

STATE OF NEBRASKA
DEPARTMENT OF NATURAL RESOURCES

RULES OF PRACTICE AND PROCEDURE

NOVEMBER 2020

NEBRASKA ADMINISTRATIVE CODE

TITLE 454 – DEPARTMENT OF NATURAL RESOURCES
RULES OF PRACTICE AND PROCEDURE

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TITLE 454 – DEPARTMENT OF NATURAL RESOURCES
RULES OF PRACTICE AND PROCEDURE

CHAPTER 1 – GENERAL DEFINITIONS

Unless otherwise specifically defined in any Chapter of this Title, the following definitions apply:

001. DEPARTMENT. The Department of Natural Resources.

02. DIRECTOR. The Director of the Department.

03. PERSON. An individual, partnership, limited liability company, corporation, association, district, governmental subdivision, agency, or public or private organization of any character.

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CHAPTER 2 - THE OFFICE OF THE DEPARTMENT OF NATURAL RESOURCES

1. LOCATION. The office of the Department is located in Lincoln, Nebraska at ~~301 Centennial Mall South on the fourth floor of the Nebraska State Office Building~~ **245 Fallbrook Boulevard, Suite 201, on the second floor of the Fallbrook Office Building.**

2. MAILING ADDRESS. The mailing address of the Department is:

Department of Natural Resources
~~P. O. Box 94676~~ **245 Fallbrook Blvd. Suite 201**
Lincoln, Nebraska ~~68509-4676~~ **68521**

003. OFFICIAL HOURS. The official hours of the Department are from 8:00 A.M. to 5:00 P.M., Monday through Friday, except legal holidays.

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CHAPTER 3 - FILING REQUIREMENTS

The following filing requirements apply unless more specific requirements are stated in statute or within the Department's Rules, Titles 454, 455, 456, 457, and 458.

01. METHOD. Pleadings, documents, and correspondence required to be filed with the Department shall be properly filed in accordance with these rules when they are:

01.01. Delivered to the office of the Department. Delivery is defined as:

001.01(A). Personal delivery by required date; or

001.01(B). Mailed to and received by the Department by the required date; or

001.01(C). Telefaxed to and received by the Department by the required date, and the original signed document filed in the Department within five days of the receipt of the telefax; or

001.01(D). Electronically scanned and electronically mailed to and received by the Department by the required date, and the original signed document filed in the Department within five days of the receipt of the electronic mail. Electronic filings shall be sent to DNR.legalfile@Nebraska.gov.

01.02. Accompanied by proper fees.

When the filing of a pleading or the performing of an act is required by a certain date which falls during nonofficial hours (as described in Chapter 2 of these rules) the date for filing or performing shall be extended to the next succeeding date which falls within official hours.

02. FORM. Pleadings filed with the Department shall be in the following form:

02.01. SIZE AND PAPER. The pleading shall be made on white, letter-sized (8½ x 11 inch) paper;

02.02. PRINT. The pleading 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;

02.03. MARGINS. The first page of the pleading shall have a top or bottom margin of not less than two inches for the stamp of the Department; and

02.04. ATTACHMENT. Any documents attached to a pleading shall be securely fastened to the pleading and shall meet the requirements of 002.01 and 002.02 and, when possible, be reproduced on 8½ x 11 inch paper or placed in an 9 x 12 inch envelope and clearly marked as an attachment to the petition.

03. COPIES. One copy of all pleadings, documents and correspondence is required unless otherwise ordered by the Director or Hearing Officer.

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CHAPTER 4 - NEGOTIATED RULEMAKING

01. NEGOTIATED RULEMAKING GENERALLY. The purpose of this rule is to establish a framework for the conduct of negotiated rulemaking consistent with the *Administrative Procedure Act* and the *Negotiated Rulemaking Act*, Neb. Rev. Stat. §§ 84-921 through 84-932. The negotiated rulemaking process can be used by state agencies, whenever appropriate, to resolve controversial issues prior to the commencement of formal rulemaking. Negotiated rulemaking is not a substitute for the requirements of the *Administrative Procedure Act*, but may be used as a supplemental procedure to permit the direct participation of affected interests in the development of new rules or the amendment or repeal of existing rules. The negotiated rulemaking process also does not preclude other Department efforts or processes designed to reach consensus with affected or interested persons concerning the content of rules. A consensus agreement on a proposed rule reached by a negotiated rulemaking committee may be modified by the Department as a result of a subsequent formal rulemaking process.

02. DEFINITIONS. For purposes of this Chapter of this procedural rule:

02.01. APA means the *Administrative Procedure Act*, Neb. Rev. Stat. §§ 84-901 through 84-920.

02.02. Consensus means unanimous concurrence among the interests represented on a negotiated rulemaking committee unless the committee agrees upon another specified definition.

02.03. Convener means a person who impartially assists the Department in determining whether establishment of a negotiated rulemaking committee is feasible and appropriate for a particular rulemaking procedure.

02.04. Facilitator means a person who impartially aids in the discussion and negotiations among the members of a negotiated rulemaking committee to develop a proposed rule. A facilitator does not have decision making authority.

02.05. Interest means with respect to an issue or matter, that multiple parties have a similar point of view or that are likely to be affected in a similar manner.

02.06. Negotiated rulemaking means rulemaking through the use of a negotiated rulemaking committee.

02.07. Negotiated rulemaking committee or committee means an advisory committee established to consider and discuss issues for the purpose of reaching a consensus in the development of a proposed rule.

02.08. Person means an individual, partnership, limited liability company, corporation, association, district, governmental subdivision, agency, or public or private organization of any character.

02.09. Rule means any rule issued by the Department, including the amendment or repeal thereof whether with or without prior hearing, and designed to implement, interpret, or make specific the law enforced or administered by it or governing its organization or procedure, but not including rules concerning the internal management of the Department not affecting private rights, private interests, or procedures available to the public and not including permits, and any rules of interpretation thereof, and for the purpose of the APA, every rule which shall prescribe a penalty shall be presumed to have general applicability or to affect private rights and interests.

03. ESTABLISHMENT OF A NEGOTIATED RULEMAKING COMMITTEE; CRITERIA. The Department may establish a negotiated rulemaking committee to negotiate and develop a proposed rule if the Director determines that the use of the negotiated rulemaking procedure is in the public interest. In making that determination, the Director shall consider whether:

03.01. There is a need for the rule;

03.02. There are a limited number of identifiable interests that may be significantly affected by the rule;

03.03. There is a reasonable likelihood that a committee can be convened with a balanced representation of persons who:

003.03(A). Can adequately represent the interests identified; and

003.03(B). Are willing to negotiate in good faith to reach a consensus on the proposed rule.

03.04. There is a reasonable likelihood that a committee will reach a consensus on the proposed rule within a fixed period of time;

03.05. The negotiated rulemaking procedure will not unreasonably delay the notice of proposed formal rulemaking and the issuance of the final rule pursuant to the APA;

03.06. The Department has adequate resources and is willing to commit those resources, including technical assistance, to the committee; and

03.07. The Department, to the maximum extent possible consistent with the legal obligations of the Department, will use the consensus of the committee as the basis of the rule proposed by the Department in the formal rulemaking process of the APA.

04. CONVENERS; SELECTION; DUTIES. The Department, at the discretion of the Director, may use the services of a convener.

04.01. The Department may employ or contract for an organization or an individual to serve as a convener, or may use the services of a state employee to act as a convener. A convener shall not have a financial or other interest that would preclude him or her from serving in an impartial and independent manner. The Department shall determine whether a person under consideration as a convener has such an interest. A person disqualified under this criterion shall be dropped from further consideration.

04.02. The convener may assist the Department in making the determination of need for a negotiated rulemaking process discussed in section 003 above. The convener may also assist the Department in:

004.02(A). Identifying persons who will be significantly affected by a proposed rule.

004.02(B). Conducting discussions with affected persons on the issues of concern and ascertaining whether the establishment of a negotiated rulemaking committee is feasible and appropriate for the particular rulemaking.

04.03. The convener shall report findings and make recommendations to the Department. Upon request of the Department, the convener shall ascertain the names of persons who are willing and qualified to represent the interests that will be significantly affected by the proposed rule. That report by the convener and any recommendations of the convener shall be public records and made available to the public for review upon request.

05. PETITIONS FOR THE USE OF A NEGOTIATED RULEMAKING COMMITTEE. Any person may petition the Department to request the use of a negotiated rulemaking committee in the development or revision of a rule, as provided below.

05.01. A negotiated rulemaking process may be requested on any topic appropriate for a rule by the Department.

005.01(A). A negotiated rulemaking process may be requested only to develop or revise rules which carry out statutes that are within the authority of the Department to implement.

005.01(B). A negotiated rulemaking process may not be requested to develop a rule to vary or change the specific terms of a statute.

005.01(C). A negotiated rulemaking process may not be requested to negotiate a rule on a matter which is not within the definition of a rule as set forth herein.

05.02. A request for the use of a negotiated rulemaking procedure shall be made by a petition that meets the requirements of form set out in this subsection. In the event that it does not, the Department may refuse to accept it.

005.02(A). A petition may be in the form of a pleading that contains a caption, heading, and name as set forth on Attachment 1, which is attached to this rule and made a part of it by reference.

005.02(B). A petition may also be made in the form of a letter so long as the letter contains all of the information required by this rule and is clearly delineated as a petition for negotiated rulemaking.

05.03. A petition for a negotiated rulemaking procedure shall meet the following requirements for content and substance. In the event that it does not, the Department may refuse to accept it.

005.03(A). The petition must identify the general subject matter about which the negotiated rulemaking procedure is requested, including the statutes or legislative bill(s) which provide authority for the desired rule, and, if amendments to existing rules are sought, identification of the rule by title, chapter, and name.

005.03(B). The petition must identify the specific issue(s) proposed for inclusion in the negotiated rulemaking process.

005.03(C). The petition must discuss the facts surrounding each problem or issue proposed for inclusion in the negotiated rulemaking process.

005.03(D). The petition must discuss why a negotiated rulemaking process is in the public interest, including information on each of the criteria set out in subsections 003.01 through 003.05 above. The petition may also include information on the criteria included in subsections 003.06 and 003.07 above, to the extent such information is available to the petitioner. The petitioner may also submit such other information as may assist the Department in making a decision.

