

## AGENDA

Nebraska Environmental Trust Board  
Special Meeting  
Tuesday, July 11, 2023  
1:00 PM CST  
Via Zoom

Fallbrook State Office Building  
LL Room 031, 245 Fallbrook Blvd, Lincoln, NE

*The public may attend the meeting at the physical address or via Zoom at <https://outdoornebraska.zoom.us/j/93225050066> at or call 312-626-6799, Meeting ID: 932 2505 0066.*

1. Call to Order
  - a. Roll call
  - b. Verify Quorum
  - c. Notice of Meeting; Published Saturday, July 8, 2023
  - d. Notification of Open Meetings Act Posting
2. Approval of June 22, 2023, Board Meeting Minutes
3. Public Comment
4. Non-substantial change to Title 137 Amendments
5. Next Meeting; Thursday, August 3, 2023, Nebraska Environmental Trust, Telegraph Lofts West, 2077 N St, Suite 310, Lincoln, Nebraska, 1:30 p.m.
6. Adjourn

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\*\*This agenda contains a list of subjects known at the time of its distribution on June 30, 2023. A current copy is kept on file at the offices of the Nebraska Environmental Trust, 2077 N St., Suite 310, Lincoln, NE 68510. Except for items of an emergency nature, the agenda will not be altered later than 24 hours before the scheduled commencement of the meeting.

# MINUTES

Nebraska Environmental Trust Board  
Special Meeting  
Thursday, June 22, 2023  
1:00 p.m.

## 1. Call to Order

Chairman Quandahl called the virtual, on-site meeting of the Nebraska Environmental Trust Board to order at 1:00 p.m. at 700 S 16<sup>th</sup> St, Lincoln, Nebraska.

Advanced notice of the meeting and public hearing was published in the Lincoln Journal Star on June 12, 2023. The agenda and documents to be considered at the meeting were provided. The Open Meetings Act was posted at the entrance of the meeting room and on the Nebraska Environmental Trust (NET) website.

Roll call was conducted, and a quorum was present.

### Members present (10):

**District I:** Mr. Jeff Kanger, Lincoln.

**District II:** Mr. Felix Davidson, Valley; Chairman Mark Quandahl, Omaha.

**District III:** Mr. Josh Andersen, Edgar; Mr. Rod Christen, Steinauer.

**State Agency Representatives:** Vice Chairman Jim Macy, Director, Nebraska Department of Environment and Energy; Mr. Tim McCoy, Director, Nebraska Game & Parks Commission; Ms. Charity Menefee, Director, Nebraska Department of Health and Human Services; Mr. Tom Riley, P.E., Director, Nebraska Department of Natural Resources; Ms. Sherry Vinton, Director, Nebraska Department of Agriculture.

### Members absent (1):

**State Agency Representative:** Mr. James Hellbusch, Columbus.

### Staff present:

Mr. Karl Elmshaeuser, Executive Director; Ms. Holly Adams, Grants Administrator; Ms. Madison Moe, Grants Assistant; and Ms. Sandra Weaver, Administrative Specialist.

## 2. Approval of May 4, 2023, Board Meeting Minutes

**Motion by** Mr. Riley, seconded by Mr. Macy, "I move to approve the May 4, 2023, minutes."

**Voting Aye:** Davidson, Andersen, Christen, McCoy, Menefee, Riley, Vinton, Macy, Kanger, Quandahl

**Absent:** Hellbusch

**10 Voted Aye. Motion carried.**

## 3. No Public Comment

Neb. Rev. Stat. § 84-1412(2) states, "A body may not be required to allow citizens to speak at each meeting, but it may not forbid public participation at all meetings." Chairman Quandahl noted the petitioners provided comments at the Title 137 Rulemaking Hearing held on May 4, 2023.

