

9200.4800 CONTESTED SUPPLEMENTARY REVIEW HEARING.

Subpart 1. **Timing of hearing.** A contested supplementary review hearing shall be held within 45 days after the board meeting held to establish the scope and procedures for review.

Subp. 2. **Notice of hearing.** Written notice of the hearing shall be provided to each political subdivision in which the facility is proposed to be located. The board shall also publish notice of a contested review hearing in a newspaper or newspapers of general circulation in the area for two successive weeks ending at least 15 days before the date of the hearing. The published notice shall:

- A. specify the date, time, and location of the hearing;
- B. describe the proposed facility and its location;
- C. describe the permits which have been issued for the proposed facility;
- D. briefly set out the scope and procedures which will be used in the supplementary review;
- E. identify the location or locations within the city, town, or county where copies of the permit applications, agency permits, and the board's scope and procedures for review are available for review and where copies may be obtained; and
- F. include the name of a person on the board's staff to whom questions about the review may be directed.

Subp. 3. **Location of hearing.** The hearing shall be held in the county where the facility is proposed to be located and as near as practical to the site of the proposed facility.

Subp. 4. **Definition of party.** "Party" for the purposes of parts 9200.4800, subparts 5 to 22 means the petitioner, the political subdivision which refused to authorize the facility, and any person who is granted intervention under subpart 9.

Subp. 5. **Duties of the administrative law judge.** The hearing shall be conducted by an administrative law judge assigned by the chief administrative law judge. The administrative law judge will not prepare a report following the hearing. The administrative law judge shall perform the following duties:

- A. hear and rule on motions;
- B. grant or deny requests for discovery including the taking of depositions;
- C. receive and act upon requests for subpoenas when appropriate;
- D. preside at the hearing;
- E. administer oaths and affirmations;

F. examine witnesses when the administrative law judge deems it necessary to make a complete record;

G. make preliminary, interlocutory, or other orders as the administrative law judge deems appropriate;

H. rule on objections;

I. do all things necessary and proper to the performance of items A to H; and

J. perform other duties which may be delegated to the administrative law judge by the board.

Subp. 6. **Disqualification of administrative law judge.** The administrative law judge shall withdraw from participation in a contested review at any time if the judge deems herself or himself disqualified for any reason. Upon the filing in good faith by a party of an affidavit of prejudice, the chief administrative law judge shall determine the matter as a part of the record. The affidavit must be filed no later than five days prior to the date set for hearing.

Subp. 7. **Environmental Quality Board members.** A majority of the permanent board members shall be present at the hearing. Members of the board may address questions to any witness or party.

Subp. 8. **Right to counsel.** Any party may be represented by legal counsel throughout the proceedings by a person of the party's choice or by herself or himself if not otherwise prohibited as the unauthorized practice of law.

Subp. 9. **Intervention.** Any person who desires to intervene as a party shall submit a petition to intervene to the administrative law judge at least ten days before the hearing. Copies of the petition to intervene shall be served on the parties to the hearing. The petition shall state how the petitioner will be affected by the hearing, shall set forth grounds and purposes for which intervention is sought, and shall show that no other party is able to adequately represent the petitioner's interests at the hearing. At a time determined by the administrative law judge, but no later than the commencement of the hearing, the administrative law judge shall review any petitions for intervention and shall permit the parties to the hearing to present their objections to the intervention. Intervention shall be allowed unless the administrative law judge determines that the petitioner's interest is adequately represented by one or more parties participating in the case.

Subp. 10. **Default.** The board may decide a review adverse to a party which defaults. Upon default, the allegations and evidence provided by the nondefaulting party shall be deemed true without further evidence. A default occurs when a party fails to appear at a hearing, fails to comply with any interlocutory orders of the administrative law judge, or fails to timely prefile testimony, and is unable to demonstrate that good cause existed for any failure.

Subp. 11. **Participation by the public.** The administrative law judge may hear the testimony of and receive exhibits from any person at the hearing, but no person shall become, or be deemed to become, a party by reason of the person's participation. Persons offering testimony or exhibits may be questioned by parties to the proceeding.

Subp. 12. **Prefiled testimony.** The petitioner, the political subdivision which refused to approve the facility, and any party seeking to intervene shall file their testimony with the administrative law judge and the board at least ten days before the hearing unless the administrative law judge directs otherwise. Testimony in the hearing shall be limited to the issues identified by the board in its statement of issues.