005.03(E). The petition must identify persons who will be significantly affected by any rule which might result from the proposed negotiated rulemaking process, to the extent known by the petitioner. The petitioner may also suggest the names of persons who are willing and qualified to represent the interests that will be significantly affected by the negotiated rulemaking process and the proposed rule.

05.04. Upon the filing of a petition for a negotiated rulemaking procedure, the Director may designate a Department employee or use the services of a convener to recommend to the Director whether a negotiated rulemaking process should be initiated.

05.05. Within sixty (60) days after submission of a petition for a negotiated rulemaking procedure, the Department shall:

005.05(A). Deny the petition in writing, stating the reason(s) for denial; or

005.05(B). Initiate the negotiated rulemaking process as provided in this rule.

05.06. The decision of the Director with respect to a petition for a negotiated rulemaking procedure will be made in the form of an order clearly designated as the decision on the petition. The petitioner shall be served with a copy of the Director's final decision by first class mail.

05.07. A decision by the Director with respect to a petition for a negotiated rulemaking procedure is not subject to judicial review, although nothing herein shall bar a judicial review if such is otherwise provided by law.

06. NOTICE OF A NEGOTIATED RULEMAKING COMMITTEE; COMMENT; APPLICATIONS FOR MEMBERSHIP. If the Director decides to go forward with the establishment of a negotiated rulemaking committee, the Department shall proceed with the following process.

06.01. The Department shall give notice to the Secretary of State, publish notice in a newspaper having general circulation in the state, and, as appropriate, publish notice in other newspapers and publications. The notice shall include:

006.01(A). An announcement that the Department intends to establish a negotiated rulemaking committee to negotiate and develop a proposed rule;

006.01(B). A description of the subject and scope of the rule to be developed and the issues to be considered;

006.01(C). A list of interests likely to be significantly affected by the proposed rule;

006.01(D). A list of the persons proposed to represent the affected interests and the Department;

006.01(E). A proposed schedule for completing the work of the committee; and

006.01(F). An explanation of how a person may apply for or nominate another person for membership on the committee.

06.02. Persons interested in making comments upon the formation of a particular proposed negotiated rulemaking committee shall have thirty (30) days from the date of publication of the notice concerning that committee to do so. Such comments shall be in writing, and shall either be personally delivered to the Department or mailed to the Department at its business office.

06.03. Persons interested in applying for membership on a particular proposed negotiated rulemaking committee or in nominating other persons for such membership shall have thirty (30) days from the date of publication of the notice concerning that committee to do so. Persons making application for membership or nominations for membership shall do so on. Persons making application for membership or nominations for membership may also do so by letter, so long as the letter contains all of the information set out in Attachments 2 and 3 and is clearly delineated as an application or nomination for membership on a specific negotiated rulemaking committee.

07. ESTABLISHMENT OF A NEGOTIATED RULEMAKING COMMITTEE; PROCEDURE. After publication of notice and termination of the comment and membership application period, the Department will consider the comments and membership applications for a particular negotiated rulemaking committee and determine whether such a committee can adequately represent the interests of the persons that will be significantly affected by a proposed rule, and whether such a committee is feasible and appropriate in the particular rulemaking. In making the final determination as to creation of a negotiated rulemaking committee, the Department may use the services of a convener as set out in Section 004 above. In making the final determination as to creation of a negotiated rulemaking committee, the Department and the Director will apply the criteria set out in 003 above.

07.01. If, after such a determination, the Department decides that a negotiated rulemaking procedure is feasible, it shall establish a negotiated rulemaking committee as provided in this rule. The committee will negotiate issues and develop proposed rules for use by the Department in formal rulemaking.

07.02. If, after such a determination, the Department decides not to establish a negotiated rulemaking committee, the Director shall:

007.02(A). Notify the persons who commented on, applied for membership on, or nominated persons for membership on the particular negotiated rulemaking committee of the reasons for the decision not to establish such a committee.

007.02(B). Publish notice of the decision not to establish the particular negotiated rulemaking committee in a newspaper having general circulation in the state, and, as appropriate, in other newspapers and publications.

08. NEGOTIATED RULEMAKING COMMITTEE; MEMBERSHIP. All members of a negotiated rulemaking committee shall participate in the deliberations of the committee with the same rights and responsibilities as other members.

08.01. Members of a negotiated rulemaking committee may include:

008.01(A). A person designated by the Director to represent the Department. This person shall be authorized to fully represent the Department in the discussions and negotiations of the committee;

008.01(B). Persons selected by the Department as willing and qualified to represent the interests that will be significantly affected by the proposed rule;

008.01(C). Persons contacted and recruited by the negotiated rulemaking committee itself by consensus as essential to the success of the negotiated rulemaking process; and

008.01(D). Persons selected by the negotiated rulemaking committee by consensus upon committee review of a petition for membership or nomination as set out in subsection 008.02 below.

08.02. Persons who will be significantly affected by a proposed rule and who believe that their interests will not be adequately represented by any person on a negotiated rulemaking committee may petition for or nominate another person for membership on the negotiated rulemaking committee.

008.02(A). Each petition or nomination for committee membership shall be in writing and be submitted to the negotiated rulemaking committee by delivering or mailing the same to the Department. All such petitions or nominations shall include:

008.02(A)(i). Identification of the applicable negotiated rulemaking proceeding;

008.02(A)(ii). The name of the petitioner or nominee, and a description of the interests the person represents;

008.02(A)(iii). Evidence that the petitioner or nominee is authorized to represent parties related to the interests the person proposes to represent;

008.02(A)(iv). A written commitment that the petitioner or nominee will actively participate in good faith in the development of the rule under consideration; and

008.02(A)(v). An explanation of reasons that the persons already on the negotiated rulemaking committee do not adequately represent the interests of the person submitting the petition or nomination.

008.02(B). Persons wishing to file such a petition for membership or nomination to a negotiated rulemaking committee may use the form attached hereto as Attachments 4 and 5. Attachments 4 and 5 are made a part of this rule by reference. Persons wishing to file such a petition for membership or nomination to a negotiated rulemaking committee may also do so by letter, provided that the letter contains the information set forth above.

008.02(C). Upon receiving a petition for membership or nomination to a particular negotiated rulemaking committee, the committee in question shall decide, at its next meeting, whether or not to expand its membership. A consensus shall be required for any such expansion.

09. NEGOTIATED RULEMAKING COMMITTEE; OPERATION. A negotiated rulemaking committee established under these rules shall consider the matter proposed by the Department for consideration and shall attempt to reach consensus concerning a proposed rule and any other matter the committee determines is relevant to the proposed rule.

09.01. A negotiated rulemaking committee may adopt procedures or ground rules for the operation of the committee consistent with these rules and the pertinent Nebraska statutes.

09.02. The Department shall provide appropriate administrative support to a negotiated rulemaking committee including technical assistance and support.

09.03. The person representing the Department on a negotiated rulemaking committee shall participate in the deliberations of the committee with the same rights and responsibilities as other members of the committee and shall be authorized to fully represent the Department in the discussions and negotiations of the committee.

09.04. If a negotiated rulemaking committee achieves consensus on a proposed rule at the conclusion of the negotiations, the committee shall transmit to the Department a report containing the proposed rule.

09.05. If a negotiated rulemaking committee does not reach a consensus on the proposed rule, the committee shall transmit to the Department a report specifying areas in which the committee reached consensus and the issues that remain unresolved. The committee may include in the report any other information, recommendations, or materials that the committee considers appropriate. Any member of the committee may include as an addendum to the report additional information, recommendations, or materials.

10. FACILITATORS; SELECTION; DUTIES. A facilitator shall be selected to assist a negotiated rulemaking committee with its duties.

10.01. The Department may nominate a person to serve as a facilitator for the negotiations of a negotiated rulemaking committee, subject to the approval of the committee by consensus. If the committee does not approve the Department's nomination for facilitator, the Department shall submit a substitute nomination. If the committee does not approve the substitute nomination of the Department for facilitator, the committee shall select, by consensus, a person to serve as facilitator.

10.02. The Department may employ or contract for an organization or an individual to serve as a facilitator for a negotiated rulemaking committee or the Department may use the services of a state employee to act as a facilitator. A person designated by the Department to represent it on a negotiated rulemaking committee with respect to substantive issues may not serve as the facilitator. A facilitator shall not have a financial or other interest that would preclude him or her from serving in an impartial and independent manner. The Department shall determine whether a person under consideration for facilitator has such an interest. A person disqualified under this criterion shall be dropped from further consideration.

10.03. A facilitator approved or selected by a committee shall:

010.03(A). Preside at the meetings of the committee in an impartial manner;

010.03(B). Impartially assist members in conducting discussions and negotiations and achieving consensus; and

010.03(C). Manage the keeping of minutes and records.

11. NEGOTIATED RULEMAKING COMMITTEE; EXPENSES. Members of a negotiated rulemaking committee shall be responsible for their own expenses of participation. However, the Department may pay for a committee member's actual and necessary expenses incurred in serving on the committee as provided in Neb. Rev. Stat. §§ 81-1174 through 81-1177, as amended, and a reasonable per diem rate of compensation if:

11.01. The committee member certifies a lack of adequate financial resources to participate on the committee using the form at Attachment 6 which is attached to this rule and made a part of it by reference; and,

11.02. The Department determines that the committee member's participation is necessary to assure an adequate representation of the interests of the members.

12. GRANTS OR GIFTS. The Department may accept grants or gifts from any source to fund a negotiated rulemaking process if:

12.01. Information on the name of the person giving the grant or gift and the amount of the grant or gift is available to the public;

12.02. The grant or gift is given to and accepted by the Department without placing any condition on the membership of a committee or the outcome of the negotiated rulemaking process; and

12.03. There is a consensus among the members of the negotiated rulemaking committee that the acceptance of the grant or gift will not diminish the integrity of the negotiated rulemaking process.

13. NEGOTIATED RULEMAKING COMMITTEE; TERMINATION. A negotiated rulemaking committee shall terminate upon the adoption of the final rule under consideration by the Department pursuant to the APA, unless the Department, after consulting the committee, or the committee itself specifies an earlier termination date.

14. NEGOTIATED RULEMAKING PROCEDURE; JUDICIAL REVIEW. Any action of the Department relating to establishing, assisting or terminating a negotiated rulemaking committee under the Negotiated Rulemaking Act shall not be subject to judicial review, except that nothing in this section shall bar judicial review if such judicial review is otherwise provided by law.

