

CHAPTER 3
RULES AND PROCEDURES FOR INDIVIDUAL PROCEEDINGS

301. Purpose and Effect

This Chapter contains rules and practice procedures for individual proceedings held by or on behalf of the Cherokee Nation Environmental Protection Commission ("CNEPC"), and also establishes general rules for petitions and other actions.

(2) Effect. This Chapter shall not be interpreted to create any right to hearing or other action by the CNEPC not otherwise specifically afforded by law.

302. General rules and hearing procedures

- (1) **Filing place.** All petitions, requests for hearing, requests for recordings, requests for copies or other documents concerning the CNEPC shall be filed with the Office of the Administrator.
- (2) **Records.** Unless otherwise specified herein or by the CNEPC, the Office of the Administrator shall maintain the records of the CNEPC including, but not limited to, records of individual proceedings, rulemaking, general meetings and other matters.
- (3) **Costs associated with individual proceedings.** If any party desires a stenographic or other recording of any hearing and/or the transcription into a written record of any such recording, they shall file a written request with the Office of the Administrator for the CNEPC not less than 10 days before the hearing date. Upon timely receipt of an appropriate cash deposit in an amount to be determined by the Administrator of the CNEPC, arrangements will be made for such services. A copy of any resulting written record of such hearing(s) shall be provided to the CNEPC at the expense of the party or parties requesting such written record.
- (4) **Hearings.** All hearings required in connection with individual proceedings shall be conducted in accordance with applicable provisions of the Cherokee Nation Administrative Procedures Act, the Cherokee Nation Environmental Quality Code and the procedures and practices set forth herein.

303. Petitions for declaratory rulings

- (a) **General provisions.** Any interested person may petition the CNEPC to request a declaratory ruling on the applicability of one or more rules. The Administrator shall keep the CNEPC informed about petitions received and may make recommendations as to the final disposition of each.
- (b) **Form and content of petition.** All such petitions shall be in writing and filed with the Administrator. The petition must specify how any rule or order interferes with or impairs, or threatens to interfere with or impair, their legal rights. Petitions to the CNEPC for declaratory rulings shall be in the following form and contain the following information:

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- (1) Petitions shall be submitted in legible typewritten form, with the original copy submitted, and shall be submitted in person or by mail to the Administrator.
 - (2) Petitions must clearly identify the submitting party or parties by name, address, official title, and complete business address and must include a clear statement reflecting the interest of the submitter(s) in such petition and the action to which it pertains and the real party(ies) of interest if the submission is by an agent or attorney.
 - (3) Every petition must clearly state that such is for issuance of a declaratory ruling as to the applicability of a specifically identified rule or rules. A petition may pertain to only one subject area and individual petitions are required for separate subjects. Separate petitions may be required for individual sections of rules.
 - (4) If the petition requests a declaratory ruling of the CNEPC as to a rule, the complete verbatim text of the existing rule shall be restated therein or attached as an appendix to the petition. If the petition pertains to a request to modify or reconsider a previous ruling or order of the CNEPC, then, a copy of the previous order or ruling shall be clearly referred to or attached as an Appendix to the Petition and the petition shall clearly identify the pertinent portions of such order or ruling which are the subject of the request, and shall clearly set forth the matter(s) the CNEPC is to consider and the action(s) the CNEPC is requested to take.
 - (5) All petitions must clearly state the factual basis, reason, legal grounds and authorities, public policy, evidence and technical justifications for each action requested of the CNEPC. All available supporting documents, records, studies and information bearing on the issue and available to the petitioner(s) must accompany the petition. The petition shall also contain or be accompanied by the names and addresses of all persons known to the petitioner(s) who are concerned with the subject matter of the petition or who may have interests which may be adversely affected by the proposed actions sought by petitioner(s).
 - (6) All petitions must be signed and endorsed by the petitioning party (ies) or their legal representative(s) and notarized.
- (c) **Actions on petitions.** All petitions shall be examined to determine whether the procedural requirements have been met and whether the facts, justifications, legal authorities, and other submissions afford a reasonable basis for the requested declaratory ruling. Petitions which are not in proper form or which lack the necessary reasonable basis for consideration by the CNEPC will be returned to the submitter(s) or may be summarily denied. Petitioners will be notified of any hearing which may be afforded on the Petition and of any CNEPC meeting, if any, at which the petition may be considered. Action on petitions for declaratory rulings may be taken at a regularly scheduled meeting of the CNEPC, at any hearing scheduled in connection with the petition pursuant to the APA and rules of the CNEPC for individual proceedings, or by the Administrator upon request by the CNEPC.
- (d) **Determination.** Petitions for declaratory rulings may be finally determined by the CNEPC or by the Administrator upon request of the CNEPC. Rulings shall state the findings and conclusions upon which they are based. If the CNEPC refuses to make a ruling, then the petition shall be deemed to have been denied. If the CNEPC commences an individual proceeding on the petition, it shall offer an opportunity for a hearing to the petitioner. A copy of the ruling or final order shall be provided to CNEPC members and the petitioner.

