

MEMPHIS WASTEWATER HEARING AUTHORITY

RULES OF PROCEDURE AND REGULATIONS

1. PURPOSE

Pursuant to its authority granted in the City of Memphis Code Section 33-171 the Memphis Wastewater Hearing Authority (the "Hearing Authority") has promulgated these Rules of Procedure and Regulations. The purpose of these rules is to provide for the orderly disposition of the business of the Hearing Authority by setting forth how business is to be transacted. In some respects, these rules clarify and supplement, but do not supersede, ambiguous language in the Ordinances and Code of the City of Memphis (the "Code"). The rules specify the procedure in situations not covered by the Ordinances that assign duties to the Hearing Authority. The Hearing Authority shall conduct all hearings according to the procedures and regulations adopted in these rules.

2. DEFINITIONS

All definitions contained in this Section shall apply to these Rules and Regulations and are incorporated herein by reference.

"Appeal" includes a request for Hearing Authority review of a City decision and includes the filing of a written appeal or written petition as provided for in Section 3.

"Chair" refers to the Chair of the Hearing Authority as per Section 33-173, paragraph (D) of City of Memphis Ordinance # 5445.

"City" refers to the City of Memphis Wastewater Program.

"Administrator" refers to the City of Memphis' Administrator of Environmental Engineering or his/her designated representative.

"Person" when capitalized refers to the business, person and/or any other entity that is appealing a decision by the Wastewater Program and by written appeal is requesting a hearing to dispute such decision. A "Person" includes an alleged violator or violator, industrial user and polluter.

"Vice-Chair" refers to the Vice-Chair of the Hearing Authority as per Section 33-173, paragraph (D) of City of Memphis Ordinance # 5445.

3. **FILING AN APPEAL**

- (A) Any Person who wishes to appeal to the Hearing Authority under the provisions of the Code must do so on the Request for Appeal form provided for that purpose by the City. A copy of such form shall be obtained by the Person seeking to appeal from the City Environmental Engineering Office, 125 North Main Street, Room 620, Memphis, Tennessee 38103 or from the City's website by going to the following:

<http://www.cityofmemphis.org/Government/PublicWorks/WastewaterHearingAuthority.aspx>

and shall fully set forth the grounds and reasons for the appeal. Following receipt of such Request for Appeal, a response ("Response") shall be issued by the City identifying the date, time and location of the hearing to be held by the Hearing Authority regarding the appeal.

- (B) Any alleged violator or violators that has been issued a written complaint by the Administrator (which may Order corrective action to be taken) pursuant to § 69-3-123 may, no later than thirty (30) days after the date such Order is served, request by written petition a hearing before the Hearing Authority; provided, that the Hearing Authority may review such final orders on the same grounds upon which a court of the state may review default judgments. A written petition must be filed with the City personnel identified in paragraph 3(H), below.
- (C) Any Person or industrial user against whom a civil penalty assessment has been issued by the Administrator pursuant to § 69-3-125(a)(2)(A) may secure a review of such assessment by filing, within thirty (30) days after the date the assessment is served, a written petition asking for a hearing in the matter involved. A written petition must be filed with the City personnel identified in paragraph 3(H), below.
- (D) Any polluter or violator who has been assessed damages by the Administrator pursuant to § 69-3-126 resulting from such Person's or industrial user's pollution or violation, failure, or neglect in complying with any permits or orders may appeal from such assessment to the Hearing Authority within thirty (30) days of notification of such assessment. A written petition must be filed with the City personnel identified in paragraph 3(H), below.
- (E) Any other action that is appealable to the Hearing Authority not specifically identified above may be appealed within (30) days of notification of the City

action. This paragraph only applies to those activities for which a right of appeal otherwise exists.

- (F) Each appeal will be assigned a number by the Administrator or his designee, and be placed on the agenda of the Hearing Authority for hearing in chronological order, unless, the Hearing Authority orders otherwise pursuant to the Code or these rules.
- (G) If an appeal or petition for review, as applicable, is not filed within the applicable time period provided above, the recipient of the City action shall be deemed to have consented to the City action and it shall become final.
- (H) An appeal must be received at the following address no later than the applicable time period provided above. An appeal or petition that has been mailed but not received by the applicable due date shall not be deemed to be timely filed. The address for the filing of an appeal or petition is:

Paul Patterson
Administrator of Engineering
City of Memphis
125 North Main
Room 620
Memphis, TN 38103

Notwithstanding the above, an electronic Adobe .pdf format of the appeal and accompanying documents may be e-mailed to the following e-mail address in accordance with paragraph 8(J), below:

wastewater.hearingauthority@memphistn.gov.