454 Neb. Admin. Code Chapter 4.
SAMPLE

STATE OF NEBRASKA
DEPARTMENT OF NATURAL RESOURCES

In the Matter of _____)
_____) Petition for Negotiated
_____) Rulemaking
_____)

COMES NOW the petitioner, _____ (insert name of Petitioner), according to the *Nebraska Negotiated Rulemaking Act* and according to the Nebraska Department of Natural Resources' rule for Petitions for Negotiated Rulemaking, and requests that the Nebraska Department of Natural Resources establish a negotiated rulemaking committee as set forth in this Petition.

In support of this request, the Petitioner states as follows:

1. The Nebraska Department of Natural Resources administers the provisions of _____ (insert sections of the statutes or legislative bill numbers for which negotiated rulemaking is sought), and is responsible for development of rules to implement these statutes.
2. Petitioner seeks a negotiated rulemaking procedure to (check one):
 - () develop new rules
 - () amend existing rules, specifically _____
 - () repeal certain existing rules, specifically _____
3. A negotiated rulemaking committee should be established to negotiate and develop rules on each of the following issues concerning the statute(s), or legislative bill(s) or regulation(s) identified above [(identify each issue as to each statute, or legislative bill or regulation and the general scope of the rulemaking proposed)]:
4. The facts surrounding each of the issues listed in paragraph 3 above are as follows:
5. Establishment of a negotiated rulemaking committee would be in the public interest under each of the following criteria based upon the information the Petitioner hereby submits.
 - A. There is a need for rulemaking on the issue(s) identified above because:

- B. There are a limited number of identifiable interests that will be significantly affected by the rule, including the following interests:
 - C. There is a reasonable likelihood that a negotiated rulemaking committee can be convened with a balanced representation of people (1) who can adequately represent the interests identified above and (2) who are willing to negotiate in good faith to reach a consensus on the proposed rule, as shown by the following:
 - D. There is a reasonable likelihood that a committee will reach a consensus on the proposed rule within a fixed period of time because:
 - E. The use of this procedure will not unreasonably delay formal rulemaking and issuance of a final rule because:
 - F. [(Optional for response by Petitioner)] The Nebraska Department of Natural Resources should commit its resources, including technical assistance, to such a committee because:
 - G. [(Optional for response by Petitioner)] The Nebraska Department of Natural Resources [or as applicable, the Natural Resources Commission] should, to the maximum extent possible consistent with its legal obligations, use a consensus of such a committee as the basis for a rule to be adopted under the Administrative Procedure Act because:
6. The following persons will be significantly affected by any rule which might result from the negotiated rulemaking procedure which is the subject of this Petition [(identify such persons by name and address where possible)]:
 7. The following persons may be willing and qualified to represent the interests that will be significantly affected by any rule which might result from the negotiated rulemaking procedure which is the subject of this Petition [(identify such persons by name and address where possible)]:
 8. Petitioner offers the following additional information (if any) for use by this agency Department in consideration of this request: [if any]

9. Petitioner has attached the following documents in support of this request [(list all documents attached)]:

Dated _____
(month) (day) (year)

Signature of Petitioner (Required)

Petitioner's Name (Printed or Typed, Required)

Petitioner's Full Mailing Address (Required)

City, State, Zip (Required)

Petitioner's Telephone Number with Area Code (Required)

Petitioner's E-mail Address (Required if available)

454 Neb. Admin. Code Chapter 4
SAMPLE

STATE OF NEBRASKA
DEPARTMENT OF NATURAL RESOURCES

In the Matter of the Negotiated
Rulemaking Committee for

)
)
)
)
)

Application
for Membership
on the Committee

APPLICATION FOR MEMBERSHIP
(complete if applicable)

1. The undersigned person (the applicant) hereby applies for membership on the above-referenced negotiated rulemaking committee proposed by this Department.

Applicant's Name (Printed or Typed, (Required))

Applicant's Full Mailing Address (Required)

City, State, Zip (Required)

Applicant's Phone Number with Area Code (Required)

Applicant's E-mail Address (Required if available)

2. The applicant represents the following identifiable interest which will be significantly affected by the proposed administrative rule to be considered by the above-referenced negotiating rulemaking committee:
3. The applicant is authorized to represent parties related to the interest listed above because:
4. The applicant can adequately represent the parties and interest listed above because:

5. In support of his or her application, the applicant has attached the following documents to this petition (list all attachments):
6. By signing this application, the applicant hereby certifies that he or she will represent the interest identified above to the best of his or her ability in the negotiation process, and that he or she is willing to actively negotiate in good faith to reach a consensus on the proposed rule to be considered by the above-referenced negotiated rulemaking committee.

Dated _____
(month) (day) (year) _____
Signature of Applicant (Required)

454 Neb. Admin. Code Chapter 4
SAMPLE

STATE OF NEBRASKA
DEPARTMENT OF NATURAL RESOURCES

In the Matter of the Negotiated)	
Rulemaking Committee for)	
_____	)	Nomination
_____	)	for Membership
_____	)	on the Committee

NOMINATION FOR MEMBERSHIP
(complete if applicable)

1. The undersigned person (the nominating party) hereby nominates the following person (the nominee) for membership on the above-referenced negotiated rulemaking committee proposed by the Department.

Nominee's Name (Printed or Typed (Required))

Nominee's Full Mailing Address (Required)

City, State, Zip (Required)

Nominee's Telephone Number with Area Code (Required)

Nominee's E-mail Address (Required if available)

2. The nominee represents the following identifiable interest which will be significantly affected by the proposed administrative rule to be considered by the above-referenced negotiated rulemaking committee:
3. The nominee is authorized to represent parties related to the interest listed above because:
4. The nominee can adequately represent the interest and parties listed above because:
5. In support of the nomination of the nominee, the nominating party has attached the following documents to this petition (list attachments):

6. The nominating party believes that the nominee will represent the interest identified above to the best of his or her ability and that the nominee is willing to negotiate in good faith to reach a consensus on the proposed rule to be considered by the above-referenced negotiated rulemaking committee because:

Dated _____
(month) (day)(year)

Signature of Nominating Party (Required)

Nominating Party's Name (Printed or Typed, Required)

Nominating Party's Full Mailing Address (Required)

City, State, Zip (Required)

Nominating Party's Telephone Number with Area Code (Required)

Nominating Party's Email Address (Required if available)

454 Neb. Admin. Code Chapter 4

SAMPLE

STATE OF NEBRASKA

DEPARTMENT OF NATURAL RESOURCES

In the Matter of the Negotiated	)	Application
Rulemaking Committee for	)	for Membership
_____	)	on the Committee
_____	)	(interest inadequately
_____	)	represented)

APPLICATION FOR MEMBERSHIP
(complete if applicable)

1. The undersigned person (the applicant) hereby applies for membership on the above-referenced negotiated rulemaking committee.

Applicant's Name (Printed or Typed (Required))

Applicant's Full Mailing Address (Required)

City, State, Zip (Required)

Applicant's Phone Number with Area Code (Required)

Applicant's E-mail Address (Required if available)

2. The applicant represents the following identifiable interest which will be significantly affected by the proposed administrative rule being considered by the above-referenced negotiated rulemaking committee:
3. The applicant is authorized to represent parties related to the interest listed above because:
4. The applicant can adequately represent the parties related to the interest listed above because:

5. Reasons that persons already serving on the above-referenced negotiated rulemaking committee do not adequately represent the interest listed in paragraph 2 above include:

A. In support of his or her application, the applicant has attached the following documents to this petition (list all attachments):

B. By signing this application, the applicant hereby certifies that he or she will represent the interest identified above to the best of his or her ability in the negotiation process, and that he or she is willing to actively negotiate in good faith to reach a consensus on the proposed rule being considered by the above-referenced negotiated rulemaking committee.

Dated

(month)

(day)(year)

Signature of Applicant (Required)

454 Neb. Admin. Code Chapter 4
SAMPLE

STATE OF NEBRASKA
DEPARTMENT OF NATURAL RESOURCES

In the Matter of the Negotiated	)	Nomination
Rulemaking Committee for	)	for Membership
_____	)	on the Committee
_____	)	(interest inadequately
_____	)	represented)

NOMINATION FOR MEMBERSHIP
(complete if applicable)

1. The undersigned person (the nominating party) hereby nominates the following person (the nominee) for membership on the above-referenced negotiated rulemaking committee.

Nominee's Name (Printed or Typed (Required))

Nominee's Full Mailing Address (Required)

City, State, Zip (Required)

Nominee's Telephone Number with Area Code (Required)

Nominee's E-mail Address (Required if available)

2. The nominee represents the following identifiable interest which will be significantly affected by the proposed administrative rule being considered by the above-referenced negotiated rulemaking committee:
3. The nominee is authorized to represent parties related to the interest listed above because:
4. The nominee can adequately represent the interest listed above because:
5. Reasons that persons already serving on the above-referenced negotiated rulemaking committee do not adequately represent the interest listed in paragraph 2 above include:

6. In support of the nomination of the nominee, the nominating party has attached the following documents to this petition (list all attachments):

7. The nominating party believes that the nominee will represent the interest identified above to the best of his or her ability and that the nominee is willing to actively negotiate in good faith to reach a consensus on the proposed rule to be considered by the above-referenced negotiated rulemaking committee because:

Dated _____
(month) (day)(year) _____
Signature of Nominating Party (Required)

Nominating Party's Name (Printed or Typed, Required)

Nominating Party's Full Mailing Address (Required)

City, State, Zip (Required)

Nominating Party's Telephone Number with Area Code (Required)

Nominating Party's E-mail Address (Required if available)

454 Neb. Admin. Code Chapter 4

SAMPLE

STATE OF NEBRASKA

DEPARTMENT OF NATURAL RESOURCES

STATE OF NEBRASKA)
) ss.
COUNTY OF _____)

In the matter of the Negotiated)
Rulemaking Committee _____)

_____)

Certification of
Financial
Need

COMES NOW the undersigned, being first duly sworn, and hereby states and certifies as follows:

1. I am a member of the above-referenced negotiated rulemaking committee created by the Nebraska Department of Natural Resources.
2. In connection with my duties on that committee, I represent [insert the name of the appropriate identified interest].
3. In connection with my duties on that committee, I have incurred or will incur expenses and/or other costs.

4. I certify that I have a lack of adequate financial resources to serve on the above-referenced negotiated rulemaking committee, and that I need financial assistance from this Department in order to serve.

