



July 16, 2021

Department of Water Resources
c/o Micheline N. Fairbank, Esq.
Deputy Administrator
901 S. Steward St., Suite 2002
Carson City, NV 89701

RE: Division of Water Resources Proposed Regulations (LCB File No. R125-20)

Dear Ms. Fairbank:

The Central Nevada Regional Water Authority submits the following comments regarding the Division of Water Resources Proposed Regulations Governing Procedure for Hearings and Public Meetings (LCB File No. R125-20).

General Comments:

The proposed regulations are intended to govern a broad range of proceedings – virtually all types of hearings and public meetings conducted by the State Engineer dealing with a diverse array of issues in a wide variety of circumstances. As a result, the proposed new regulations are unwieldy and do not appear to have been tailored to properly correspond to the varying demands of differing types of proceedings.

The Division of Water Resources has proposed these regulations without having provided justification for many of the changes being proposed. This has created some confusion about the goals of the new regulations and whether they are necessary.

Comments on Individual Provisions:

Section 3: Definition of “Beneficial use”

Any additional definition of “beneficial use” beyond that provided in NRS 533.035 and Nevada’s decisional law should be provided statutorily by the Legislature.

Section 7: Definition of “Party”

It is unclear why a standard legal term such as “party” should be defined in these regulations. To the extent a definition is needed it ought to contain more of a substantive explanation of what nature of interest or involvement qualifies a person or entity as a “party” to the proceeding in question.

The Absence of a Definition of “Interested Person”

To the extent that a definition of “party” is either necessary or helpful there also must be a definition of “interested person,” which is lacking. The standard for determining who qualifies as an “interested person” should cover any person or entity that can demonstrate a cognizable interest in or connection to water resources or water-dependent resources or activities.

Section 12.1(a)(3) Breadth and Looseness of these Regulations' Coverage

This provision makes clear that the proposed regulations are intended to govern an exceptionally broad range of different sorts of hearings and public meetings that the State Engineer may conduct. The breadth of this provision corresponds to statements made by DWR at the public workshop held on June 16, 2021, which made clear that DWR intends these proposed regulations to govern virtually every type of hearing or public meeting. The sweeping scope of these regulations is problematic because they do not include provisions that are tailored to the specific nature and needs of certain types of hearings or meetings that the State Engineer conducts, such as hearings and meetings regarding proposed basin designations, groundwater management plans, and the adoption of rules and regulations. *E.g.*, NRS 532.175, NRS 533.390.2, NRS 533.395, NRS 534.030, NRS 534.037, NRS 534.110.6, NRS 534.110.7, NRS 534.120, NRS 534.270.5, NRS 534.320., NRS 536.200.1. It also is unclear whether the application of these regulations to such State Engineer proceedings will comply with the standards and requirements of the Nevada Administrative Procedure Act, NRS chapter 233B.

Section 12.1(b): Overly Broad Liberal Construction

This subsection provides that these regulations “shall be liberally construed” and is not tied to any particular type of hearing or the application of specific provisions. While a certain amount of flexibility is needed to apply or modify the application of the regulations to fit the circumstance of a particular hearing, this provision seems too general to ensure meaningful adherence to the standards and requirements set forth in these regulations.

Section 12.3: Permitting Deviation from the Regulations

This subsection provides no standard or guidance limiting when the State Engineer or a hearing officer may choose to dispense with the requirements of the regulations. While the subsection calls for affected persons to be given notice of such deviation, it does not provide any recourse for those persons should the State Engineer or hearing officer abuse his or her discretion in deviating from the regulations.

Sections 13 and 13.4: General Provision for Holding Public Meeting

This section is written in such general terms as to make it unclear what sorts of public meetings it applies to. In addition, the use of the permissive term “may” in opening subsection 13.1 makes it unclear how the provisions of this section are intended to, or would be allowed to, govern public meetings that are mandatory under statutory provisions enacted by the Legislature.

Regarding subsection 13.4, it is unclear what justification there is for limiting the submission of documents at the public meeting to only those documents that are submitted at least two days before the public meeting. Such a meeting is not like a contested hearing in which adversarial parties justifiably must be given an opportunity to review each other’s evidence so that they may have a fair opportunity to challenge the validity of that evidence. In the context of a public meeting, where the State Engineer will receive and have a subsequent opportunity to evaluate all oral and written information submitted there does not appear to a valid reason for preventing members of the public from bringing documentary material with them to the meeting and submitting it then.

Section 14.1(c): Limiting Opportunity to Intervene

There is no need to limit the right to intervene in any way not already dictated by existing law. Nor has any justification for doing so been provided. Thus, the limitation that this subsection seeks to impose on the opportunity to intervene is unwarranted and could prevent meritorious intervention by local governmental entities. The plain language of NRS 533.130 should be allowed to govern without the additional filtering that this subsection attempts to impose.