304. Individual proceedings in general

- (a) **Purpose and applicability.** The general procedures for individual proceedings established herein apply to proceedings conducted by the CNEPC or their designated Administrative Law Judge or hearing officer or representative, for such purposes as declaratory rulings, licensing and enforcement matters. These procedure do not apply to complaints filed against the Nation, its employees or the CNEPC.
- (b) **Initiation of proceedings and petitions by CNEP.** Individual proceedings may be initiated as provided by the Environmental Quality Code. In the event of any conflict between the Code and these rules, the Code shall prevail.
- (c) **Content and service of notices and petitions.**
 - (1) The CNEP will usually first serve the Respondent with a written notice of violation (NOV) which informs the Respondent of the regulatory requirement, statute, license term or other matter at issue. Each Notice of Violation and Petition shall name the Respondent(s) and provide a brief statement of the facts giving a right to relief and of the relief requested. The petition shall be signed by the person presenting the same, or his attorney and shall include the signer's address and phone number. A letter, inspection sheet, petition, consent order or final order may constitute a NOV for purposes of instituting these proceedings if it meets these requirements.
 - (2) The style of documents filed to initiate a proceeding shall appear in substantially the form provided.
 - (3) A Notice or Petition should specify that the Respondent may file a response, how and where the response may be filed, the number of days or a date certain within which to file the response, state any scheduled hearing date, place and time or include notice of the opportunity to request an administrative hearing, and shall be served on the named Respondents.
- (d) **Methods and proof of service.**
 - (1) Service of a petition and initial notice of hearing shall be by personal delivery served by a person licensed to make service of process in civil cases, or by certified mail with delivery shown by return receipt, or by publication if it is shown that service cannot be made by any other means despite the exercise of due diligence. Service by certified mail shall be effective on the date of receipt or, if refused, on the date refusal by the Respondent. Acceptance or refusal by any officer of a business or an authorized agent for a business shall constitute acceptance or refusal by the party addressed.
 - (2) The person making service shall file proof of service with the Administrative Law Clerk promptly and in any event within the time during which the person served must respond to the process. Failure to make proof of service does not affect the validity of service.
 - (3) The Administrative Law Judge may refer to Federal Rules of Civil Procedure for guidance regarding service. Acknowledgment in writing by the recipient, or appearance by the recipient at a hearing without objecting to service, is equivalent to proof of service.
 - (4) Service by mail in a matter seeking to revoke or suspend any license may be deemed complete when there is an affirmation that the notice was mailed by certified mail to the licensee's last known address, and that he or she may not be found otherwise,

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despite the exercise of due diligence. The Administrative Law Judge shall inquire into and determine whether due diligence has been exercised.

305. Individual proceedings filed by others.

- (a) **Request for administrative hearing in response to Order.** A request for an individual proceeding initiated by the Respondent named in an Order shall be in writing and shall specifically set forth the Respondent's objections to the Order.
- (b) **Administrative hearing on permits.** An individual proceeding on a proposed permit may be requested in accordance with provisions of the Environmental Quality Code.
- (c) **Style.** The style of the case shall be in accordance with the format provided.
- (d) **Content.** All requests of individual proceedings must be in writing, contain a brief statement of the basis of the request and the name and address of each requester, and be signed by the requester or an authorized representative.