Dated _____
(month) (day)(year) Signature of Affiant (Required)

Subscribed and sworn to before me _____
(month) (day) (year)

Notary Public

My Commission Expires:

NEBRASKA ADMINISTRATIVE CODE

TITLE 454 – DEPARTMENT OF NATURAL RESOURCES
RULES OF PRACTICE AND PROCEDURE

CHAPTER 5 - PETITIONING FOR RULEMAKING

001. RULEMAKING PETITION.

01.01. PETITION. Any person may petition the Department requesting the promulgation, amendment, or repeal of a rule.

01.02. FORM. The petition shall:

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

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

001.02(C). In the case of a petition for the repeal of an existing rule, state such purpose and either set forth the rule to be repealed in full or refer to it by Department rule number;

001.02(D). Describe the reason for the rules change;

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

001.02(F). Be signed by:

001.02(F)(i). The petitioner or his or her attorney in which case the attorney shall also state his or her address and telephone number; or

001.02(F)(ii). A duly authorized officer of the petitioner, if petitioner is a corporation or other legal entity.

02. PETITION CONSIDERATION AND DISPOSITION.

02.01. Within sixty (60) days after submission of a petition, the Department shall:

002.01(A). Deny the petition in writing, stating its reasons therefor; or

002.01(B). Initiate rulemaking proceedings in accordance with the *Administrative Procedure Act*.

NEBRASKA ADMINISTRATIVE CODE

TITLE 454 – DEPARTMENT OF NATURAL RESOURCES RULES OF PRACTICE AND PROCEDURE

CHAPTER 6 - DECLARATORY ORDERS

001. GENERAL INFORMATION.

001.01 Scope of this chapter. This chapter pertains solely to the procedures to be used by any person or entity seeking issuance of a declaratory order by the Department.

02. DEFINITIONS. As used in this chapter:

02.01. Argument means 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;

02.02. Contested case means a proceeding before the Department 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 Department;

02.03. Declaratory order proceeding means a proceeding initiated by a petitioner seeking issuance of a binding order by the Department regarding the applicability of specified circumstances to a statute, rule, or order within the primary jurisdiction of the Department;

02.04. Hearing officer means the person or persons conducting a declaratory order proceeding pursuant to the *Administrative Procedure Act*, whether designated as the presiding officer, administrative law judge, or some other title;

02.05. Intervenor(s) means person(s), political subdivision(s), corporation(s), organization(s), or other entity (entities) who have or claim to have any interest, legal right, duty, privilege, or immunity, which would be directly affected by the Department's issuance of a binding declaratory order;

02.06. Necessary party means a person who or an entity which has a specific interest in the applicability of the statute, rule, 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;

02.07. Parties means persons, political subdivisions, corporations, organizations, or other entities subject to the jurisdiction of the Department who are involved in a declaratory order proceeding according to the procedures set forth in this chapter;

02.08. Petition means the document filed in accordance with section 003 of this chapter to initiate a declaratory order proceeding;

02.09. Petitioner(s) means a party or parties who have filed a petition with the Department seeking issuance of a declaratory order; and

02.10. Pleading means any written petition, answer, or motion used in any declaratory order proceeding before the agency as set forth in this chapter.

03. PETITION FOR DECLARATORY ORDER.

03.01. GENERALLY. A request for a declaratory order must be made by a petition that meets the requirements of this section.

03.02. WHO MAY FILE. Any person may petition the Department for issuance of a declaratory order regarding the applicability to specified circumstances of a statute, rule, or order which is within the primary jurisdiction of the Department.

03.03. WHEN ORDERS APPROPRIATE. A declaratory order may be requested on the applicability of a statute, rule, or order enforced by the Department. "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:

003.03(A). A declaratory order may be requested only on the applicability of existing statutes and rules;

003.03(B). 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(C). A declaratory order is not a mechanism for review or appeal of a decision made by the Department in a contested case;

003.03(D). A declaratory order may not be requested to obtain a declaration by the Department that a statute or rule is unconstitutional or that a rule of the Department is invalid; and

003.03(E). A declaratory order may not be issued by the Department 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.

03.04. FORM OF PETITION. A petition for declaratory order shall be in the form of a pleading (see Attachment 1 to this rule incorporated by reference to this rule) which shall contain each of the following:

003.04(A). A caption, which shall include:

003.04(A)(i). STATE OF NEBRASKA, DEPARTMENT OF NATURAL RESOURCES;

003.04(A)(ii). A heading specifying the subject matter and the name of the petitioner; and

003.04(A)(iii). The name of the pleading: PETITION FOR DECLARATORY ORDER;

003.04(B). The statements required in subsection 003.05 of this chapter;

003.04(C). The signature of the petitioner, or when represented by an attorney, the signature of the attorney; and

003.04(D). The name and address of the petitioner, and when represented by an attorney, the name, address, telephone number, and bar number of the attorney.

03.05. CONTENTS OF PETITION. To be considered, the petition shall include the following:

003.05(A). The name and address of the petitioner;

003.05(B). 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, or order or who may be adversely affected by the issue sought to be resolved by the petitioner;

003.05(C). The statute, rule, or order upon which the petitioner seeks issuance of a declaratory order;

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

003.05(E). All propositions of law or contentions asserted by the petitioner;

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

003.05(G). Any documents pertinent to the petition that the petitioner wishes to be considered by the Department.

03.06. 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.

03.07. SAMPLE PETITION. The petitioner may use the sample form of a petition which is Attachment 1 and incorporated within this chapter. The petitioner may also prepare a reasonable facsimile of Attachment 1 so long as the requirements of subsections 003.04, 003.05, and 003.06 of this chapter are satisfied.

03.08. 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.

04. SUBMISSION AND SERVICE OF DECLARATORY ORDER PETITION.

04.01. At the same time the petition is filed with the Department, 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 Department.

05. DISPOSITION OF THE PETITION.

05.01. GENERALLY. Upon the filing of a petition, the Director may consider the petition, or delegate the matter to a designated hearing officer, or Department employee to consider the petition and recommend a decision to the Director. In reviewing the petition, the Director may, in his/her discretion, do one or more of the following:

005.01(A). Require that additional information be submitted before the petition will be further considered;

005.01(B). 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 Department;

005.01(C). 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;

005.01(D). Consider the petition and any attachments without oral presentation.

05.02. Within thirty (30) days after the petition is filed, the Director shall, in writing:

005.02(A). Issue an order declaring the applicability of the statute, rule, or order in question to the specified circumstances; or

005.02(B). Agree to issue an order by a specified time declaring the applicability of the statute, rule, or order in question to the specified circumstances; or

005.02(C). Set the matter for specified proceedings as set forth in subsection 005.01 of this Chapter; or

005.02(D). Decline to issue a declaratory ruling, stating the reasons for the Director's decision.

05.03. Notwithstanding section 005.02 of this rule, the Director may determine at any time that he/she will not issue a declaratory order if issuance of an order under the circumstances would be contrary to any provisions of section 009 of this Chapter. The Director shall notify the petitioner and, if applicable, any intervenor or necessary party in writing when the Director determines not to issue a declaratory order.

06. INTERVENTION IN DECLARATORY ORDER PROCEEDING.

06.01. Intervention by any person or entity in a declaratory order proceeding shall be allowed when the following requirements are met:

006.01(A). A petition for intervention must be submitted in writing to the Department. Copies must be mailed to all parties to the proceeding;

006.01(B). The contents of the petition must be as specified in 006.02; and

006.01(C). The Director determines that the interests of justice and the orderly and prompt conduct of the proceedings will not be impaired by allowing the intervention.

06.02. CONTENTS OF PETITION. The petition for intervention shall be submitted to the Department in writing, on 8½ " x 11" white paper, and shall include each of the following:

006.02(A). The statute, regulation, rule, or order that may apply to or affect the person, property, entity, or facts at issue in the matter;

006.02(B). A statement of facts sufficient to show the intervenor's interest;

006.02(C). A statement of facts which demonstrates that the intervenor's legal rights, duties, privileges, immunities, or other legal interests may be substantially affected by the proceeding or that the intervenor may intervene pursuant to a provision of law;

006.02(D) All propositions of law or contentions asserted by the intervenor; and

006.02(E). A statement of the specific relief requested by the intervenor.

06.03. The Director may, at his/her discretion, invite any person or entity to file a petition for intervention.

06.04. The Director may grant a petition for intervention if the requirements of section 006.01 and section 006.02 are satisfied.

06.05. The Director shall deny a petition for intervention upon determining that the interests of justice or the orderly and prompt conduct of the proceedings would be impaired by allowing the intervention.

06.06. The Director's decision to grant or deny a petition for intervention shall be in writing and served upon all parties.

07. DECLARATORY ORDER PROCEEDINGS.

07.01. ORAL ARGUMENT, WHEN. Oral argument shall be had only on specific order of the Department. A petitioner, intervenor, necessary party, or the Department may submit a motion for oral argument to the Director, hearing officer, or appointed Department employee. If opportunity for oral argument is granted, then argument shall be scheduled to be conducted not more than forty-five (45) days after filing of the petition. Petitioner and all other parties or, when represented, their attorneys, shall be served by the Director or the Director's designee with a notice of the date, time, and location for oral argument. The Director or the Director's designee shall provide each of the parties with notice of the proceeding not less than seven (7) days in advance of the scheduled date. Service shall be made by certified mail, return receipt requested.

07.02. ORAL ARGUMENT, PROCEDURE. Oral argument will be made before a hearing officer or before any representative of the Department who is authorized to render or to recommend a decision to the Director. The hearing officer or Department representative shall be in control of the proceeding and shall :

007.02(A). Identify the proceeding and introduce himself or herself and identify each party for the record;

007.02(B). Hear the oral argument of the petitioner, intervenor, or necessary parties;

007.02(C). Close the proceedings.

07.03. At the declaratory order proceeding, Department staff shall have the right to present oral argument.

07.04. The hearing officer or representative may impose reasonable time limits on the amount of time allocated to each party for oral argument.

07.05. The parties and Department staff may file briefs in support of their respective positions. The hearing officer may fix the time and order of filing briefs and may direct that briefs be submitted prior to the date of oral argument.

07.06. The oral argument may be conducted either in person or by telephone conference call or by other suitable electronic means.

08. ISSUANCE OF DECLARATORY ORDER.

08.01. The Director shall issue its declaratory order within sixty (60) days of the date on which the petition was filed unless otherwise provided for in section 005 of this chapter.

