

ADJUDICATORY PROCEDURES - WATER QUALITY CONTROL -- 20NMAC 1.3

Statutory Authority: Water Quality Control Commission

Regulation Effective as of: 11/15/96



[Download text copy](#)

NEW MEXICO WATER QUALITY CONTROL COMMISSION
1190 ST. FRANCIS DRIVE
POST OFFICE BOX 26110
SANTA FE, NEW MEXICO 87502

TITLE 20 ENVIRONMENTAL PROTECTION
CHAPTER 1 ENVIRONMENTAL PROTECTION GENERAL
PART 3 ADJUDICATORY PROCEDURES - WATER QUALITY CONTROL
COMMISSION

SUBPART I - GENERAL PROVISIONS

100. ISSUING AGENCY: Water Quality Control Commission ("Commission") [11-15-96]

101. SCOPE:

A. This Part governs the following adjudicatory proceedings of the Water Quality Control Commission:

1. Appeal Hearings which include proceedings for: (a) the appeal from permitting actions pursuant to the Water Quality Act, NMSA 1978 Section 74-6-5(N), and (b) the appeal of certain abatement plan actions pursuant to Commission Regulation 20 NMAC 6.2.4114;

2. Variance Hearings which include proceedings for: (a) the consideration of variance requests pursuant to the Water Quality Act, NMSA 1978 Section 74-6-4(G), and (b) the consideration of alternative abatement standards pursuant to Commission Regulation 20 NMAC 6.2.4103.F;

3. Order Hearings which include proceedings for the appeal from compliance orders pursuant to the Water Quality Act, NMSA 1978 Section 74-6-10, and the Utility Operators Certification Act, NMSA 1978 Section 61-33-10; and

4. any other adjudicatory proceedings under the jurisdiction of the Commission to which the Commission applies this Part. [11-15-96]

B. APPLICATION OF THIS PART. In addition to the provisions of Subparts I and V through VII which pertain to all hearings:

1. Appeal Hearings shall follow the process provided in Subpart II;

2. Variance Hearings shall follow the process provided in Subpart III; and

3. Order Hearings shall follow the process provided in Subpart IV. [11-15-96]

C. UNIFORM LICENSING ACT PROCEEDINGS. In any Commission adjudicatory proceeding conducted under the Uniform Licensing Act, NMSA 1978 Sections 61-1-1 et seq.

("ULA"), including the suspension or revocation of a certification under the Utility Operators Certification Act, NMSA 1978 Section 61-33-7, the procedures in the ULA shall govern the proceeding. However, the Commission may, in the absence of a specific provision in the ULA governing an action, look to this Part for guidance. [11-15-96]

102. AUTHORITY. -- This Part is adopted under the authority of the Water Quality Act, NMSA 1978 Sections 74-6-4, 74-6-5, and 74-6-10, as amended, and the Utility Operators Certification Act, NMSA 1978 Section 61-33-10, as amended. [11-15-96]

103. DURATION: Permanent. [11-15-96]

104. EFFECTIVE DATE: November 15, 1996, unless a later date is cited at the end of a paragraph. [11-15-96]

105. OBJECTIVE: The objective of this Part is to establish procedures that govern the adjudicatory proceedings of the Water Quality Control Commission. [11-15-96]

106. APPLICABILITY OF RULES OF CIVIL PROCEDURE.-- In the absence of a specific provision in this Part governing an action, the Commission may look to the New Mexico Rules of Civil Procedure, SCRA 1986, 1-001 to 1-102 and the New Mexico Rules of Evidence, SCRA 1986, 11-101 to 11-1102 for guidance. Any reference to the Rules of Civil Procedure and the Rules of Evidence shall not be construed to extend or otherwise modify the authority and jurisdiction of the Commission under the Act. [11-15-96]

107. CONSTRUCTION; SEVERABILITY; SAVINGS CLAUSE. -- This Part shall be liberally construed to carry out its purpose. If any part or application of this Part is held the remainder of this Part, or its application to other persons or situations, shall not be affected. This Part does not apply to pending Petitions before the Commission or Compliance Orders issued before the effective date of this Part, except as stipulated to by the parties to such proceeding. [11-15-96]

108. DEFINITIONS.--

A. GENERAL. As used in this Part:

1. "Act" means, as the context requires:

a. the Water Quality Act, NMSA 1978 Chapter 74, Article 6 and its subsequent amendments and successor provisions;

b. the Utility Operators Certification Act, NMSA 1978 Chapter 61, Article 33 and its subsequent amendments and successor provisions; and

c. any other statute enacted or amended by the Legislature that includes authority for adjudicatory proceedings before the Commission when the Commission applies this Part to such proceedings;

2. "Applicant" means the person who is the holder of, or the applicant for, the permit or abatement plan that is the subject of the permitting action to which an Appeal Petition applies.