Subp. 13. **Rights of parties.** Parties shall have the right to present evidence, rebut evidence, argue with respect to the issues, and cross-examine witnesses.

Subp. 14. **Witnesses.** Any party may be a witness or may present witnesses on the party's behalf at the hearing. All oral testimony shall be under oath or affirmation. The board may call its own witnesses if the board or the chair acting on behalf of the board determines that testimony from the witness would be helpful in reaching a decision in the case. The board's staff may also present evidence during the review.

Subp. 15. **Prehearing procedures.** The purpose of the prehearing conference is to obtain stipulations regarding foundation for testimony or exhibits, to consider the proposed witnesses for each party, and to consider other matters that may be necessary or advisable to consider. Upon the request of any party or upon the judge's own motion, the administrative law judge may, in his or her discretion, hold a prehearing conference prior to each contested review hearing. The administrative law judge may require the parties to file a prehearing statement prior to the prehearing conference. The statement shall contain items the administrative law judge deems necessary to promote a useful prehearing conference. A prehearing conference shall be an informal proceeding conducted expeditiously by the administrative law judge. Agreements on any matters considered by the prehearing conference may be entered on the record or may be made the subject of an order by the administrative law judge. The administrative law judge shall hold any prehearing conferences in a manner and at a time which will not interfere with the completion of the review process in the time allowed by Minnesota Statutes, section 115A.35 and part 9200.4800.

Any application to the administrative law judge for an order shall be by motion, shall state the grounds for the order, and shall set forth the relief or order sought. A written notice of any motion shall be provided to all parties and to the board and shall be served five days prior to the submission of the motion except where impractical. All orders by the administrative law judge, other than those made during the course of the hearing, shall be in writing and shall be served upon all parties of record and the board. In ruling on motions where these procedures are silent, the administrative law judge shall apply the Rules of

Civil Procedure for the district courts for the state of Minnesota to the extent that he or she determines that it is appropriate to do so in order to promote a fair and expeditious proceeding.

Subp. 16. Discovery.

A. Each party shall, within ten days of a demand by another party, disclose the names and addresses of all witnesses that a party intends to call at the hearing. All witnesses unknown at the time of the disclosure shall be disclosed as soon as they become known. Each party shall also disclose any relevant written or recorded statements made by the party or by witnesses on behalf of a party. The demanding party shall be permitted to inspect and reproduce those statements. Any party unreasonably failing upon demand to make the disclosure required by this rule may, in the discretion of the administrative law judge, be foreclosed from presenting any evidence at the hearing through witnesses not disclosed or through witnesses whose statements are not disclosed.

B. A party may serve upon any other party a written request for the admission of relevant facts or opinions, or of the application of law to relevant facts or opinions, including the genuineness of any document. The request must be served at least 15 days prior to the hearing and it shall be answered in writing by the party to whom the request is directed within ten days of receipt of the request. The written answer shall either admit or deny the truth of the matters contained in the request or shall make a specific objection thereto. Failure to make a written answer shall result in the subject matter of the request being deemed admitted.

C. Upon the motion of a party, the administrative law judge may order discovery of any other relevant material or information, provided that privileged work product of attorneys, investigators, and similar people shall not be discoverable. The administrative law judge shall also recognize all other privileged information or communications which are recognized at law. Upon proper motion made to the administrative law judge, any means of discovery available pursuant to the Rules of Civil Procedure for the district courts of the state of Minnesota may be allowed provided that the request can be shown to be needed for the proper presentation of a party's case, can be completed within the time allowed in this rule, and the issues are significant enough to warrant extensive discovery. Upon the failure of a party to reasonably comply with this type of order by the administrative law judge, the administrative law judge may order that the subject matter of the order for discovery or any other relevant facts shall be taken as established for the purposes of the case in accordance with the claim of the party requesting the order, or may refuse to allow the party failing to comply to support or oppose designated claims or defenses, or may prohibit the failing party from introducing designated matters in evidence.

D. When asked to reveal material which a party considers to be proprietary information or trade secrets, the party shall bring the matter to the attention of the

administrative law judge who shall make protective orders which are reasonable and necessary or as otherwise provided by law.

