DOUGLAS
ATTORNEY GENERAL

BY *William L. Lantz*
Assistant Attorney General
AUG 11 83

DATE _____

APPROVED:

Date 9-27-83

Bob Kerrey
Governor

FILED

Allen J. Beaumont
Secretary of State

9-27-83 /re

Title 428 — BOARD OF PUBLIC ROADS CLASSIFICATIONS AND STANDARDS

Chapter 5 — Hearing Practice and Procedure of the Board of Public Roads Classifications and Standards (Continued)

001.10 The chairperson will make an opening statement which shall fulfill all necessary legal requirements by setting out the purpose and giving recorded notice of the hearing.

001.11 The presiding officer shall have the power to recess the hearing at any time and to close it when all relevant discussion has been heard.

001.12 Copies of the transcript shall be supplied to each Board Member in time to be reviewed before a decision is made. A copy of the transcript will be furnished without charge to any interested person upon request.

001.13 The findings shall consist of a concise statement of the conclusions upon each contested revision. Interested parties testifying at the hearing 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 attorney of record.

001.14 The validity of the final order shall be subject to review in accordance with the laws of the State of Nebraska.

001.15 When any petition for the promulgation, amendment or repeal of any Rule or Regulation by the Board has been denied in whole or in part, a subsequent petition covering substantially the same subject matter will not be considered by the Board within one hundred eighty calendar days from the date of the final denial in whole or in part of the previous petition, except for good cause shown.

SEP 27 1983

Title 428 — BOARD OF PUBLIC ROADS CLASSIFICATIONS AND STANDARDS

Chapter 5 — Hearing Practice and Procedure of the Board of Public Roads Classifications and Standards (Continued)

002 HEARING PRACTICE AND PROCEDURES BEFORE THE BOARD OF PUBLIC ROADS CLASSIFICATIONS AND STANDARDS

002.01 General

002.01A Scope and Application. These rules shall govern practice and procedure in all hearings involving contested cases as that term is defined in 84-901(3) Neb. Rev. Stat. Practice and procedure for hearings involving this Board is also governed by Chapter 84, Article 9 Neb. Rev. Stat. In the absence of a specific rule, practice pertaining to proceedings in the district courts of this State shall be applicable.

002.01B Filings. All correspondence and filings shall be addressed or delivered to the Board of Public Roads Classifications and Standards, State of Nebraska, Attention: Secretary for the Board, Box 94759, Lincoln, Nebraska 68509-4759.

002.01C Time Computation. In computing any period of time prescribed or allowed by these Rules the day of the act or event after which the designated period of time begins to run is not to be included. The last day of the period so computed is to be included, unless it is a Saturday, Sunday or a legal holiday, in which event, the period runs until the end of the next day which is neither a Saturday, Sunday nor a holiday. When the period of time prescribed or allowed is less than five days, intermediate Saturdays, Sundays and holidays shall be excluded in the computation. When the Federal government (Post Office) and the State observe the same holiday on different days and such prevents a party from acting within the prescribed time, both days observed shall be considered as holidays.

002.01D Copies of these rules shall be furnished without charge, to any interested person, upon request from the Board at its offices, South Junction U.S. 77 and N-2, Lincoln, Nebraska.

002.01E Appearances. Any individual may appear on his/her own behalf before the Board. An individual may appear on behalf of another if:

1. He/she is admitted to practice law before the Nebraska Supreme Court, or
2. He/she is admitted to practice law before the Supreme Court of any state and is accompanied by a person admitted to practice before the Nebraska Supreme Court.

Nothing in this Rule shall prohibit attorneys representing the Board who are admitted to practice law in Nebraska from interrogating witnesses or otherwise participating in proceedings before the Board.

Title 428 — BOARD OF PUBLIC ROADS CLASSIFICATIONS AND STANDARDS

Chapter 5 — Hearing Practice and Procedure of the Board of Public Roads Classifications and Standards (Continued)

002.01F Definitions. As used in these Rules of practice and procedure, the following definitions shall apply unless the context, to be intelligible or prevent absurdity, otherwise requires:

002.01F1 Pleadings Defined: Pleadings shall mean any written application, petition, protest, complaint, answer or motion used in any proceedings pursuant to this Rule.

002.01F2 Board Defined: Board shall mean the Board of Public Roads Classifications and Standards, State of Nebraska.