3. "Commission" means the Water Quality Control Commission or its successor agency under the Act;

4. "Compliance Order" means a written administrative order issued by the Department pursuant to NMSA 1978 Sections 61-33-10 or 74-6-10;

5. "Department" means, as the context requires, the Environment Department or other constituent agency, that pursuant to its authority under the Act, either (a) performed the permitting action which is the subject of the Appeal Petition; (b) is charged with implementing Regulations at the site where the variance is sought; or (c) issued the Compliance Order;

6. "Hearing Clerk" means the person designated to maintain the official record of the proceeding;

7. "Hearing Officer" means the person designated under this Part or appointed

by the Commission to conduct a proceeding under this Part;

8. "interested participant" means any person, other than a party, who files an entry of appearance in accordance with Section 205 of this Part;

9. "Order Hearing" means a proceeding before the Commission initiated by the timely filing of a Request for Order Hearing;

10. "party" means, the Petitioner, the Applicant if different from the Petitioner, the Respondent, the Department, or any person who is permitted to intervene in the particular hearing pursuant to SCRA 1986, 1-024. Any other constituent agency, as defined in the Water Quality Act, may intervene in the proceeding at any time;

11. "permitting action" means those actions that may be appealed to the Commission (a) pursuant to the Water Quality Act, NMSA 1978, Section 74-6-5(N), including the certification of a federal water quality permit and (b) pursuant to Commission Regulations, 20 NMAC 6.2.4114 (appeals of certain abatement plan actions);

12. "Petition Hearing" means a proceeding before the Commission initiated by the timely filing of one of the following Petitions:

a. a Variance Petition filed pursuant to NMSA 1978 Section 74-6-4(G) or to 20 NMAC 6.2.4103.F, or

b. an Appeal Petition filed pursuant to NMSA 1978 Section 74-6-5(N) or to 20 NMAC 6.2.4114;

13. "Petitioner" means any person who files a timely Petition;

14. "Record Proper" means all documents filed by or with the Hearing Clerk during the proceeding and includes:

a. the verbatim record of the hearing and all exhibits offered into evidence at the hearing, whether or not admitted;

b. for an Appeal Hearing, the administrative record of the Department;
and

c. minutes, or an appropriate extract of minutes, of any Commission meeting where the Commission deliberated or acted on any procedural or substantive issue in the proceeding;

15. "Regulations" means any rules or standards promulgated by the Commission to implement the Act;

16. "Request for Order Hearing" means a written request for hearing on a Compliance Order filed by a Respondent pursuant to NMSA 1978 Sections 61-33-10(E) or 74-6-10(G);

17. "Respondent" means any person to whom a Compliance Order has been issued; and

18. "technical evidence" means scientific, engineering, economic or other specialized testimony, but does not include legal argument, general comments, or statements of policy or position concerning matters at issue in the hearing. [11-15-96]

B. TERMS DEFINED IN ACT OR REGULATIONS. Terms defined in the Act or Regulations and not defined in this Part are used consistent with the meanings given in the Act Regulations. [11-15-96]

109. POWERS AND DUTIES OF THE COMMISSION AND HEARING OFFICER. --

A. COMMISSION. The Commission shall exercise all powers and duties as prescribed under the Act, the Regulations and this Part and not otherwise delegated to a staff member, the Hearing Officer or the Hearing Clerk.

1. The Commission may issue procedural orders that, based on the nature of the proceeding, either impose additional procedural duties, such as expanded public notice, or

simplify the procedures provided in this Part, such as foregoing post-hearing submittals or holding the hearing before the full Commission. In no event may the Commission eliminate any procedural requirements of the Act.

2. The appointment of a Hearing Officer does not preclude the Commissioners from attending or participating in the proceeding. [11-15-96]

B. HEARING OFFICER. The Commission may appoint one or more Hearing Officers to perform the functions described in Paragraph 2 of this subsection. From the date a Petition or Request for Order Hearing is received by the Commission, the chair of the Commission shall serve as Hearing Officer until such time as another hearing officer is appointed.