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

008.02(A). The names of all parties to the proceeding;

008.02(B). The facts upon which the order is based;

008.02(C). The statute, rule, or order at issue in the matter;

008.02(D). The Director's conclusion as to the applicability of the statute, rule, or order to the facts;

008.02(E). The Director's conclusion as to the legal effect or result of applying the statute, rule, or order to the facts; and

008.02(F). The reasons relied upon by the Director to support his/her conclusions.

08.03. A copy of the declaratory order shall be served upon each party.

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

08.05. No Response within 60 Days. If the Director has not issued a declaratory order within sixty (60) days after the petition has been filed, then the petition shall be deemed to have been denied by the Director.

09. CIRCUMSTANCES UNDER WHICH DIRECTOR WILL NOT ISSUE DECLARATORY ORDERS.

09.01. Grounds upon which the Director shall refuse to issue a declaratory order include, but are not limited to, the following:

009.01(A). The petition requests a declaratory order on a matter that is outside the scope of authority of the Department;

009.01(B). The petition requests review or appeal of a decision made by the Department in a contested case;

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

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

009.01(E). The petition seeks a declaration that a statute or rule is unconstitutional or invalid;

009.01(F). 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;

009.01(G). 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;

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

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

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

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

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

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

10. APPEAL.

10.01. Orders pertaining to water rights for irrigation, power, or other useful purposes. Any party or parties dissatisfied with the decision made in a declaratory order regarding water rights for irrigation, power, or other useful purposes may appeal to the Court of Appeals to

reverse, vacate, or modify the order complained of. The procedure to obtain such reversal, vacation, or modification shall be governed by the same provisions in force with reference to appeals and error proceedings from the district court.

10.02. All other matters. All declaratory orders issued by the Department except for those described in 454 *Neb. Admin. Code* Chapter 6 § 010.01 are subject to review in the same manner provided for review of contested cases by the *Administrative Procedure Act*, §§ 84-901 to 84-920. Specific procedures for appeal are set forth in *Neb. Rev. Stat.* § 84-917.

454 *Neb. Admin. Code* Chapter 6
SAMPLE

STATE OF NEBRASKA
DEPARTMENT OF NATURAL RESOURCES

In the Matter of _____)
_____)
_____)
_____)

PETITION FOR
DECLARATORY ORDER

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

Dated _____
(month) (day)(year)

Signature of Petitioner (Required)

Petitioner's Name (Printed or Typed, Required)

Petitioner's Full Mailing Address (Required)

City, State, Zip (Required)

Petitioner's Telephone Number with Area Code (Required)

Petitioner's E-mail Address (Required if available)

VERIFICATION

STATE OF)
) ss.
COUNTY OF)

On _____, _____, _____ [name],
(month) (day) (year)

being first duly sworn, states that he/she has read the foregoing Petition for Declaratory Order;
and that the allegations of fact therein are true.

Notary Public

My Commission Expires:

NEBRASKA ADMINISTRATIVE CODE

TITLE 454 – DEPARTMENT OF NATURAL RESOURCES
RULES OF PRACTICE AND PROCEDURE

CHAPTER 7 - CONTESTED CASES

01. DEFINITIONS. The following definitions shall apply as used throughout Chapter 7 of these rules.

01.01. Adjudicative and show cause proceedings include, but are not limited to, the following:

001.01(A). Actions taken by the Department under the provisions of Neb. Rev. Stat. §§ 46-229 to 46-229.06 to modify or cancel a surface water appropriation;

001.01(B). Administration of surface water appropriator taking more water than can be beneficially used, Neb. Rev. Stat. § 46-231;

001.01(C). Cases before the Department to determine whether applications or petitions should be approved;

001.01(D). Administration of water appropriations of an irrigation ditch or canal because owners do not maintain the embankments so as to prevent waste as described under Neb. Rev. Stat. § 46-265;

001.01(E). Actions taken by the Department to modify or revoke a Municipal and Rural Domestic Ground Water Transfers Permit under the provisions of Neb. Rev. Stat. § 46-644;

001.01(F). Cases before the Department under the provisions of Neb. Rev. Stat. § 46-684(1) to revoke or modify an Industrial Ground Water Transfer Permit;

001.01(G). Actions taken by the Department under the provisions of Neb. Rev. Stat. § 46-684(2) to determine whether violations have occurred relative to an Industrial Ground Water Transfer Permit;

001.01(H). Actions taken by the Department to revoke an approval to operate a dam under the provisions of Neb. Rev. Stat. § 46-1660(3);

001.01(I). Actions taken by the Department under the provisions of Neb. Rev. Stat. §§ 46-1650 and 46-1667(1) to determine whether a person is violating the Safety of Dams and Reservoirs Act;

001.01(J). Actions taken by the Department under the provisions of Neb. Rev. Stat. §§ 46-1650 and 46-1667(2) relative to the construction, reconstruction, enlargement, alteration, breaching, removal, or abandonment of a dam without having first obtained the required approval;

001.01(K). Actions taken by the Department under the provisions of Neb. Rev. Stat. § 46-1670(3) requiring a person to file an application for approval of an existing dam; and,

001.01(L). Actions taken by the Department under the provisions of Neb. Rev. Stat. § 46-1670(6) to stop impoundment when the Department finds an existing dam is not safe to impound.

01.02. Application includes, but is not limited to, the following:

001.02(A). Application for Recognition of Incidental Underground Water Storage under the provision of Neb. Rev. Stat. § 46-226.01;

001.02(B). Application for a Permit to Appropriate Water under the provision of Neb. Rev. Stat. § 46-233 or § 46-259;

001.02(C). Application for a Permit to Appropriate Water for Induced Ground Water Recharge under the provisions of Neb. Rev. Stat. § 46-233;

001.02(D). Application for a Permit for Intentional Underground Water Storage and Recovery under the provisions of Neb. Rev. Stat. § 46-233, § 46-240, § 46-241, § 46-242, or § 46-297;

001.02(E). Application for a Permit to Appropriate Water for Use in Another State under the provisions of Neb. Rev. Stat. § 46-233.01;

001.02(F). Application to Transfer the Priority Dates Among Water Wells Under an Induced Groundwater Recharge Permit under the provisions of Neb. Rev. Stat. § 46-235.04;

001.02(G). Application for an Appropriation from Natural Lakes and Reservoirs under the provisions of Neb. Rev. Stat. § 46-240;

001.02(H). Application for Additional Water under the provisions of Neb. Rev. Stat. § 46-240.01;

001.02(I). Application for a Permit to Impound under the provisions of Neb. Rev. Stat. § 46-241;

001.02(J). Application for a Permit to Appropriate Stored Water under the provisions of Neb. Rev. Stat. § 46-242;

001.02(K). Application to Conduct Water in a Channel of a Stream under the provisions of Neb. Rev. Stat. § 46-252;

001.02(L). Application for Approval of Plans and Specifications under the provisions of Neb. Rev. Stat. § 46-258;

001.02(M). Application for an Interbasin Transfer under the provisions of Neb. Rev. Stat. § 46-289;

001.02(N). Application for an Intrabasin Transfer under the provisions of Neb. Rev. Stat. § 46-290;

001.02(O). Application for Renewal of a Temporary Transfer under the provisions of Neb. Rev. Stat. § 46-294.02;

001.02(P). Application to Levy Fees Relative to Intentional Underground Water Storage under the provisions of Neb. Rev. Stat. § 46-2,101;

001.02(Q). Application for a Permit to Appropriate Water for Instream Flows under the provisions of Neb. Rev. Stat. § 46-2,110;

001.02(R). Application for Transfer and Map under the provisions of Neb. Rev. Stat. § 46-2,122;

001.02(S). Application to Drain a Natural Lake under the provisions of Neb. Rev. Stat. §§ 46-801 to 46-807;

001.02(T). Application for a Special Permit to Waive Groundwater Well Spacing under the provisions of Neb. Rev. Stat. § 46-610 or § 46-653;

001.02(U). Application for a Permit to Transfer Groundwater to Another State under the provisions of Neb. Rev. Stat. § 46-613.01;

001.02(V). Application for a Permit to Pump From a Groundwater Well Located Within 50 Feet of a Channel of a Stream for Purposes of Irrigation under the provisions of Neb. Rev. Stat. § 46-637;

001.02(W). Application for a Municipal and Rural Domestic Groundwater Transfer Permit under the provisions of Neb. Rev. Stat. § 46-639;

001.02(X). Application for a Permit to a Public Water Supplier to Store Excess, Unused and Unappropriated Water for Recharging Groundwater Reservoirs under the provisions of Neb. Rev. Stat. § 46-645;

001.02(Y). Application for an Industrial Groundwater Transfer Permit under the provisions of Neb. Rev. Stat. § 46-678;

001.02(Z). Application to Amend an Industrial Groundwater Transfer Permit under the provisions of Neb. Rev. Stat. § 46-683.01;

001.02(AA). Application for a Permit to Develop Geothermal Resources under the provisions of Neb. Rev. Stat. § 66-1105;

001.02(BB). Application for Approval of Plans for Dams under the provisions of Neb. Rev. Stat. § 46-1654.

01.03. Complaint means an initial filing in the Department whereby a person sets out allegations of violation of statutes under the authorities of the Department and describes the relief requested. Complaints include, but are not limited to, allegations against the Department regarding violations of Neb. Rev. Stat. Chapter 456, Article 7. See also *Neb. Admin. Code 454* Chapter 10, Public Hearings Regarding Integrated Water Management, Rule 002.04.

01.04. Contested case means a formal proceeding before the Department in which the legal rights, duties, or privileges of a specific party is required by law or constitutional right to be determined after a Department hearing. Hearings held under the provisions of Nebraska Statutes Chapter 46, Article 2; Chapter 46, Article 16; Chapter 46, Article 6 and Neb. Rev. Stat. § 61-206 are all contested case hearings. Public hearings required to be held by the Department under all provisions of the *Nebraska Ground Water Management Act* (Chapter 46, Article 7) are not contested case hearings.

01.05. Ex parte communication means 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:

001.05(A). Communications which do not pertain to the merits of a contested case;

001.05(B). Communications required for the disposition of ex parte matters as authorized by law;

001.05(C). Communications in a rulemaking proceeding; and

001.05(D). Communications to which all parties have given consent.

01.06. Hearing Officer means the person or persons designated by the Director to conduct 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.