## 4. Jordan Anderson petition for Title 137 Negotiated Rulemaking from May 4, 2023

### Background on Agenda Item 6

At the Title 137 Rulemaking Hearing held on May 4, 2023, a petition signed by Jordan Anderson for

negotiated rulemaking was submitted by Mr. Al Davis. The petition sought a negotiated rulemaking procedure to develop new rules or amend existing rules in Title 137, NAC, Chapters 4, 5, 6, 7, & 8.

Executive Director Elmshaeuser reviewed the petition and relevant facts with the Board. Neb. Rev. Stat. §§ 84-921 to 84-932 was cited as the Negotiated Rulemaking Act.

**Motion by** Mr. Davidson, seconded by Mr. Macy, "I move to deny the petition from Jordan Anderson for negotiated rulemaking and direct the Executive Director to notify the petitioner in writing as required."

**Discussion:** None

**Voting Aye:** Davidson, Andersen, Christen, McCoy, Menefee, Riley, Vinton, Macy, Kanger, Quandahl

**Absent:** Hellbusch

**10 Voted Aye. Motion carried.**

## 5. Bob Wickersham petition for Rulemaking from May 4, 2023

### Background on Agenda Item 7

At the Title 137 Rulemaking Hearing held on May 4, 2023, William Wickersham signed a petition for rulemaking pursuant to Neb. Rev. Stat. § 84-907.08, requesting that the Nebraska Environmental Trust Board repeal Chapters 4, 5, 6, 7, and 8 and adopt new chapters within Title 137 as described in the submitted documents.

Executive Director Elmshaeuser reviewed the petition and relevant facts with the Board.

**Motion by** Mr. Andersen, seconded by Mr. Kanger, "I move to deny the petition from William Wickersham for rulemaking and direct the Executive Director to notify the petitioner in writing as required."

**Discussion:** None

**Voting Aye:** Andersen, Christen, McCoy, Menefee, Riley, Vinton, Macy, Kanger, Davidson, Quandahl

**Absent:** Hellbusch

**10 Voted Aye. Motion carried.**

## 6. Next Meeting

Thursday, August 3, 2023, Telegraph Lofts West, 2077 N St, Suite 310, Lincoln, Nebraska, 1:30 p.m.

## 7. Adjourn

Chairman Quandahl adjourned the meeting at 1:12 p.m.

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Karl L. Elmshaeuser  
Executive Director

## Title 137 Amendments

### NET Board Agenda Materials

Item #: 4

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Object: Action on NE Attorney General's office review and recommendation

Contact Person: Josh Andersen, Karl Elmshaeuser

For: Action

Attachments: 2 pages

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#### BACKGROUND

Nebraska State Statute

81-15,173.

Board; powers and duties.

The board shall have and may exercise the following powers and duties:

(2) Keep records, conduct hearings, and adopt and promulgate rules and regulations to carry out its duties and implement the Nebraska Environmental Trust Act;

(7) Establish ad hoc advisory boards and subcommittees;

#### EXPLANATION

Title 137 covers the Rules and Regulations Governing Activities of the Nebraska Environmental Trust. They were last amended May 8, 2018.

During the Trust 22 Committee's work with the Center of Operational Excellence, several issues were discovered that required additional efforts to resolve. It was recommended to establish a dedicated ad hoc committee to work over the next year to further identify, propose and resolve these issues through the formal process to amend Title 137. The committee was established on May 19, 2022. A Public Hearing and written testimony were provided on May 4, 2023.

The NET Board approved the proposed amendments and submitted them to the Attorney General's (AG's) office for review. The AG's office has reviewed the proposed Title 137 amendments and has a recommendation for a non-substantial change. Please see the attached two-page letter.

#### PROPOSAL

Recommended motion, "I move to adopt the non-substantial change to the amendments to Title 137 as proposed, "Chapter 4 – Criteria for Eligibility, 001.01(B) Regulations means only those rules codified in the Nebraska Administrative Code or in the Code of Federal Regulations" and to authorize the Executive Director to sign the Certification of Adoption and forward the applicable and appropriate documents for processing as required."