1. QUALIFICATIONS. A Hearing Officer may be an independent contractor or a Commissioner, shall be knowledgeable of the laws of the state and of administrative hearing procedures, and shall not be:

a. an employee of the Department, except for the Commissioners themselves or their designees or unless employed by the Department as a hearing officer;

b. a person who has a personal bias or prejudice concerning a party or a party's lawyer or consultant, or has personal knowledge of disputed facts concerning the proceeding, or is related to a party within the third degree of relationship, or has a financial interest in the proceeding; or

c. a person who has performed prosecutorial or investigative functions in connection with the Compliance Order or permitting action at issue in the hearing.

2. FUNCTIONS. The Hearing Officer shall exercise all powers and duties prescribed or delegated by the Commission under the Act or this Part. The Hearing Officer shall conduct a fair and impartial proceeding, assure that the facts are fully elicited, and avoid delay. The Hearing Officer shall have authority to take all measures necessary for the maintenance of order and for the efficient, fair and impartial adjudication of issues arising in proceedings governed by this Part including, but not limited to:

a. conduct hearings under this Part;

b. rule upon motions and procedural requests that do not seek final resolution of the proceeding and issue all necessary orders;

c. issue subpoenas, as authorized by the Act, for the attendance and testimony of witnesses and the production of documentary evidence as provided for in this Part;

d. administer oaths and affirmations, examine witnesses, and admit or exclude evidence;

e. require parties to attend conferences for the settlement or simplification of issues, or the expedition of proceedings; and

f. impose sanctions, subject to review by the Commission, on parties and interested participants who cause undue delay and fail to cooperate in the proceeding. [11-15-96]

C. NOTICE OF HEARING OFFICER ASSIGNMENT. If a Hearing Officer other than a Commissioner is assigned, the Hearing Clerk shall notify the parties of the name and address of the Hearing Officer. The Hearing Clerk shall also, at that time, forward to the Hearing Officer copies of all documents filed to date. [11-15-96]

110. EX PARTE DISCUSSIONS. -- At no time after the initiation and before the conclusion of a proceeding under this Part shall any party, interested participant or their representative discuss ex parte the merits of the proceeding with any Commissioner or the Hearing Officer. This prohibition does not preclude any constituent agency Commissioner from conferring with agency employees who are not, and have not been, involved in the matter before the Commission. [11-15-96]

111. COMPUTATION AND EXTENSION OF TIME. --

A. COMPUTATION OF TIME. In computing any period of time prescribed or allowed by this Part, except as otherwise specifically provided, the day of the event from which designated period begins to run shall not be included. The last day of the computed period shall be included, unless it is a Saturday, Sunday, or legal state holiday, in which event the time is extended until the end of the next day which is not a Saturday, Sunday, or legal state holiday. Whenever a party must act within a prescribed period after service upon him, and service is by mail, three days is added to the prescribed period. The three day extension does not apply to any deadline under the Act. [11-15-96]

B. EXTENSION OF TIME. The Commission or Hearing Officer may grant an extension of time for the filing of any document upon timely motion of a party to the proceeding for good cause shown, and after consideration of prejudice to other parties. [11-15-96]

112. DOCUMENTS: FILING, SERVICE, FORM AND EXAMINATION. --

A. As used in this Section, "document" means any pleading, motion, response, memorandum, decision, order, or other written material filed in a proceeding under this Part, but does not include a cover letter accompanying a document transmitted for filing. [11-15-96]

B. FILING OF DOCUMENTS.

1. Except as otherwise provided, the originals of all documents served in the proceeding shall be filed with the Hearing Clerk.

2. Except as otherwise provided, a party filing documents shall serve copies thereof upon all other parties. A certificate of service, as shown in Appendix A, shall accompany each filed document. [11-15-96]

C. SERVICE OF DOCUMENTS. Except as otherwise provided, all documents may be served personally, by telefax or by express or first class mail. [11-15-96]

D. FORM OF DOCUMENTS.-- Unless otherwise ordered by the Hearing Officer, all documents, except exhibits, shall be prepared on 8½ X 11-inch white paper, printed single sided, if possible, and where appropriate, the first page of every document shall contain a heading and caption as illustrated in Appendix A. [11-15-96]

E. DOCUMENTS ISSUED BY COMMISSION OR HEARING OFFICER.-- All documents issued by the Commission or Hearing Officer shall be filed with the Hearing Clerk. The Hearing Clerk shall promptly serve copies of the documents upon all parties and interested participants. [11-15-96]

F. EXAMINATION OF DOCUMENTS FILED.

1. EXAMINATION ALLOWED. Subject to the provisions of law restricting the public disclosure of confidential information, any person may, during normal business hours, inspect and copy any document filed in any proceeding. Such documents shall be made available by the Hearing Clerk, as appropriate.