In such case, the e-mail must be received no later than the applicable time period provided above.

4. WITHDRAWALS, REFILINGS AND FAILURE TO APPEAR

- (A) Due to settlement with the City or for any other reason, any Person may withdraw his/her appeal prior to a decision by the Hearing Authority in accordance with Section 9 below.
- (B) Each hearing will be held at the place, time and date specified in the City's Response to the Request for Appeal, absent exigent circumstances. In any case where the Person has failed to appear at the time stated in the Response, the Hearing Authority shall dismiss the appeal for lack of prosecution, unless continued. Continuation of an appeal is at the sole discretion of the Hearing Authority.

5. **PREVIOUSLY DECIDED ISSUES**

Any issue that was decided by the Hearing Authority in a prior hearing, or could have been decided by the Hearing Authority had the Person appealed the matter, shall be binding upon such Person in subsequent civil penalty hearing(s) unless there is a change in law (e.g., a court overturned the Hearing Authority's decision or the underlying Ordinance standard has been amended) or fact.

6. **CONFLICT OF INTEREST/ETHICS**

- (A) Each member of the Hearing Authority shall conduct his/herself in accordance with the latest applicable City of Memphis Code of Ethics.
- (B) Ex Parte Contact: It shall be the policy of the Hearing Authority that no member shall discuss the merits of any pending case with any person prior to or after the hearing until the matter has been finally adjudicated by the Hearing Authority and all appeals have been exhausted through the proper courts of law.
- (C) Ex Parte Site Visits: No Hearing Authority member that will be ruling on a case shall visit the facility or discharge site under consideration unless such a site visit is approved and scheduled by the Hearing Authority. No Hearing Authority members will make individual visits and shall only visit the facility or discharge site, if at all, when approved and scheduled by the Hearing Authority.

7. **PREHEARING/HEARING PROCEDURE**

- (A) The City and the Person have the option of providing the Hearing Authority such relevant documents as they deem appropriate in advance of the hearing. In such situation, documents must be provided to the City personnel identified in paragraph 3(H), above, and in accordance with paragraph 8(J), below, at least ten calendar days in advance of a hearing.
 - (1) For the City, such documents may include, but are not limited to, the Notice of Violation, Notice of Assessment of a Civil Penalty, Notice of Assessment of Damages, Inspection Reports or any other relevant information.
 - (2) For the Person, such documents may include, but are not limited to, documentation supporting its defense, any legal analysis in support of its argument or any other relevant information.
- (B) All parties will provide all such additional documentation, both verbal and written, to the Hearing Authority during the appeal hearing.

(C) Where an emergency order is issued pursuant to § 69-3-123(b), any Person to whom the emergency order is directed shall comply with the emergency order immediately, but on petition appealing such order, such Person shall be afforded a hearing as soon as possible, but in no case shall such hearing be held later than three (3) days from the receipt of such petition by the Hearing Authority.

(D) The Chair is authorized to issue subpoenas in response to any reasonable request by any party to the hearing requiring the attendance and testimony of witnesses and the production of evidence relevant to any matter involved in the hearing.

(E) Meetings Generally

(1) All meetings of the Hearing Authority shall be open to the public pursuant to T.C.A. §8-44-101, et seq.

(2) Meetings shall be scheduled for the third Thursday of each month unless otherwise voted on by the Hearing Authority. In cases where meeting dates conflict with holidays or political elections, the Hearing Authority may cancel or re-schedule the meeting to avoid conflict with these dates. Meetings shall be convened at the Memphis Public Library, 3030 Poplar Avenue, 38111 unless an alternate site is designated by the Hearing Authority.

(3) As provided by Ordinance, there are seven (7) Hearing Authority members plus two (2) alternates. The presence of four (4) members of the Hearing Authority shall constitute a quorum and a quorum must be present to vote on any case. The alternates can serve as Hearing Authority members as necessary to establish a quorum. Either the Chair or the Vice-Chair must be present at each meeting and before a vote can be taken. The Chair, or Vice-Chair in the absence of the Chair, will only cast a vote to break a tie by the other Hearing Authority members.