STATE OF NEBRASKA  
**Office of the Attorney General**

2115 STATE CAPITOL BUILDING  
LINCOLN, NE 68509-8920  
(402) 471-2682  
TDD (402) 471-2682  
FAX (402) 471-3297 or (402) 471-4725

**MIKE HILGERS**  
ATTORNEY GENERAL

**CARLTON WIGGAM**  
ASSISTANT ATTORNEY GENERAL

June 30, 2023

Karl Elmshaeuser  
Executive Director  
Nebraska Environmental Trust  
700 S. 16<sup>th</sup> Street  
PO Box 94913  
Lincoln, Nebraska 68509

**RE: Changes to Environmental Trust Regulations Title 137 Chapters 1-10**

Mr. Elmshaeuser:

On or about May 25, 2023, the Attorney General's Office received the Nebraska Environmental Trust Board's amendments to Title 137 NAC Chapters 1-10. Pursuant to Neb. Rev. Stat. § 84-905.01, it is the obligation of this office to determine, *inter alia*, whether the agency has statutory authority to pass the proposed regulation, the constitutionality of said regulation, and whether the regulation is substantially different from the noticed regulation.

In my review of the proposed regulations, I have identified an issue with the changes to Chapter 4 Section 001, specifically, the definition of "regulations" contained in subsection 001.01(B). As identified in one of the comments received by the Board, the plain meaning of "regulations," as used in Neb. Rev. Stat. § 81-15,176(2)(a), also includes federal regulations. To the extent that Attorney General Opinion No. 01015 stated that "regulations" means only State of Nebraska regulations, it is an inaccurate statement. By reducing the breadth of the restriction (the plain meaning of "regulations") in Neb. Rev. Stat. § 81-15,176(2)(a), the proposed regulation would modify and narrow the statutory restrictions put in place by the Legislature.

In order to remedy this, I am returning the regulations to you so the Board may consider a specific amendment. The amendment would be to the definition of "regulations." If the Board wishes to take this approach, I recommend the following language for the amendment:

Regulations refers only to those rules codified in the Nebraska Administrative Code or in the Code of Federal Regulations.

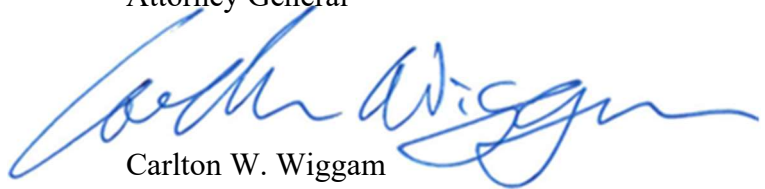
Although this would be a change from the publicly noticed language, it is my opinion that this change would not be a substantial change that would not require a new notice and hearing as required by Neb. Rev. Stat. § 84-907.05.

Whether a change to a regulation is a substantial change is determined by the test expressed in Neb. Rev. Stat. § 84-907.05(2). In this case, no party would not have been on notice of proposed changes to the grant application process because the interested parties before and after this potential change would be the applicants for the grants. All interested parties would also have been on notice because this amendment stems from one of the comments received as part of the public participation process. The subject matter of the regulation would remain the same as it deals with the grant application process and the administration of the Trust. Finally, the effects of the proposed change would be to bring it in line with the plain meaning of the statute. This is how the statute was interpreted prior to the proposed changes, so there was no new or different effect from the status quo. As all parts of the substantially different test weigh in favor of this proposed amendment not being a substantial change, the Board will not be required to go through the notice, comment, and hearing process. If the Board does make this possible change, the Board would need to approve the regulations as amended in whole.

Please contact me if you have any questions.

Sincerely,

MIKE HILGERS  
Attorney General



Carlton W. Wiggam  
Assistant Attorney General  
[Carlton.Wiggam@Nebraska.gov](mailto:Carlton.Wiggam@Nebraska.gov)  
(402)471-1803

cc: Justin Lavene