2. COST OF DUPLICATION. Unless waived by the Department, the cost of duplicating documents or tapes filed in any proceeding shall be borne by the person seeking copies of such documents or tapes. [11-15-96]

113. NOTICE OF DOCKETING. -

A. DOCKETING NOTICE. The Hearing Clerk shall, as soon as practicable after initiation of a proceeding under this Part, issue and serve upon the parties and each Commission a Notice of Docketing, containing the caption and docket number of the case, and the date upon which the Petition or Request for Order Hearing was received by the Hearing Clerk. A copy of this Part shall be included with a Notice of Docketing sent to a Petitioner, Applicant or Respondent. [11-15-96]

B. UNTIMELINESS. The Hearing Clerk shall docket any Petition or Request for Order Hearing, without regard to whether it appears to be timely; but the Commission or any party may move to dismiss an untimely Petition or Request for Order Hearing. [11-15-96]

114. MOTIONS.--

- A. GENERAL. All motions, except those made orally during a hearing, shall be in writing, specify the grounds for the motion, state the relief sought and state whether it is opposed or unopposed. Each motion shall be accompanied by an affidavit, certificate or other evidence relied upon and shall be served as provided by Section 112. [11-15-96]
- B. UNOPPOSED MOTIONS. An unopposed motion shall state that the concurrence of all other parties was obtained. The moving party shall submit a proposed order approved by parties for the Hearing Officer's review. [11-15-96]
- C. OPPOSED MOTIONS. Any opposed motion shall state either that concurrence was sought and denied, or why concurrence was not sought. A memorandum brief in support of such motion may be filed with the motion. [11-15-96]
- D. RESPONSE TO MOTIONS. Any party upon whom an opposed motion is served shall have fifteen (15) days after service of the motion to file a response. A non-moving party failing to file a timely response shall be deemed to have waived any objection to the granting motion. [11-15-96]
- E. REPLY TO RESPONSE. The moving party may, but is not required to, submit a reply to any response within ten (10) days after service of the response. [11-15-96]
- F. DECISION. All motions shall be decided by the Hearing Officer without a hearing unless otherwise ordered by the Hearing Officer. The Hearing Officer shall refer any motion that would effectively dispose of the matter, and may refer any other motion, to the Commission for decision. A procedural motion may be ruled upon prior to the expiration of the time for response. Any response received thereafter shall be treated as a request for reconsideration of the ruling. [11-15-96]

115. - 199. [Reserved]

SUBPART II - APPEAL HEARING

200. INITIATION OF APPEAL HEARING. -- An Appeal Hearing shall be initiated by the filing of an Appeal Petition under either Section 200.A or 200.C.

A. TIMING AND CONTENTS. An Appeal Petition shall:

1. be filed with the Commission within thirty (30) days from the date notice is given of the permitting action;
2. identify the Petitioner, and certify that the Petitioner has standing under NMSA 1978, Section 74-6-5(N) or 20 NMAC 6.2.4114 to file the Petition;
3. identify the permitting action appealed from, specify the portions of the permitting action to which Petitioner objects and generally state the objections;
4. have a copy of the permitting action attached;
5. be signed under oath or affirmation and attest to the truth of the information contained therein; and
6. be filed with the Commission and a copy served on the Department. [11-15-96]

B. RESPONSE OF THE DEPARTMENT. If an Appeal Petition is filed under Section 200.A, the Department shall within thirty (30) days after receipt of the Petition:

1. file with the Commission the administrative record of the permitting action which is the subject of the Petition. The Department shall serve only the index to the record on other parties. The parties may stipulate that only the relevant portions of the record be filed with the Commission;
2. deliver to the Hearing Clerk a list of all persons who have expressed an interest in writing an interest in the facility or the permitting action that is the subject of the Petition and participated in a public hearing on the permitting action; and

3. file an answer to the Petition clearly and directly responding to each of the objections in the Petition. [11-15-96]

C. INFORMAL APPEAL. If a Petitioner wishes to delay a hearing in order to negotiate with the Department, the Petitioner may file an informal Appeal Petition under this subsection.