01.07. Interested Person means a person who or an entity which has a specific legally protectable interest in the applicability of a statute, rule, or order, as distinguished from a general interest such as may be the concern of the public at large. An interested person is one who is or could be adversely affected in a legally cognizable way by the outcome of a proceeding.

01.08. Objection is a statement or statements presenting arguments in opposition to an action. Any objections filed in response to a notice given may or may not, at the discretion of the objector, include a request for hearing. If a request for hearing is filed with the objection, the objector will be responsible for paying a portion of the costs of the hearing. If an objection is filed without a request for hearing, and if a hearing will be held, then the objector will be given an opportunity to become a party to the hearing, and if the request is granted, then the objector will be responsible for paying a portion of the costs of the hearing. Objections and any accompanying requests for hearing shall be filed as described in:

001.08(A). Objection filed under the provisions of Neb. Rev. Stat. § 46-233(5);

001.08(B). Objection filed in response to a notice of application or petition.

001.08(C). Objection and request for hearing filed under the provisions of Neb. Rev. Stat. § 46-235.04;

001.08(D). Objection and request for hearing filed under the provisions of Neb. Rev. Stat. § 46-291(4);

001.08(E). Objection and request for hearing filed under the provisions of Neb. Rev. Stat. § 46-2,1114;

001.08(F). Objection and request for hearing filed under the provisions of Neb. Rev. Stat. § 46-640;

001.08(G). Objection and request for hearing filed under the provisions of Neb. Rev. Stat. § 46-680.

01.09. Party means an interested person who is recognized by the Department as having standing in a contested case. A party is classified as:

001.09(A). Applicant: A person filing an application;

001.09(B). Objector: A person filing an objection to the granting of an application or petition;

001.09(C). Complainant: A person filing a complaint;

001.09(D). Defendant: A person against whom a complaint is filed;

001.09(E). Petitioner: Any person filing a petition or seeking relief other than by complaint or application;

001.09(F). Respondent: A person designated in an investigative, adjudicative, or show cause proceeding;

001.09(G). Intervenor: A person permitted to intervene; and

001.09(H). Department Staff: Persons who appear in a proceeding by virtue of their Department employment.

01.10. Petition includes, but is not limited to, an application or a request for Department action filed as required under:

001.10(A). Petition for Extension of Time filed under the provisions of Neb. Rev. Stat. § 46-238;

001.10(B). Petition for Changing the point of diversion or changing the line of any flume, ditch, or aqueduct, or changing a storage site under the provisions of Neb. Rev. Stat. § 46-250;

001.10(C). Petition for hearing under the provisions of Neb. Rev. Stat. § 46-686.01;

001.10(D). Petition for Leave to File or Consider an Application filed under the provisions of Department rules 457 Neb. Admin. Code Chapter 23; and

001.10(E). Petition to reevaluate a basin, subbasin, or reach under the provisions of Neb. Rev. Stat. § 46-713(2)(a).

01.11. Request for a hearing includes, but is not limited to:

001.11(A). Any request for hearing filed with any objection filed in response to a notice of application or petition;

001.11(B). Request for hearing filed with objection filed under the provisions of Neb. Rev. Stat. § 46-233(5);

001.11(C). Request for a hearing filed by an applicant aggrieved by the decision made under the provisions of Neb. Rev. Stat. § 46-235 in those instances where a hearing was not held before the final decision;

001.11(D). Request for hearing filed with objection under the provisions of Neb. Rev. Stat. § 46-235.04;

001.11(E). Requests for hearing filed under the provisions of Neb. Rev. Stat. § 46-238(2);

001.11(F). Requests for hearing filed with objections filed under the provisions of Neb. Rev. Stat. § 46-291(4);

001.11(G). Requests for hearing filed with objections under the provisions of Neb. Rev. Stat. § 46-2,114;

001.11(H). Requests for hearing filed with objection under the provisions of Neb. Rev. Stat. § 46-640;

001.11(I). Requests for hearing filed with objection under the provisions of Neb. Rev. Stat. § 46-680;

001.11(J). Requests for hearing made under the provisions of Neb. Rev. Stat. § 46-684;

001.11(K). Requests for hearing made under the provisions of Neb. Rev. Stat. § 46-691(2); and

001.11(L). Requests for hearing made at the request of any party to the proceeding under the provisions of Neb. Rev. Stat. § 61-206 if a final decision is made without a hearing.

01.12. Response to a Department order includes, but is not limited to:

001.12(A). Notice of contests under the provisions of Neb. Rev. Stat. § 46-229.02; and

001.12(B). Response filed under the provisions of Neb. Rev. Stat. § 46-1667.

02. COMMENCEMENT OF A CONTESTED CASE.

02.01. A contested case begins with the timely filing of a:

002.01(A) Formal objection to an application; or

002.01(B). Formal objection to a petition; or

002.01(C). Formal objection to a transfer made under the provisions of Neb. Rev. Stat. § 46-678.01; or

002.01(D). A notice by the Department that a hearing will be held on the Director's own motion regarding an application or petition; or

002.01(E). Request for a hearing by an applicant aggrieved by a decision made under the provisions of Neb. Rev. Stat. § 46-235 in those instances where a hearing was not held before the final decision; or

002.01(F). Request for a hearing on any Department order that is a final decision when the decision was made without a contested case hearing and the petition is filed by a party to the proceeding; or

002.01(G). Formal complaint regarding violations under the authorities of the Department; or

002.01(H). An investigative, adjudicative or show cause order issued by the Director under the authorities of the Department; or

002.01(I). Petition for a hearing from a natural resources district under the provisions of Neb. Rev. Stat § 46-691.

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. Any attorney that is not admitted into practice in Nebraska must be associated with an attorney admitted in this state as allowed by state statutes.

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

04.01. The pleading shall contain a heading specifying the name of the Department and the title or nature of the pleading, shall state material factual allegations and state concisely the action the Department is being requested to take, shall contain the name and address of the Petitioner, and shall be signed by the party filing the pleading, or when represented by an attorney, shall be signed by that attorney;

04.02. Attorneys shall also include their address, telephone number, and bar association number;

04.03. The initial petition shall also contain the name and address of the Respondent;

04.04. All pleadings shall be made on white, letter-sized (8½" X 11") paper and shall be legibly typewritten, photostatically reproduced, printed, or handwritten. If handwritten, a pleading must be written in ink;

04.05. All pleadings must be filed with the Department at its official office; and

04.06. All pleadings subsequent to the commencement of the contested case 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 Department at the time of the filing of the pleading.

05. The Director may, prior to serving a complaint or objection as described in 006 of this rule, dismiss a complaint or objection without holding a hearing when it is found that there is a lack of jurisdiction or of authority to grant the relief requested.

06. The Department shall serve a copy of the objection or complaint on each Applicant, Petitioner or Defendant listed in the pleading personally or by first-class or certified mail. Written proof of such service shall be filed with the Department. Each Applicant or Defendant who chooses to file a responsive pleading must do so within 30 days from the date of personal service or the date of Department mailing of the objection or complaint.

07. A hearing date shall be set by the Department in accordance with statutory requirements. A written notice of the date, time and place of hearing and the name of the Hearing Officer, if known, shall be served by the Department upon all attorneys of record or other representatives of record and upon all unrepresented parties. The notice shall include a proof of such service and shall be filed with the Department.

08. INTERVENTION IN A PROCEEDING.

08.01. Intervention in a proceeding shall be allowed when the following requirements are met:

008.01(A). A petition for intervention is filed with the Department at least five days before the hearing. Copies must be served by the Petitioner for intervention to all parties named in the Hearing Officer's notice of the hearing and any other parties that subsequently joined the proceeding;

008.01(B). The petition for intervention states 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

008.01(C). The Hearing Officer or designee determines that the interests of justice and the orderly and prompt conduct of the proceedings will not be impaired by allowing the intervention.

08.02. The 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.

08.03. If a Petitioner qualifies for intervention, the 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:

008.03(A). Limiting the Intervenor's participation to designated issues in which the Intervenor has a particular interest demonstrated either by the petition or otherwise;

008.03(B). 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

008.03(C). Requiring two or more Intervenors to combine their presentation of evidence and/or argument, cross-examination, discovery, and/or other participation in the proceedings.

08.04. The 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.

008.04(A). The Hearing Officer or designee may modify the order at any time, stating the reasons for the modification.

008.04(B). The Hearing Officer or designee shall promptly give notice of an order granting, denying, or modifying intervention to the Petitioner for intervention and to all parties.

09. HEARING OFFICER; CRITERIA.

09.01. The Department may delegate to a Hearing Officer the functions of conducting a prehearing conference and/or a hearing and submitting a recommended decision to the Director.

09.02. 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 009.04.

09.03. 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 009.04.

09.04. 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.

09.05. A person who has participated in a determination of probable cause or other equivalent preliminary determination in a contested case may serve as Hearing Officer or assist or advise a Hearing Officer in the same proceeding.

09.06. A person may serve as Hearing Officer at successive stages of the same contested case.

10. PREHEARING PROCEDURES.

10.01. Prehearing conferences and orders. At the discretion of the Hearing Officer or upon the request of any party, a prehearing conference may be held. All requests for a prehearing conference must be filed at least five days prior to any scheduled hearing. 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.

10.02. If a prehearing conference is conducted:

010.02(A). The Hearing Officer shall promptly notify the Department of the determination that a prehearing conference will be conducted. The Department may assign another Hearing Officer for the prehearing conference; and

010.02(B). The Hearing Officer for the prehearing conference shall set the date, 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 notice shall be given to other persons entitled to notice.

010.02(C). The notice referred to in subsection 010.02B shall include the following:

010.02(C)(i). The names and mailing addresses of all parties and other persons to whom notice is being given by the Hearing Officer;

010.02(C)(ii). The name, official title, mailing address, and telephone number of any counsel or employee who has been designated to appear for the Department;

010.02(C)(iii). The official file or other reference number, the name of the proceeding, and a general description of the subject matter;

010.02(C)(iv). A statement of the date, time, place, and nature of the prehearing conference;

010.02(C)(v). A statement of the legal authority and jurisdiction under which the prehearing conference and the hearing are to be held;

010.02(C)(vi). The name, official title, mailing address, and telephone number of the Hearing Officer for the prehearing conference;

010.02(C)(vii). 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 these rules; and

010.02(C)(viii). Any other matters that the Hearing Officer considers desirable to expedite or otherwise improve the proceedings.