002.01F3 Filed with the Board Defined: The filing of pleadings with the Board as required by these Rules shall be made by filing them with the Secretary for the Board. If mailed to the Board the date of receipt at the Board and not the date of deposit in the mails is determinative.

002.01F4 Holiday Defined: A holiday is a day or any portion of a day designated by statute or authorized by the Governor in which no business is transacted by State Government.

002.01F5 Office Hours Defined: Office hours are 8:00 A.M. to 5:00 P.M., Monday through Friday.

002.01F6 Formal Public Hearing Defined: A formal public hearing may be a hearing conducted by a hearing examiner not within the employ of the Board at the time of appointment, the record of which hearing is prepared by a court reporter and at which the rules of evidence applicable in the district courts may be used if requested by either party in accordance with the requirement of 84-914 Neb. Rev. Stat.

002.01F7 Informal Public Hearing Defined: An informal public hearing shall be a hearing conducted by a hearing examiner who is a Board Member or a member of the Board's staff, the record of which hearing shall be transcribed or recorded by the Board, at which either party may elect to be bound by the rules of evidence applicable in the district courts, if such election is in accordance with the requirements of 84-914 Neb. Rev. Stat.

002.01F8 Party Defined: Party shall mean the Nebraska Board of Public Roads Classifications and Standards, an individual, corporation or other entity that is aggrieved by a decision resulting from an interpretation and/or application of the Rules and Regulations of the Board of Public Roads Classifications and Standards.

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Title 428 — BOARD OF PUBLIC ROADS CLASSIFICATIONS AND STANDARDS

Chapter 5 — Hearing Practice and Procedure of the Board of Public Roads Classifications and Standards (Continued)

002.02 Hearing Examiner.

002.02A Appointment of Hearing Examiner. Upon receipt of a request for a hearing by a party, the Board's chairperson may appoint a Hearing Examiner to administer, conduct and preside over a hearing, or may schedule the hearing before the Board at a regular or special meeting.

002.02A1 Informal Public Hearings. The Board's chairperson may, in his/her discretion, appoint any individual to act as Hearing Examiner for informal hearings, including staff members within the employ of the Nebraska Department of Roads, so long as the individual so appointed can, in the opinion of the Board's chairperson serve as a Hearing Examiner in a competent and efficient manner.

002.02A2 Formal Public Hearings. The Board may appoint an individual to act as Hearing Examiner in formal public hearings who is not a member of the Board or a State employee.

002.02B Duties of Hearing Examiner.

002.02B1 Conduct of Hearing. The Hearing Examiner shall preside at the hearing, open the proceedings, acknowledge appearance of parties and counsel, receive evidence for the record, rule on all motions and objections, may interrogate witnesses, and shall close the proceedings. If a party or parties are not represented by legal counsel, the Hearing Examiner shall explain to them the Rules of practice and procedure and shall conduct the hearing generally in a less formal manner.

002.02B2 Custodian of All Pleadings. Upon appointment as Hearing Examiner, the Hearing Examiner shall become the custodian of all pleadings, exhibits, depositions, documents, and briefs entered, filed and introduced into evidence by the parties.

002.02B3 Limitation of Powers. A Hearing Examiner, except for a Board Member, shall have no power to take any action involving a final determination of the proceedings.

002.02B4 Record of Proceedings.

002.02B4(a) Informal Public Hearing. The Hearing Examiner shall prepare an official record which shall include testimony and exhibits, however, it shall not be necessary to transcribe shorthand notes or recordings unless requested by either party.

Title 428 — BOARD OF PUBLIC ROADS CLASSIFICATIONS AND STANDARDS

Chapter 5 — Hearing Practice and Procedure of the Board of Public Roads Classifications and Standards (Continued)

002.02B4(b) **Formal Public Hearing.** The Hearing Examiner shall prepare an official record which shall include testimony and exhibits and such proceedings shall be recorded by a court reporter.

002.02B4(c) **Notice of Hearing.** It shall be the duty of the Hearing Examiner to determine that notice of hearing has been given in accordance with the Rules and Regulations of the Board.

002.02B4(d) **Oath.** All testimony presented before the Hearing Examiner shall be given under oath which the Hearing Examiner will have the authority to administer.

002.02B4(e) **Conduct of Parties.** The Hearing Examiner shall have the power to exclude or remove from the hearing any person who engages in improper conduct.

002.02B4(f) **Findings and Recommendations.** The Hearing Examiner shall, in writing, make complete findings of fact and conclusions of law together with a recommendation for disposition of the issue to the Board.