1. An informal Appeal Petition must comply with Section 200.A.1, 2, 4 and 6 and must waive the right to a hearing on the Petition within ninety (90) days;

2. The filing of an informal Appeal Petition stays all other deadlines under this Part;

3. If no alternate resolution occurs under Subpart VII, the Petitioner shall, within ninety (90) days after the filing of an informal Appeal Petition, file a formal Appeal under Section 200.A and all deadlines under this Part will be based on the filing date of the Petition. The ninety day period may be extended by a stipulated or unopposed motion;

4. The failure to file a timely formal Appeal Petition shall be grounds for dismissal of the appeal. [11-15-96]

201. SCHEDULING THE HEARING. --

A. HEARING DATE. The hearing shall be scheduled to begin no later than ninety (90) days after the date an Appeal Petition is received unless a stipulated or unopposed motion filed requesting that the ninety day deadline be waived. The motion must be filed prior to the expiration of the ninety day deadline. [11-15-96]

B. SCHEDULING ORDER. Unless the ninety day hearing deadline has been waived, the Hearing Officer shall, no later than forty-five (45) days prior to the hearing deadline, in order setting the date, time and location of the hearing. The order may include other procedural matters. The parties may, jointly or singly, submit to the Hearing Officer, prior to the issuance of the scheduling order, requests regarding the date and location of the hearing and other procedural matters, such as the assignment of a non-Commissioner Hearing Officer. The Hearing Officer may consult with the Commission on procedural matters at a Commission meeting. [11-15-96]

202. PUBLIC NOTICE OF HEARING. --

A. CONTENT. The Hearing Clerk shall, upon direction from the Commission or Hearing Officer, prepare a Notice of Hearing setting forth the date, time, and location of the hearing, a brief description of the Petition, and information on the requirements for entry of appearance and the statement of intent to present evidence. [11-15-96]

B. DISTRIBUTION. The Hearing Clerk shall:

1. no later than thirty (30) days prior to the hearing date, send copies, with requests for publication, to at least one newspaper of general circulation in the state, and to one additional newspaper published or distributed at least weekly in the county where the facility is located;

2. mail a copy to each interested participant who has previously filed an entry of appearance, and to each person who has expressed in writing to the Department or the Commission an interest in the facility or permitting action that is the subject of the Petition;

3. immediately upon receipt of an entry of appearance that is received after the initial mailing, mail a copy to such interested participant. [11-15-96]

C. CERTIFICATION. After the Notice of Hearing has been distributed in accordance with this Section, the Hearing Clerk shall file an affidavit certifying how and when notice was given, with a copy of the Notice of Hearing and any affidavits of publication attached. [11-15-96]

203. REQUEST BY PETITIONER TO RECORD HEARING.--

A. REQUEST BY PETITIONER. The Petitioner may, no later than twenty (20) days prior to the hearing date, request that the hearing be recorded at the cost of the Petitioner. The request shall be in writing, filed with the Hearing Clerk, and shall certify that the Petitioner

hired a court reporter and will deliver thirteen (13) copies of the hearing transcript to the Clerk. [11-15-96]

B. FAILURE TO REQUEST. As provided in NMSA 1978 Section 74-6-5(P), unless the Petitioner requests that the hearing be recorded, the decision of the Commission on an Appeal Petition shall be final. If the Petitioner fails to timely request that the hearing be transcribed, the Hearing Clerk shall, unless otherwise ordered by the Commission, arrange for the tape recording of the hearing. [11-15-96]

204. STATEMENT OF INTENT TO PRESENT TECHNICAL EVIDENCE. --

A. REQUIREMENT TO FILE. Any person who wishes to present technical evidence at the hearing shall, no later than ten (10) days prior to the hearing, file a statement of intent to present technical evidence. [11-15-96]

B. CONTENT. The statement of intent to present technical evidence shall include:

1. the name of the person filing the statement;
2. indication of whether the person filing the statement supports or opposes the Petition at issue;
3. the name of each witness;
4. an estimate of the length of the direct testimony of each witness;
5. a list of exhibits, if any, to be offered into evidence at the hearing; and
6. a summary or outline of the anticipated direct testimony of each witness. [11-15-96]

205. PARTICIPATION BY PERSONS OTHER THAN PARTIES

A. INTERESTED PARTICIPANTS: ENTRY OF APPEARANCE. Any person who wishes to be treated as an interested participant and to cross-examine witnesses at the hearing shall file and serve upon all parties an entry of appearance at least ten (10) days prior to the hearing. For purposes of this subsection, a statement of intent to present technical evidence filed under Section 204 shall be considered an entry of appearance if the person has not previously filed a separate entry of appearance. The entry of appearance shall identify the person wishing to be treated as an interested participant, any individual who may appear on behalf of that person at the hearing, and the subjects they intend to address. [11-15-96]