Section 15: Standards for Intervention

This section provides the State Engineer or hearing officer with broad discretion to determine whether or not to permit intervention, and it does not contain adequate provision to ensure that those seeking to protect the public interest in water resource decisions will be accorded adequate opportunity to intervene. The use of the phrase “protectable interest in a water right” in the introductory sentence of this section is unnecessarily and inappropriately constraining. People and entities with genuine cognizable interests in the water resource management decisions that the State Engineer is making in a given proceeding should be entitled to intervene. It makes sense for the State Engineer, or hearing officer, to consider the factors listed in section 15, but the section should contain language specifying that a liberal standard for granting intervention should be applied.

In particular, local governing bodies, such as counties and cities, are required to prepare and regularly update water resource plans pursuant to NRS 278.0228. Given the importance accorded to such local water resource management planning by the Legislature, local governmental entities whose jurisdictions may be affected by the water right or water resource at issue in a hearing or public meeting should have an automatic right of intervention in such a hearing or meeting.

Section 17: Motion Practice

By shortening the timeframe for motions, responses, and replies from existing NAC 533.142 this section would create the potential, and probably the likelihood, that briefing on motions preceding hearings will not conclude until the first day of the hearing itself. Allowing the briefing of motions to overlap with the start of a hearing seems both unnecessary and unwise, as it would deprive both the party opposing a motion and the hearing officer of an opportunity to review the final reply brief before a motion may need to be argued and decided at the commencement of the hearing. Existing NAC 533.142 requires motions to be filed not later than 30 days prior to the date set for a hearing, which allows briefing to conclude seven days before the date of the hearing. This procedure seems perfectly workable for all parties and allows the parties and staff to have an opportunity to review the final reply brief in advance of the hearing. In contrast, section 17 of the proposed new regulations would allow motions to be filed 21 days prior to the date set for the hearing, with the result that the final reply brief would not be due until the date of the hearing. This would deprive any opposing party and the State Engineer’s staff of an opportunity to review that brief and prepare for argument before the date on which the hearing commences and motion would be argued.

Section 19: Delegation of Authority to Preside Over Hearing without Standards

CNRWA does not object to the State Engineer designating a staff person to preside over a hearing, but this provision should include some guidance or standards for the qualifications required of a person to serve as a presiding hearing officer.

Section 23.6: No Provision for Corrections of Errors in Court Reporter’s Transcript

It is unclear why no provision is made in section 23 for parties to review and correct typographic or other errors in the transcript of a hearing prepared by a court reporter, and why subsection 23.6 expressly prohibits the State Engineer from accepting any corrections to a transcript. The existing regulation, NAC 533.220, contains no such prohibition. If the intent is for corrections to be made at a stage prior to the certification of the transcript, then section 23 should include a provision specifying when the parties may review and make corrections to a transcript of the hearing.

Section 26.3: Administrative Notice of Certain Expert Testimony

This provision raises concerns of due process and the adequacy of the development of the administrative record in a hearing. It is understandable that the State Engineer might wish to promote efficiency by taking administrative notice of some of the factual basis for expert testimony that the State Engineer determines is within the field of expertise of the Office of the State Engineer. However, if the State Engineer takes administrative notice of an expert witness's proffered testimony that may deprive the party presenting such testimony of an adequate opportunity to fully develop the record to reflect that party's view or interpretation of the underlying technical evidence because that party could be deprived of adequately exploring that evidence through direct examination. In addition, the opposing party could be deprived of an opportunity to test or expose deficiencies in that evidence through cross-examination. Accordingly, while it may be appropriate for the State Engineer to take administrative notice of certain established facts, it does not seem appropriate for the State Engineer to take administrative notice of an expert witness's entire proffered testimony.

Section 43.9: Public Comment

This provision should expressly provide that public comment will be included in the administrative record. In addition, while public comment may not be given the same weight as sworn testimony, as it is not given under oath and is not subject to cross-examination, this provision should expressly provide that the State Engineer will consider public comment in making his or her determination on the issues presented in the hearing.

Problematic Deletions of Existing Regulations Governing Hearings and Meetings:

In addition to the above comments concerning problems with sections of the proposed new regulations relating to hearings and public meetings, the proposed deletion of certain existing NAC provisions raises some concerns. In particular, the deletion of NAC 532.180 is of concern because it would eliminate any allowance for the State Engineer to extend any time limit for good cause. This would be impractical, as it is predictable that occasionally circumstances will arise that make the extension of a deadline necessary where it would not unduly burden or prejudice any other party of the State Engineer. Accordingly, if a new regulation is adopted in place of NAC 532.180 it should include a provision for extensions of time limits where appropriate. Similarly, the deletion of NAC 533.141 is problematic because it eliminates any provision permitting the State Engineer to allow a pleading or protest to be amended or corrected.

Conclusion:

CNRWA encourages the Division of Water Resources to take up individual issues and problems that it has identified with the existing regulations and to conduct a public process to develop appropriate, limited revisions to the regulations governing particular types of hearings and public meetings.

Thank you for considering CNRWA's comments.

Sincerely,


Jeff Fontaine
Executive Director