002.03 **Commencement of Proceeding.** A hearing shall be scheduled within sixty days of receipt of a written request of a party. Such hearing may, at the discretion of the Board, be either a formal or an informal public hearing except that a formal public hearing shall be scheduled when so requested by a party.

002.04 **Scheduling of Hearing.** A hearing shall be held no sooner than twenty days after receipt of a written request.

002.05 **Location of Hearing.** All hearings shall be held at the Lincoln offices of the Board at a room to be announced by the Hearing Examiner.

002.06 **Notice of Hearing.** The Board's Secretary shall give reasonable notice of hearing stating the date, time, location and general subject matter of the hearing. Notice shall be given by mail no later than twenty days prior to a hearing. Failure of a party to appear at a hearing so scheduled shall be grounds for dismissal of the proceeding.

002.07 **Motions.**

002.07A **Motions made prior to a hearing shall be in writing and a copy thereof shall be served on the parties. Such motions, except motions constituting final disposition of a proceeding, shall be ruled on by the Hearing Examiner. Motions constituting final disposition of a proceeding shall be ruled upon by the Board.**

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Chapter 5 — Hearing Practice and Procedure of the Board of Public Roads Classifications and Standards (Continued)

002.07B Motions may be ruled on ex parte, without argument. A copy of the motion with the ruling thereon shall be mailed to the parties.

002.07C Motion for Continuance. Motions for continuance shall be granted at the discretion of the Hearing Examiner, however, no continuance shall be requested and none allowed but for good cause shown and in no case shall a hearing be continued for a period of more than twenty days.

002.08 Discovery.

002.08A The party shall have the right to request answers to questions, and to request the production of specified documents relevant to the proceedings. Further, each may take depositions of any witness upon ten working days notice to the other.

002.08B Discovery requests and/or notice shall be addressed to the party from whom the information or documents are sought with a copy filed with the Hearing Examiner.

002.08C Answers and documents must be provided within ten working days of receipt of request. Objections to such requests shall be made to the Hearing Examiner within five days of receipt of the request. The Hearing Examiner shall affirm or deny such objection within five days of receipt thereof and shall establish time limits for response when objections are denied.

002.08D Failure to respond to any discovery request, except where objections to such requests are sustained, may, at the discretion of the Hearing Examiner, result in the nonresponding party being denied the right to introduce any evidence on the subject of the request, or such other remedy as deemed appropriate.

002.08E The time limits of the discovery procedure may, if necessary and justified in the opinion of the Hearing Examiner, be adjusted to accommodate the time required by the circumstances.

002.09 Subpoena. A subpoena may be had upon request which shall indicate to the Hearing Examiner the names and the last known addresses of the witnesses to be called. If evidence other than oral testimony is required, each item to be produced shall be adequately described. All requests for subpoena shall be directed to the attention of the Hearing Examiner no less than five days prior to the published date of said hearing. The Hearing Examiner shall issue subpoena as requested and mail the same to the party so requesting within seven days of receipt of request therefore. Service may be made either by mailing a copy thereof by registered or certified mail, return receipt requested, no less than three days before the hearing date of the cause which the witness is required to attend, or personally by any person not interested in the action. No costs for serving a subpoena will be allowed.

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Title 428 — BOARD OF PUBLIC ROADS CLASSIFICATIONS AND STANDARDS

Chapter 5 — Hearing Practice and Procedure of the Board of Public Roads Classifications and Standards (Continued)

002.10 Conduct of Hearing. The Board shall present its case first, setting forth the grounds and reasons for its actions, and then the other party shall be heard. In cases where the Board feels that the other party should be heard first, that party shall be notified not less than five days in advance of the hearing.

002.11 Decision of the Board. The decision of the Board shall be in writing and a copy of the decision shall be mailed to the party by mail no later than sixty days after the recommendation of the Hearing Examiner is received by the Board. The Board may, at its discretion, adopt the recommendation of the Hearing Examiner, or the Board may make an independent decision accompanied by its findings of fact and conclusions of law. Any decision concerning the penalty provisions of Nebraska Statutes shall be mailed by certified or registered mail.

APPROVED

PAUL L. DOUGLAS

ATTORNEY GENERAL

BY

Anna L. Lorty
Assistant Attorney General

AUG 11 '83

DATE _____

FILED

Allen J. Burman

Secretary of State

9-27-83/r

APPROVED:

Date 9-27-83

Bob Kerrey

Governor