B. PARTICIPATION BY THE GENERAL PUBLIC. Any person who has not timely filed either an entry of appearance or a statement of intent to present evidence may present a general non-technical statement as follows:

1. Any member of the general public may testify at the hearing. No prior notification is required to present general non-technical statements in support of or in opposition to the Petition. Any such member may also offer exhibits in connection with his testimony, so long as the exhibit is non-technical in nature and not unduly repetitious of the testimony.
2. A member of the general public who wishes to submit a written statement for the record, in lieu of providing oral testimony at the hearing, shall file the written statement prior to or at the hearing. [11-15-96]

206. DISCOVERY.

A. GROUNDS FOR DISCOVERY. Discovery shall only be permitted upon a determination by the Hearing Officer that:

1. the type of discovery sought will not unreasonably delay the proceeding, and is neither unreasonably burdensome nor unreasonably expensive; and
2. the information to be obtained is relevant and is not otherwise reasonably obtainable, may be lost, or may become unavailable. [11-15-96]

B. ORDER FOR DISCOVERY. Upon motion for discovery by a party and determination by the Hearing Officer that such motion should be granted, the Hearing Officer shall issue an order for the taking of such discovery together with the conditions and terms thereof. [15-96]

207. HEARING: BURDEN OF PERSUASION. -- At the hearing, the Petitioner has the burden of going forward with the evidence and of proving by a preponderance of the evidence the facts relied upon to justify the relief sought in the Petition. Following the establishment of an *in* facie case by the Petitioner, any person opposed to the relief sought in the Petition has the burden of going forward with any adverse evidence and showing why the relief should not be granted. [15-96]

208. - 299. [Reserved]

SUBPART III - VARIANCE HEARING

300. INITIATION OF VARIANCE HEARING. -- A Variance Hearing shall be initiated by the filing of a Variance Petition. A copy of the Petition shall be served on the Department. [15-96]

A. CONTENTS. A Variance Petition shall comply with 20 NMAC 6.2 Sections 1210.A and 4103.F, as applicable. [11-15-96]

B. RESPONSE OF THE DEPARTMENT. The Department shall review each Variance Petition and, within sixty (60) days after receipt of the Petition, file a recommendation with the Commission to grant, grant with conditions, or deny the variance request. The recommendation shall include reasons and a copy shall be served on the Petitioner by certified mail and on any other party or interested participant. [11-15-96]

301. HEARING REQUIREMENT. If the Department recommends granting the variance request, or any part of the variance request, with or without conditions, the Commission shall hold a hearing on those requests recommended for approval. If the Department recommends denial of all or part of the variance request, the Commission shall only hold a hearing on the variances recommended for denial if the Petitioner files a request for hearing within fifteen (15) days after receipt of the Department's recommendation. If a timely request for hearing is not filed, the recommended denial shall become a final action of the Commission and shall not be subject to review. [11-15-96]

302. SCHEDULING THE HEARING. --

A. TIMING OF HEARING. If a hearing on a Variance Petition is required, the hearing shall be held within ninety (90) days after the later of the filing of a Department recommendation to grant a variance or the filing of a request for hearing by the Petitioner, as applicable. The ninety day deadline may be waived upon the filing of a stipulated or unopposed motion prior to the expiration of the deadline. [11-15-96]

B. SCHEDULING ORDER AND PUBLIC NOTICE. If a hearing on a Variance Petition is required, a Scheduling Order shall be issued as provided in Section 201.B, and public notice shall be given as provided in Section 202. [11-15-96]

303. ADDITIONAL PROCEDURES. -- Procedures for statements of intent to present technical evidence, for participation by persons other than parties, for discovery and for the burden of persuasion in Variance Hearings shall follow the procedures for Appeal Hearings, Sections 204 to 207. [11-15-96]

304. - 399. [reserved]

SUBPART IV - ORDER HEARING

400. INITIATION OF ORDER HEARING. --

A. FILING OF REQUEST. An Order Hearing shall be initiated by the filing of a Request for Order Hearing within thirty (30) days after the Compliance Order is served. The Respondent shall file the original of the Request for Order Hearing with the Commission and serve

a copy on the Department. [11-15-96]

B. REQUEST FOR ORDER HEARING. The Request for Order Hearing shall also serve as an Answer to the Compliance Order and shall:

1. clearly and directly admit or deny each of the factual assertions contained in the Compliance Order; but where the Respondent has no knowledge of a particular factual assertion and so states, the assertion may be denied on that basis. Any allegation of the Compliance Order not specifically denied shall be deemed admitted;

2. indicate any affirmative defenses upon which the Respondent intends to rely. Affirmative defenses not asserted in the Request for Order Hearing, except a defense asserting lack of subject matter jurisdiction, shall be deemed waived;

3. be signed under oath or affirmation that the information contained therein is, to the best of the signer's knowledge, believed to be true and correct; and

4. attach a copy of the Compliance Order. [11-15-96]

401. SCHEDULING THE HEARING. --

A. HEARING DATE. The hearing shall be scheduled to begin no later than ninety (90) days after the date a Request for Order Hearing is received, unless a stipulated or unopposed motion is filed requesting that the ninety day deadline be waived. The motion must be filed prior to the expiration of the ninety day deadline. [11-15-96]

B. SCHEDULING ORDER. Unless the ninety day hearing deadline has been waived, the Hearing Officer shall, no later than forty-five (45) days prior to the hearing deadline, issue an order setting the date, time and location of the hearing. The order may include other procedural matters. The parties may, jointly or singly, submit to the Hearing Officer, prior to the issuance of the scheduling order, requests regarding the date and location of the hearing and other procedural matters, such as the assignment of a non-Commissioner Hearing Officer. The Hearing Officer may consult with the Commission on procedural matters at a Commission meeting. [11-15-96]

402. PUBLIC NOTICE OF HEARING. --

A. PUBLICATION. The Hearing Clerk shall, upon direction from the Commission or Hearing Officer, prepare a Notice of Hearing setting forth the date, time, and location of the hearing, and a brief description of the Request for Order Hearing, and, no later than thirty (30) days prior to the hearing date, send copies, with requests for publication, to at least one newspaper of general circulation in the state, and to at least one additional newspaper published or distributed at least weekly in the county where the facility is located. [11-15-96]

B. CERTIFICATION. After the Notice of Hearing has been distributed in accordance with this Section, the Hearing Clerk shall file an affidavit certifying how and when notice was given, with a copy of the Notice of Hearing and any affidavits of publication attached. [11-15-96]

403. GENERAL RULES REGARDING DISCOVERY.--

A. DISCOVERY REQUEST. Except as otherwise provided by the Commission, a party requesting discovery shall serve the discovery request directly upon the party from whom discovery is sought and shall file a notice with the Hearing Clerk, indicating the date of service of the discovery request, the type of discovery sought, and the party from whom discovery is sought. [11-15-96]

B. RESPONSE TO DISCOVERY REQUEST. A party responding to a discovery request shall serve the response, including any objections, upon the party making the discovery request and shall file a notice with the Hearing Clerk, indicating the date of service of the response, the type of discovery request being responded to, and the party upon whom the response was served. [11-15-96]

C. CONTINUING OBLIGATION TO SUPPLEMENT RESPONSES. Any party from whom discovery is sought has a continuing obligation, subject to any objections interposed and not overruled by the Hearing Officer, to supplement responses with relevant information obtained after serving of the initial response and any previous supplemental responses. Unless otherwise ordered by the Commission or Hearing Officer, supplemental responses shall be served as soon as practicable but not later than five (5) days from when the information became available.

If the new information becomes available less than five (5) days prior to the hearing or during hearing, it shall be brought to the attention of the Hearing Officer for direction and ruling on use of the information. [11-15-96]

D. PROTECTIVE ORDER. The Hearing Officer may, upon motion and for good cause shown, issue any order which justice requires to protect a party or person from annoyance, embarrassment, oppression or undue burden or expense, including that discovery be limited or that a trade secret or other confidential information not be disclosed. [11-15-96]

E. FAILURE TO MAKE DISCOVERY; SANCTIONS. Upon motion by a party showing that another party from whom discovery was requested has failed to respond within the required time, the Hearing Officer may order the response and may impose such sanctions as may be appropriate, including:

1. refusal to allow the testimony of a witness not identified as required by Section 404;
2. denial of admission of a document not disclosed as required by Section 405;
3. drawing of adverse inference against the non-responsive party; and
4. in an extreme case, dismissal or default judgment against the non-responding party. [11-15-96]

404. IDENTITY OF WITNESSES.-- Except as allowed by the Hearing Officer, each party shall, fifteen (15) days before the hearing, provide the name and address of each person expected to be called as a witness and a description of the general subject matter of the anticipated testimony of each witness. [11-15-96]