306. Administrative Law Judges and Clerks

- (a) **Designation of Judges.** The CNEPC may designate one or more Administrative Law Judge(s) for any administrative hearing or may perform such duties and functions themselves. Administrative Law Judges shall be familiar with the rules of procedure and generally familiar with the substantive rules governing the matter, and shall not have had prior involvement in the matter other than as an Administrative Law Judge. The Administrative Law Judge so designated shall have full authority to conduct all aspects of the hearing proceedings except for the issuance of a Final Order.
- (b) **Authority and responsibilities.** Administrative Law Judges have complete authority to conduct administrative hearing proceedings and may take any action not inconsistent with the Code, this Chapter or the APA for the maintenance of order at hearings and for the expeditious, fair, and impartial conduct of the proceedings. Administrative Law Judges may, without limitation:
 - (1) arrange and issue notice of the date, time and place of hearings and conferences;
 - (2) establish the methods and procedures to be used in the presentation of the evidence;
 - (3) hold conferences to settle, simplify, determine, or strike any of the issues in a hearing, or to consider other matters that may facilitate the expeditious disposition of the hearing;
 - (4) administer oaths and affirmations;
 - (5) regulate the course of the hearing and govern the conduct of participants;
 - (6) examine witnesses;
 - (7) rule on, admit, exclude and limit evidence, at or before hearings;
 - (8) establish the time for filing motions, testimony, and other written evidence, briefs, findings, and other submissions, and hold the record open for such purposes;
 - (9) rule on motions and pending matters;
 - (10) divide the hearing into stages or join claims of parties whenever the number of parties is large or the issues are numerous and complex; and
 - (11) restrict attendance by persons not parties to the hearing in appropriate cases

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307. Administrative hearings

- (a) **Request.** A hearing request shall be in writing and shall be filed with the Office of the Administrator as part of or in response to a filed Petition.
- (b) **Scheduling.** The Administrator shall schedule an administrative hearing after receipt of a proper and timely request.
- (c) **Notice.** When a hearing is scheduled, the parties shall be notified of the date, time and place of the hearing. Such notice shall satisfy requirements of the Code and APA, and shall be made at least fifteen (15) days prior to the hearing unless otherwise provided by law or agreed by the parties.
- (d) **Procedure.** The Administrative Law Judge may with the consent of all parties, may vary the procedures of this Chapter.

308. Prehearing procedures and orders

- (a) The Administrative Law Judge may schedule and conduct prehearing conferences or require the parties to file appropriate documents and briefs as necessary to identify parties and issues and to set schedules and agendas for hearing-related activities. The Administrative Law Judge may authorize a prehearing conference by telephone. On request, prehearing conferences shall be on the record. Prehearing conferences, filings or requirements and orders issued by the Administrative Law Judge may address:
 - (1) identification and simplification of issues, including the elimination of frivolous claims or defenses;
 - (2) amendments to the pleadings;
 - (3) the plan and schedule of discovery and limitations to be placed thereon;
 - (4) identification of admissions of fact to avoid unnecessary proof and cumulative evidence;
 - (5) the identification of witnesses and substance of testimony, exhibits, and documents;
 - (6) the use of prehearing briefs and prefiled testimony in the form of sworn affidavits;
 - (7) settlement of all or some of the issues before the hearing;
 - (8) adoption of special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, novel or difficult legal questions, or evidence problems;
 - (9) schedules regarding time within which to amend the pleadings, file and hear motions, complete discovery; and for accomplishing any other matters appropriate in the circumstances of the case.
- (b) Following a prehearing conference, the Administrative Law Judge may issue a Prehearing Order which recites and schedules the action to be taken and which shall control the course of the action unless modified by a subsequent order to prevent manifest injustice. The Prehearing Order should include the results of the conference and summaries of material evidence, to be presented. The Prehearing Order should also present all questions of law in the case. All exhibits shall be marked, listed and identified in the Prehearing Order. If there is objection to the admission of exhibits, the grounds for the objection must be specifically stated. Witnesses shall also be listed along with the nature of their testimony. No exhibit or witness may be added to the Prehearing Order once the Order has been prepared, signed, and filed by the Administrative Law Judge without a showing by the

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requesting party that injustice would be created if the evidence or testimony were not allowed.

309. Subpoenas

- (a) **Issuance.** Subpoenas for the attendance of witnesses, the furnishing of information required by the Administrative Law Judge and the production of evidence shall be issued by the Office of Administrator or other authorized entity upon written request by a party or on the Administrative Law Judge's own motion. Subpoenas shall be served and a return made in the same manner as provided for state court proceedings.
- (b) **Failure to obey.** The Administrator or CNEPC may seek an appropriate judicial order to compel compliance by persons who fail to obey a subpoena, who refuse to be sworn or make an affirmation at a hearing, or who refuse to answer a proper question during a hearing. The hearing may proceed despite any such refusal but the Administrative Law Judge may, in his/her discretion at any time, continue the proceedings as necessary to secure a court ruling.