E. Discovery shall be conducted in a manner to ensure the completion of the review in the time permitted by Minnesota Statutes, section 115A.35 and part 9200.4800. The hearing shall not be continued to permit additional time for discovery.

Subp. 17. **Depositions to preserve testimony.** Upon the request of any party, the administrative law judge may order that the testimony of any witness be taken by deposition to preserve the testimony in the manner prescribed by law for depositions in civil actions. The request shall indicate the relevancy of the testimony and shall make a showing that the witness will be unable or cannot be compelled to attend the hearing or show other good cause.

Subp. 18. **Subpoenas.** Requests for subpoenas for the attendance of witnesses or the production of documents shall be made in writing to the administrative law judge, shall contain a brief statement demonstrating the potential relevance of the testimony or evidence sought, shall identify any documents sought with specificity, and shall name all persons to be subpoenaed. A subpoena shall be served in the manner provided by the Rules of Civil Procedure for the district courts of the state of Minnesota unless otherwise provided by law. The cost of service, fees, and expenses of any witnesses subpoenaed shall be paid by the party at whose request the witness appears. The person serving the subpoena shall make proof of service by filing the subpoena with the administrative law judge, together with the affidavit of service. Upon motion made promptly, and in any event at or before the time specified in the subpoena for compliance with it, the administrative law judge may quash or modify the subpoena on finding that it is unreasonable or oppressive.

Subp. 19. **Rules of evidence.**

A. The administrative law judge may admit all evidence which possesses probative value, including hearsay, if it is the type of evidence on which reasonable prudent persons are accustomed to rely in the conduct of their serious affairs. The administrative law judge shall utilize the rules of privilege recognized by law. Evidence which is incompetent, irrelevant, or unduly repetitious may be excluded.

B. All evidence to be considered in the case shall be offered and made a part of the record in the case. No other factual information or evidence shall be considered in the determination of the case.

C. Documentary evidence in the form of copies or excerpts may be received or incorporated by reference in the discretion of the administrative law judge or upon agreement of the parties.

D. The administrative law judge or the board may take notice of judicially cognizable facts but shall do so on the record and with the opportunity for any party to contest the facts so noticed.

E. A party may call an adverse party, his or her agent or employees, and interrogate by leading questions and contradict and impeach on material matters in all respects as if she or he had been called by the adverse party. The adverse party may be examined by his or her counsel upon the subject matter of the examination in chief under the rules applicable to direct examination, and may be cross-examined, contradicted, and impeached by any other party adversely affected by the testimony.

F. Testimony in the hearing shall be limited to issues identified by the board in its statement of issues.

Subp. 20. **The record.** The board shall maintain the official record in each contested review hearing. The record in a contested review shall contain: all pleadings, motions, and orders; evidence received or considered; offers of proof, objections, and rulings on them; all memoranda or data submitted by any party in connection with the case; and the transcript of the hearing.

Subp. 21. **Conduct of hearing.** Unless the administrative law judge determines that the public interest will be equally served otherwise, the hearing shall be conducted substantially in the following manner:

A. The administrative law judge shall briefly review the procedural rules for the hearing.

B. Each party may make an opening statement in a sequence determined by the administrative law judge.

C. Each party may then present a summary of its prefiled testimony in a sequence determined by the administrative law judge.

D. Cross-examination of witnesses shall be conducted in a sequence determined by the administrative law judge.

E. When all parties and witnesses have been heard, opportunity shall be offered to present final argument in a sequence determined by the administrative law judge. Final argument may, in the discretion of the board, be in the form of written memoranda or oral argument. Written memoranda may, in the discretion of the board, be submitted simultaneously or sequentially and within time periods the board may prescribe; provided, however, that all written material shall be submitted at least 30 days before the close of the supplementary review period.

F. The record of the case shall be closed on the date set by the board for receiving the final written memorandum or late filed exhibits which the parties and the board have agreed should be received into the record, or upon receipt of the transcript of the hearing.

Subp. 22. **Completion of hearing.** The administrative law judge shall conduct the hearing in a manner to ensure its completion in the time required by Minnesota Statutes, section 115A.35 and part 9200.4800.

Statutory Authority: *MS s 115A.32*

History: *L 1984 c 640 s 32; 17 SR 1279; L 1999 c 73 s 5*

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