(F) Hearings Generally

(1) Upon receipt of a timely written petition under paragraph 3(B), (C) and/or (D), above, the Administrator shall give the petitioner thirty (30) days' written notice of the time and place of the hearing, but in no case shall such hearing be held more than sixty (60) days from the receipt of the written petition, unless the Administrator and the petitioner agree to a postponement.

- (2) All other petitions for appeal shall be processed in such time the Hearing Authority deems appropriate.
- (3) No public hearings (where the general public is invited to comment) shall be held unless required by law.

8. **HEARING**

- (A) A hearing may be conducted at a regular or special meeting of the Hearing Authority. Except as otherwise decided by the Chair, each case, which is listed on the Hearing Authority's agenda for the meeting, shall be taken in the order listed on the agenda. Solely at the Hearing Authority's discretion, the Hearing Authority may move the appeal to an alternate time on the agenda.
- (B) All business, other than appeals, shall be taken up at the rear of the docket. Agenda items may be re-arranged solely at the Hearing Authority's discretion.
- (C) The Code shall be considered a part of the record in every case coming before the Hearing Authority even though not read verbatim into the record.
- (D) The Hearing Authority will base its decision only on information submitted under Section 7(A) and (B) or otherwise presented in the hearing and accepted by the Hearing Authority.
- (E) At the instruction of the Chair, the City will present its case. The City's case for each Appeal shall be presented by the Administrator and/or his designee (e.g., legal counsel for the City) and shall include the following:
 - (1) A presentation of the facts supporting the City's position regarding the Appeal;
 - (2) A presentation of documents, maps and photographs, and other exhibits, if necessary;
 - (3) Any fact witnesses in support of the City's position regarding the Appeal;
 - (4) Any subpoenaed witness or adverse witness; and
 - (5) Such other matters as the City deems appropriate.

- (G) At the instruction of the Chair, the Person seeking Appeal will present its case and shall include the following:
- (1) The Person's name, company name and address;
 - (2) A presentation of the facts supporting the Person's position regarding the Appeal as to why the Person believes the relief sought should be granted;
 - (3) A presentation of documents, maps and photographs, and other exhibits, if necessary;
 - (4) Any fact witnesses regarding the Appeal;
 - (5) Any subpoenaed witness or adverse witness; and
 - (6) Such other matters as the Person deems appropriate.
- (H) Any Person seeking appeal may be represented by legal counsel.
- (I) Witnesses appearing before the Hearing Authority shall be required to affirm or swear under oath. Any member of the Hearing Authority may administer oaths. Witnesses are subject to examination and cross-examination, as applicable, by the parties.

If it is determined that false information has been presented to the Hearing Authority, the Hearing Authority has the right, not only to reconsider its decision, but to refer such person for criminal prosecution, as appropriate. Any member of the Hearing Authority may directly question any witness appearing before the Hearing Authority at any time during his/her testimony.

- (J) A minimum of five (5) copies for the Hearing Authority and one (1) copy for the opposing party of all exhibits (including, without limitation, documents, maps and photographs) presented to the Hearing Authority for consideration by a witness must be submitted as evidence and made a part of the record unless the Hearing Authority otherwise deems it irrelevant or unnecessary. All bulky exhibits must be photographed by the Person presenting the exhibit and submitted on a suitable size for the permanent file. Requests for Appeals and their supporting materials may be submitted in electronic Adobe .pdf format.
- (K) Strict rules of evidence shall not apply, but evidence must be relevant to the issues. Irrelevant, immaterial, or unduly repetitious evidence shall be excluded, but all other evidence of a type commonly relied upon by

reasonably prudent persons in the conduct of their affairs shall be admissible, whether or not such evidence would be admissible in the courts of Tennessee. Hearsay evidence may be used only for the purpose of supplementing or explaining other evidence, but it shall not be sufficient, in and of itself, to support a finding unless it would be admissible over objection in civil actions.

- (L) Upon the conclusion of all the testimony and evidence, the hearing will be closed and no further evidence admitted except as the Hearing Authority may permit. After a hearing is closed, no one will be allowed to present additional verbal or written documentation unless the Hearing Authority re-opens the case.