310. Record

- (a) **Recording the proceedings.**
 - (1) A record of the hearing shall be made, which shall be a tape recording unless otherwise agreed by the parties and the Administrative Law Judge. The recording will not be transcribed as a matter of course. A transcript may be obtained by submitting to the Administrator or his designee a written request and tendering payment in an amount sufficient to pay the cost of having the recording transcribed.
 - (2) A party may request a court reporter. The requesting party shall pay the costs, and the original transcript shall be filed in the case file as part of the record in the case. Each person or party requesting copies shall make arrangements for such with the reporter, and pay the costs.
- (b) **Maintaining files and records.** The record of a proceeding and the file containing the notices and the pleadings will be maintained in a location designated by the Administrator. All pleadings, motions, orders and other papers submitted for filing in such a proceeding shall be date/file-stamped by the Administrative Law Clerk upon receipt.

311. Motions

- (a) **Filing.** All requests for action in a matter already before the CNEPC shall be made in the form of a motion, signed by the party presenting same or his attorney, and filed with the Office of the Administrator. A copy of any motion shall be mailed by the moving party to all parties of record concurrently with the filing of the motion, and a certification of such mailing shall appear on the motion.
- (b) **Response.** Within ten (10) days after service of any written motion, any party to the proceedings may file a response to the motion. The notice requirements may be modified or the time for response may be extended or shortened by the Administrative Law Judge for good cause shown.

312. Continuances.

A motion for an extension or continuance shall state the reasons for the request and specify the length of time requested. Unless made before the Administrative Law Judge in open hearing, motions for extensions of time or for a continuance of the hearing to another date or time shall be in writing and filed with the Office of the Administrator. The Administrative Law Judge shall promptly grant or deny such request at his/her discretion. If the motion is denied, it may be renewed orally by the party at the hearing.

313. Default

Any Respondent who fails to appear as directed, after receipt of notice as required, may be determined to have waived the right to appear and present a defense to the allegations contained in the notice and/or petition. A Final Order in such proceeding may be issued granting by default no more than the relief prayed for in the petition.

314. Settlement

Administrative hearings may be resolved by agreed settlement or consent order with the concurrence of the Administrative Law Judge, CNEPC and Administrator, as appropriate. The Administrative Law Judge may grant continuances to allow the parties to discuss settlement.

315. Proposed orders

- (a) **Preparation of proposed orders.** The Administrative Law Judge shall hear all evidence and arguments applicable in a case and shall prepare a proposed order including findings of facts and conclusions of law. Prior to such preparation, the Administrative Law Judge may request or require briefs from the parties on any relevant issue. The Administrative Law Judge shall also have the discretion to request or accept from the parties, proposed findings and conclusions.
- (b) **Service and presentation.** Upon finalization of a proposed order, the Administrative Law Judge shall:
 - (1) present the proposed order and the record of the matter to the CNEPC, as appropriate, for review and entry of a final order; or
 - (2) serve it on the parties, by regular mail, offering an opportunity for parties to file exceptions to the proposed order before a final order is entered if such is required by the APA, and then shall present the proposed order, the exceptions, if any, and the record of the matter to the CNEPC for entry of a final order. The parties may by written stipulation waive any of the requirements for a proposed order.

316. Final orders

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- (a) **Action on ALJ findings and conclusions.** For proceedings heard by an Administrative Law Judge, the CNEPC may adopt, amend, or reject any findings or conclusions of the Administrative Law Judge or exceptions of any party, or may remand the proceeding for additional argument or the introduction of additional evidence.
- (b) **Issuance.** At the conclusion of the proceedings and review of the record and/or proposed findings of fact and conclusions of law, the CNEPC shall issue a final order reflecting the findings of fact made, the conclusions of law reached, and specifying the action to be taken.
- (c) **Notice.** Parties shall be notified either personally or by mail of the issuance of a final order. A copy of the final order shall be provided to any party and its attorney.

317. Reconsideration

Any party may petition the CNEPC for rehearing, reopening or reconsideration of any decision in an individual proceeding within ten days of its entry.

318. Judicial review

The provisions of the APA and Environmental Quality Code setting forth the right and procedure for obtaining judicial review, if any, shall apply.