10.03. The Hearing Officer may conduct a prehearing conference to deal with such matters as exploration of settlement, possibilities, preparation of stipulations, clarification of issues, rulings on 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. If a prehearing conference is conducted, the Hearing Officer shall issue a prehearing order incorporating the matters determined at the prehearing conference.

10.04. 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.

11. DISCOVERY IN CONTESTED CASES.

11.01. 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 utilizing the Nebraska Supreme Court rules except as may otherwise be prescribed by law. To the extent authorized by law, subpoenas and orders issued under this subsection may be enforced by the district court.

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

011.02(A). 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;

011.02(B). State the reasons supporting the motion;

011.02(C). Be accompanied by a statement setting forth the steps or 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

011.02(D). Be filed with the Department. The moving party must serve copies of all such motions to all parties to the contested case.

11.03. Other than is provided in subsection 011.02 above, discovery materials need not be filed with the Department.

12. 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.

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

012.01(A). Illness of the party, legal counsel or witness;

012.01(B). A change in legal representation; or

012.01(C). Settlement negotiations are underway.

13. AMENDMENTS.

13.01. A petition, objection, or complaint may be amended at any time before an answer or response is filed or is due if notice is given to all the other parties to the proceeding or their attorneys. In all other cases, a petitioner, objector, or complainant must request the Hearing Officer's or in the case of no Hearing Officer, the Director's permission to amend.

13.02. A Hearing Officer may also allow, in his or her discretion, the filing of supplemental pleadings alleging facts material to the case occurring after the original pleading was 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.

14. CONDUCTING A CONTESTED CASE HEARING.

14.01. ORDER OF HEARING. At the discretion of the Hearing Officer, the hearing may be conducted in the following order:

014.01(A). The hearing is called to order by the Hearing Officer. Each party shall thereafter enter his/her/its appearance. Any preliminary motions, stipulations, or agreed upon orders may then be raised and/or resolved.

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

014.01(C). PRESENTATION OF EVIDENCE.

014.01(C)(i). Evidence will be received in the following order:

014.01(C)(i)(1). First:

(A) For cases commenced under the provisions of 002.01A or 002.01C of this rule, evidence is presented by the Applicant;

(B) For cases commenced under the provisions of 002.01B, 002.01D, or 002.01E of this rule, evidence is presented by the Petitioner;

(C) For cases commenced under the provisions of 002.01F of this rule, evidence is presented by the Complainant;

(D) For cases commenced under the provisions of 002.01G or 002.01H of this rule, evidence is presented by the Department.

014.01(C)(i)(2). Second:

(A) For cases filed under 002.01A and 002.01B of this rule, evidence is presented by the Objector;

(B) For cases filed under 002.01C of this rule, evidence is presented by any Objector and/or the Department;

(C) For cases filed under 002.01D of this rule, evidence is presented by the Department;

(D) For cases filed under 002.01E of this rule, evidence is presented by any Respondent and/or the Department;

(E) For cases filed under 002.01F of this rule, evidence is presented by the Respondent and/or the Department;

(F) For cases filed under 002.01G or 002.01H of this rule, evidence is presented by the Respondent.

014.01(C)(ii). With regard to each witness who testifies, the following examination may be conducted:

014.01(C)(ii)(1). Direct examination conducted by the party who calls the witness;

014.01(C)(ii)(2). Cross-examination by the opposing party;

014.01(C)(ii)(3). Redirect examination by the party who called the witness; and

014.01(C)(ii)(4). Recross-examination by the opposing party.

014.01(C)(ii)(5). The Hearing Officer may question a witness at any time, and shall give an opportunity for redirect and recross after any such questioning.

014.01(D). After the evidence is presented, each party may have the 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 briefs in lieu of closing arguments, and parties may request that they be allowed to submit briefs in lieu of closing arguments. The hearing officer shall determine, based upon the issues raised prior to and/or during the hearing, whether briefs are to be submitted simultaneously or their sequence and timing. Any issue not raised prior to or during the hearing is waived and shall not be considered subsequent to the hearing unless allowed by the Department.

14.02. EVIDENCE.

014.02(A). In contested cases the Director 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.

014.02(B). Any party to a contested case hearing before the Department, may request that the Department be bound by the rules of evidence applicable in district court by delivering to the Department at least three days prior to the holding of the hearing a written request. 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.

014.02(C). Documentary evidence may be received in the form of copies or excerpts.

014.02(D). All evidence including records and documents in the possession of the Department 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.

014.02(E). 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.

014.02(F). The Department will abide by the privileges recognized by law.

014.02(G). The Department 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 adopted and promulgated by it.

014.02(G)(i). Parties shall be notified either before or during the hearing or by reference in preliminary reports or otherwise of materials so noticed.

014.02(G)(ii). Parties shall be afforded an opportunity to contest facts so noticed.

014.02(G)(iii). The record shall contain a written record of everything officially noticed.

014.02(H). The Department may utilize its experience, technical competence and specialized knowledge in the evaluation of the evidence presented to it.

14.03. 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.

14.04. OFFICIAL RECORD

014.04(A). The Department shall prepare an official record and transcript (also known as the Bill of Exceptions), which shall include testimony and exhibits, in each contested case.

014.04(B). The Department 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.

014.04(C). The Department record shall consist only of the following:

014.04(C)(i). Notices of all proceedings;

014.04(C)(ii). Any pleadings, motions, requests, preliminary or intermediate rulings and orders, and similar correspondence to or from the Department pertaining to the contested case;

014.04(C)(iii). The record of the hearing before the Department, including all exhibits and evidence introduced during such hearing, a statement of matters officially noticed by the Department during the proceeding, and all proffers of proof and objections and rulings thereon; and

014.04(C)(iv). The final order.

014.04(D). Except to the extent that the *Administrative Procedure Act* or another statute provides otherwise, the Department record shall constitute the exclusive basis for Department action in contested cases under the Act and for judicial review thereof.

14.05. COSTS. If a hearing is held at the request of one or more parties, each such requesting party and each person who requests to be made a party will pay their proportional share of the cost of such transcript.

15. PROHIBITIONS AGAINST EX PARTE COMMUNICATIONS.

15.01. PROHIBITIONS; WHEN APPLICABLE. The prohibitions found in this section shall apply beginning at the time notice for hearing is given.

15.02. PROHIBITIONS; TO WHOM APPLICABLE.

015.02(A). PARTIES AND PUBLIC. No party in a contested case or other person outside the Department 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 the Director or any employee who is or may reasonably be expected to be involved in the decision making process of the contested case.

015.02(B). PERSONS IN DECISION MAKING ROLES. No Hearing Officer or the Director or any employee who is or may reasonably be expected to be involved in the decision making 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 Department having an interest in the contested case.

015.02(C). INVESTIGATORS. Any employee engaged in the investigation or enforcement of a contested case shall not make or knowingly cause to be made an ex parte communication to a Hearing Officer or the Director or any employee who is or may reasonably be expected to be involved in the decision making process of the contested case.

15.03. DISCLOSURE OF CONTACTS. The Hearing Officer, the Director and any 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 set forth in subsections 002.02A through 002.02C shall file in the record of the contested case:

015.03(A). A copy of any such written communications;

015.03(B). Memoranda stating the substance of any such oral communications; and

015.03(C). All written responses and memoranda stating the substance of any oral responses to the ex parte communications.

015.03(D). 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.

015.03(E). Filing and notice of filing provided under subsection 016.03D shall be considered on the record and reasonable notice for purposes of the definition of ex parte communication.

16. DECISION AND ORDER IN A CONTESTED CASE.

16.01. DISPOSITION. Unless otherwise precluded by law, disposition of a contested case may be made by stipulation, agreed settlement, consent order, or default. The Director shall make a determination whether the stipulation, agreed settlement, or consent order constitute sufficient cause to dismiss the case or whether the default of a party should cause dismissal of the action.

16.02. Every decision or order adverse to a party to the proceeding, rendered by the Department 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.

16.03. The decision and order should include:

016.03(A). The name of the Department and caption of the proceeding;

016.03(B). The date, time, and place of the hearing;

016.03(C). The names of all parties or their attorneys or other authorized representation who entered an appearance at the hearing;

016.03(D). The findings of fact consisting of a concise statement of the conclusions upon each contested issue of fact;

016.03(E). The conclusions of law consisting of the controlling law to the facts found and the legal results arising therefrom; and

016.03(F). The order consisting of the action taken by the Department as a result of the facts found and the legal conclusions arising therefrom.

16.04. Parties to the proceeding shall be notified of the decision and order. A copy of the decision and order and accompanying findings and conclusions shall be delivered or mailed to each party or his or her attorney or other authorized representative of record.

17. REHEARING AND APPEALS.

17.01. PETITION FOR REHEARING. Any party aggrieved by any final order issued at or after the conclusion of a hearing, may, within thirty days after receipt of such decision, file with the Department a petition for rehearing. Such petition shall set forth the grounds relied upon for requesting a rehearing.

017.01(A). REVIEW. The Director shall review the petition and may deny the petition if it is without sufficient merit. If sufficient grounds are given, the Director or Department shall grant a rehearing. Such rehearing shall be conducted pursuant to this Chapter.

017.01(B). EFFECT ON APPEAL PROCEDURE. Parties should not assume that filing a request for rehearing extends the deadline for appeal to the Court of Appeals or other applicable court.

17.02. Appeal shall be made under the applicable statutes.

NEBRASKA ADMINISTRATIVE CODE

TITLE 454 – DEPARTMENT OF NATURAL RESOURCES

CHAPTER 8 - (Repealed)

NEBRASKA ADMINISTRATIVE CODE

TITLE 454 – DEPARTMENT OF NATURAL RESOURCES
RULES OF PRACTICE AND PROCEDURE

CHAPTER 9 – PROCEEDINGS

01. DEFINITIONS: The following definitions shall apply:

01.01. Proceeding shall mean the form and manner of conducting business before the Department. Types of proceedings include:

001.01(A). Informal proceeding shall mean any business conducted other than through a formal proceeding or a ministerial proceeding.