9. **CASE DECISIONS**

- (A) The Hearing Authority has the power to uphold the City's position on the case, reject the City's position on the case, or modify the City's position which, in the case of a penalty or damage assessment, includes potentially reducing or increasing the amount of civil penalty and/or damage assessment levied by the City in the case, as applicable. Upon conclusion of the presentations by both parties the Hearing Authority will deliberate and issue a decision on the case in accordance with section 11 below.
- (B) If the Hearing Authority deems more information is needed, by majority vote, the Hearing Authority may remand the matter to the City and request additional information from either or both parties. This being the case, the Hearing Authority will forego its decision until a subsequent Hearing Authority meeting at which time the additional information will be presented by the parties. Both parties will again be allowed to present their respective case as per Section 7 of this document
- (C) Except as otherwise provided for by law, when the Hearing Authority considers any civil penalty issued by the City its members will refer to the Guidelines for Pretreatment Civil Penalty Guidelines ("the Pretreatment Guidelines") once such guidelines are established. Such guidelines are intended to guide, but not obligate, the Hearing Authority in its assessment of penalties, where applicable. The following factors in each case may have been considered to determine an appropriate civil penalty applied: (1) whether the civil penalty imposed will be a substantial economic deterrent to the illegal activity; (2) damages to the City, including compensation for the damage or destruction of the facilities of the publicly owned treatment works, and also including any penalties, costs and attorneys' fees incurred by the City as the result of the illegal activity, as well as the expenses involved in enforcing this section and the costs involved in rectifying any

damages; (3) cause of the discharge or violation; (4) the severity of the discharge and its effect upon the facilities of the publicly owned treatment works and upon the quality and quantity of the receiving waters; (5) effectiveness of action taken by the violator to cease the violation; (6) the technical and economic reasonableness of reducing or eliminating the discharge; (7) the economic benefit gained by the violator; and, (8) such other matters as justice may require.

- (D) In assessing a penalty, pursuant to § 69-3-125(b), the Hearing Authority shall consider any penalty assessed by the Commissioner of the Tennessee Department of Environment and Conservation ("TDEC") to assure that the sum of the penalty assessment by the Hearing Authority and by TDEC shall not exceed ten thousand dollars (\$10,000) per day for each day during which the act or omission continues or occurs.

10. APPEAL OF A HEARING AUTHORITY DECISION

Unless otherwise provided by law, any aggrieved party may appeal a decision of the Hearing Authority pursuant to Title 27, Chapter 8 of the Tennessee Code Annotated.

11. WRITTEN ISSUANCE OF DECISIONS

- (A) On the basis of information produced at a hearing, the Hearing Authority shall make findings of fact and conclusions of law and enter such decisions and orders as, in its opinion, will best further the purposes of the pretreatment program and shall give written notice of such decisions and orders to the alleged violator and the City. The order issued pertaining to an appeal under paragraph 3(B), (C) and/or (D), above shall be issued no later than thirty (30) days following the close of the hearing by the person or persons designated by the Chair. Orders on other hearings shall be issued in such time as the Hearing Authority deems appropriate.
- (B) The Order will also provide information as how to appeal the decision.

12. MINUTES AND RECORDS

Each action of the Hearing Authority shall be recorded by Order and supporting documentation shall be retained in the appeal file until disposed of by City following final adjudication or exhaustion of all appellate remedies. The entire proceedings shall be recorded by a court reporter. The Administrator, or the Administrator's designee, may have the record transcribed upon request for a fee.

13. ABSENCE OF A RULE

When an issue arises which is not specifically covered by these rules or a specific statutory requirement, the Hearing Authority will be governed by Robert's Revised Rules of Order.

14. AMENDMENTS

These rules may be amended at any regular or special meeting of the Hearing Authority by a positive vote of a majority of the Hearing Authority, provided all members have been notified of the amendment at least ten (10) working days prior to the meeting.

15. INTERPRETATION OF THE HEARING AUTHORITY'S RULES

- (A) The Hearing Authority is the final authority as to the meaning of these rules.
- (B) Except as otherwise specifically required by law, the Hearing Authority may, from time to time, make an exception in these rules for extraordinary cases, setting out the reasons therefore.

16. FILING AND EFFECTIVE DATE

These rules shall become effective, after adoption by the Hearing Authority.

APPROVED AND ADOPTED ON THIS 24 DAY OF Oct, 2013.


CHAIRPERSON


ADMINISTRATOR

EXHIBIT A

Pretreatment Guidelines

[Pending Development]