001.01(B). Formal proceedings shall include, but not be limited to, business conducted under the provisions of:

001.01(B)(i). Chapter 4 of these rules, Negotiated Rule Making;

001.01(B)(ii). Chapter 5 of these rules, Petitioning for Rulemaking;

001.01(B)(iii). Chapter 6 of these rules, Declaratory Orders;

001.01(B)(iv). Chapter 7 of these rules, Contested Cases;

001.01(B)(v). Rulemaking hearings held under the provisions of the *Administrative Procedures Act*, Neb. Rev. Stat. §§ 84-901 to 84-909;

001.01(B)(vi). Chapter 10 of these rules, Public Hearings;

001.01(B)(vii). Public meetings held under the provisions of the *Open Meetings Act*, Neb. Rev. Stat. §§ 84-1407 to 84-1414; or

001.01(B)(viii). Any application or petition filed pursuant to the Department's jurisdiction.

001.01(C). Ministerial proceedings shall mean the action of the Department performed in a prescribed manner under certain authorities of the Department based upon a given state of facts. Ministerial actions include, but are not limited to the following:

001.01(C)(i). Administration of surface water based upon first in time is first in right, Neb. Rev. Stat. § 46-203 and distribution of water in accordance with the rights of priority, Neb. Rev. Stat. § 61-216;

001.01(C)(ii). Administration of surface water for a riparian water right that has been recognized in a court order, Neb. Rev. Stat. § 46-226;

001.01(C)(iii). Administration of surface water pass inflow through a reservoir when needed for livestock, Neb. Rev. Stat. § 46-241(5);

001.01(C)(iv). Administration of surface water when a person takes water without authority, Neb. Rev. Stat. § 46-254;

001.01(C)(v). Administration of surface water for failure to install a measuring device, Neb. Rev. Stat. § 46-256;

001.01(C)(vi). Denying the right to divert surface water if an acreage report is required, or map transfer information is required, or a gage is to be installed or a report is required and an appropriator does not comply, Neb. Rev. Stat. § 46-261; or

001.01(C)(vii). Administration of a surface water appropriation because of overflow on roads as described under Neb. Rev. Stat. § 46-266.

02. INFORMAL PROCEEDINGS. The Department may accept informal complaints, objections, or informal requests for adjudicative or investigative actions by the Department unless there is a formal proceeding before the Department on the same matter. The Department may investigate such complaints or requests and depending upon the facts determined by such investigation, may proceed either in an informal, formal, or ministerial manner, at the discretion of the Director.

03. FORMAL PROCEEDINGS. The Department will take formal action on:

03.01. Any application or petition filed pursuant to the Department's jurisdiction;

03.02. A formal complaint which may be filed by any interested person against any person or entity subject to the jurisdiction of the Department; or

03.03. An investigative, adjudicative, or show cause order or notice issued by the Department.

04. MINISTERIAL PROCEEDINGS. Ministerial proceedings are initiated by the Department in a timely manner based upon a set of facts known to or determined by the Department. Persons who believe they are harmed by the ministerial actions of the Department, and believe that the facts used and/or determined by the Department are an incorrect set of facts or an incomplete set of facts, may file a complaint in the Department under Chapter 7 of these rules. Filing a complaint does not stay the action of the Department.

NEBRASKA ADMINISTRATIVE CODE

TITLE 454 – DEPARTMENT OF NATURAL RESOURCES RULES OF PRACTICE AND PROCEDURE

CHAPTER 10 – PUBLIC HEARINGS REGARDING INTEGRATED WATER MANAGEMENT

001. DEFINITIONS.

01.01. Interested person means a person who or an entity which has a specific interest in the applicability of a statute, rule, or order, as distinguished from a general interest such as may be the concern of the public at large. An interested person is one who is or could be adversely affected in a legally cognizable way by the outcome of a proceeding.

01.02. Public hearing shall include, but not be limited to, hearings held for the purpose of soliciting public comment under the provisions of:

001.02(A). Neb. Rev. Stat. § 46-713(2)(b), Department's determination based upon a reevaluation that a basin, subbasin, or reach is or is not fully appropriated or overappropriated;

001.02(B). Neb. Rev. Stat. § 46-714(4), Department's determination that a basin, subbasin, or reach is fully appropriated;

001.02(C). Neb. Rev. Stat. § 46-715(5)(a), basin-wide integrated management plans for overappropriated area held in coordination with applicable natural resources districts; and

001.02(D). Neb. Rev. Stat. § 46-718(1), integrated management plan held in coordination with applicable natural resources districts.

02. PROCESS.

02.01. NOTICE. Notice of the hearings held under Neb. Rev. Stat. §§ 46-713(2)(b) and 46-714(4) shall be given in accordance with Neb. Rev. Stat. § 46-714(1). Notice of the hearings held under the provisions of Neb. Rev. Stat. §§ 46-715(5)(a) and 46-718(1) shall be given in accordance with Neb. Rev. Stat. § 46-743. At the time notice is given, copies of the documents that are the subject of the hearing shall be available on the Department's website.

02.02. HEARING.

002.02A. Public hearings held under the provisions of Neb. Rev. Stat. §§ 46-713(2)(b) and 46-714(4).

002.02(A)(i). A hearing officer will be appointed by the Director.

002.02(A)(ii). The hearing shall be recorded and transcribed by a court reporter. Documentary evidence presented at the hearing shall be marked as an exhibit and made a part of the record by the court reporter.

002.02(A)(iii). Any interested person may appear and present written or oral information concerning the appropriation status of the river basin, subbasin, or reach. Testimony and evidence must be relevant to the issues regarding:

002.02(A)(iii)(1). Whether current uses of hydrologically connected surface water and ground water in the river basin, subbasin, or reach cause or will in the reasonably foreseeable future cause (a) the surface water supply to be insufficient to sustain over the long term the beneficial or useful purposes for which existing natural-flow or storage appropriations were granted and the beneficial or useful purposes for which, at the time of approval, any existing instream appropriation was granted, (b) the streamflow to be insufficient to sustain over the long term the beneficial uses from wells constructed in aquifers dependent on recharge from the river or stream involved, or (c) reduction in the flow of a river or stream sufficient to cause noncompliance by Nebraska with an interstate compact or decree, other formal state contract or agreement, or applicable state or federal laws;

002.02(A)(iii)(2). The appropriation status of the river basin, subbasin, or reach;

002.02(A)(iii)(3). The Department's preliminary conclusions about the extent of the area within which the surface water and ground water supplies for the river basin, subbasin, or reach are determined to be hydrologically connected; and

002.02(A)(iii)(4). Whether any stays on new uses should be terminated.

002.02(B). Public Hearings held under the provisions of Neb. Rev. Stat. §§ 46-715(5)(a) and 46-718(1).

002.02(B)(i). A hearing officer will be appointed by the Director and the applicable natural resources district(s).

002.02(B)(ii). The hearing shall be recorded and transcribed by a court reporter. Documentary evidence presented shall be marked as an exhibit and retained by the court reporter.

002.02(B)(iii). Any interested person may appear and present written or oral information relevant to the issues being considered.

02.03. FINAL DECISIONS. Final decisions shall be in writing, shall be issued in accordance with the controlling statutes, and will be published on the Department's web site.

02.04. REQUEST FOR A CONTESTED CASE HEARING. Any interested person may file a request for a contested case hearing as described in Chapter 7 of these rules within 30 days following the final decision. See Chapter 7.001.03.

NEBRASKA ADMINISTRATIVE CODE

TITLE 454 – DEPARTMENT OF NATURAL RESOURCES

CHAPTERS 11 – 12 (Repealed)

NEBRASKA ADMINISTRATIVE CODE

TITLE 454 – DEPARTMENT OF NATURAL RESOURCES RULES OF PRACTICE AND PROCEDURE

CHAPTER 13 – INTEGRATED MANAGEMENT PLANS

01. TYPES DATA CONSIDERED. The following types of scientific data and other information will be considered in the adoption of a plan for the integrated management of hydrologically connected surface and ground water pursuant to Neb. Rev. Stat. § 46-717, Reissue 2004, as amended.

01.01. Historical data on stream flows within the proposed integrated management plan area.

01.02. Past, present, and potential future surface water use within the proposed integrated management plan area.

01.03. Groundwater supplies within the proposed integrated management plan area including hydraulic conductivity, saturated thickness, and other ground water reservoir information, and/or ground water models if available.

01.04. Local recharge characteristics and rates from any sources, if available.

01.05. Precipitation and the variations including trends within the proposed integrated management plan area.

01.06. Crop water needs within the proposed integrated management plan area.

01.07. Water data collection programs.

01.08. Past, present, and potential ground water uses within the proposed integrated management plan area.

01.09. Proposed water conservation and supply augmentation programs within the proposed integrated management plan area.

01.10. The availability of supplemental water supplies, including the opportunity for ground water recharge within the proposed integrated management plan area.

01.11. Surface and ground water quality concerns within the proposed integrated management plan area.

01.12. Opportunities to integrate and coordinate the use of water from different sources of supply within the proposed integrated management plan area.

01.13. Existing and potential subirrigation uses within the proposed integrated management plan area.

01.14. The relative economic value of different uses of surface and ground water proposed or existing within the proposed integrated management plan area.

01.15. Rules and regulations for ground water management developed by the natural resources district(s) affected by the integrated management plan.

NEBRASKA ADMINISTRATIVE CODE

TITLE 454 – DEPARTMENT OF NATURAL RESOURCES

CHAPTER 14 – (Repealed)

NEBRASKA ADMINISTRATIVE CODE

TITLE 454 – DEPARTMENT OF NATURAL RESOURCES RULES OF PRACTICE AND PROCEDURE

CHAPTER 15 – CONFIDENTIALITY FOR TRADE SECRETS

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

01.01. If no claim of confidentiality for trade secrets accompanies the record or information when it is received by the Department, the claim is waived and the material may be made available to the public by the Department 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.

01.02. 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.

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

001.03(A). 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;

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

001.03(C). 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

001.03(D). 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.

01.04. 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 Department. The Department 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.

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

02. 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 Department will make such efforts as are administratively practicable to associate the late claim with copies of the previously submitted information in the Department files, although the Department cannot assure that such efforts will be effective given the possibility of prior disclosure to the public.

03. 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.

03.01. In making such determination which shall be in writing, the Director shall consider whether;

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

003.01(B). 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;

003.01(C). The information or record is not, and has not been, reasonably obtainable without the business's 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);

003.01(D). No statute, specifically requires disclosure of the information or record; and

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

04. Whenever the Director or his or her designee preliminarily determines that records or information required to be submitted to the Department 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.

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

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

05. 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 Department 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.

06. 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.