405. PRODUCTION OF DOCUMENTS.--

A. DEFINITION. As used in this Subpart, "document" includes writings, drawings, graphs, charts, photographs, videotapes and other data compilations from which information can be obtained, and if necessary, translated by a party through detection devices into reasonably usable form. In addition, each copy of a document that is not identical in all respects to every other copy shall be considered a separate document. [11-15-96]

B. REQUEST. Any party, upon written request to another party, is entitled to inspect and make copies of any relevant documents in the possession or control of the other party. The request shall specify a reasonable time (not less than twenty (20) days after service of the request), place and manner of making the inspection and copies. The party responding to the request shall also provide a list of privileged documents, identified by title, author and date. [11-15-96]

406. SUBPOENAS.-- As allowed by the Act, the Hearing Clerk shall, upon request by any party and without the necessity for notice to other parties, prepare a subpoena requiring the attendance and testimony of any witness and the production of any evidence in the possession or under the control of the witness at the hearing or at a deposition authorized by the Hearing Officer under Section 408, and forward the subpoena to the Hearing Officer for issuance. A subpoena may be issued with the name and address of the witness blank, to be completed by the requesting party. [11-15-96]

407. REQUEST FOR ADMISSIONS.-- Any party may serve upon any other party a written request for the admission of any statement or opinion of fact or the application of law to fact, including the genuineness of any document. If the request includes a request for admission of the genuineness of a document, the document shall be attached to the request unless it has been otherwise furnished. Each statement shall be deemed admitted unless, within twenty (20) days after service of the Request, or such other time prescribed by the Hearing Officer, the party to whom the Request is directed serves upon the requesting party a sworn written response specifically denying such matter. [11-15-96]

408. OTHER DISCOVERY.--

A. ADDITIONAL DISCOVERY NOT FAVORED. Discovery not specifically provided for under this Part, including interrogatories and depositions, is discouraged. Request for additional discovery may be made by motion to the Hearing Officer setting forth:

1. the circumstances and necessity warranting the taking of the discovery;
2. the nature of the information expected to be discovered; and
3. the proposed time and place where the discovery will be taken. [11-15-96]

B. FINDINGS FOR ADDITIONAL DISCOVERY. Discovery may be permitted upon determination by the Hearing Officer that:

1. such discovery will not unreasonably delay the proceeding;
2. the information to be obtained is not otherwise reasonably obtainable, may be lost, or may become unavailable because of physical illness or infirmity; and
3. there is a substantial reason to believe that the information sought will be admissible at the hearing or will be likely to lead to the discovery of admissible evidence. [11-15-96]

C. ORDER FOR ADDITIONAL DISCOVERY. Upon determining that a motion for additional discovery should be granted, the Hearing Officer shall issue an order for the taking of such discovery together with any conditions and terms of the additional discovery. [11-15-96]

409. HEARING: BURDEN OF PERSUASION. -- At an Order Hearing, the Department has the burden of going forward with the evidence and of proving by a preponderance of the evidence that the violation occurred, and that the proposed civil penalty, revocation, or suspension, as a case may be, is appropriate. Following the establishment of a prima facie case, the Respondent shall have the burden of going forward with any adverse evidence or defense to the allegations. [11-15-96]

410. - 499. [Reserved]

SUBPART V - GENERAL HEARING PROCEDURES

500. HEARING.--

A. LOCATION OF THE HEARING. Unless otherwise ordered by the Commission or Hearing Officer, the hearing shall be in Santa Fe. [11-15-96]

B. POSTPONEMENT OF HEARING. No request for postponement of a hearing shall be granted except upon consent of all parties or for good cause shown. [11-15-96]

501. CONDUCT OF HEARING.--

A. The Hearing Officer shall conduct the hearing so as to provide a reasonable opportunity for all interested persons to be heard without making the hearing unreasonably lengthy or cumbersome or burdening the record with unnecessary repetition. [11-15-96]

B. The Hearing Officer shall establish the order of testimony except that the party with the burden of persuasion shall present its case first. The hearing officer may allow brief opening and closing statements. [11-15-96]

502. EVIDENCE.--

A. GENERAL. The Hearing Officer shall admit any relevant evidence, unless the Hearing Officer determines that the evidence is unduly repetitious or otherwise unreliable or of little probative value. Evidence relating to settlement that would be excluded in the courts under SCRA 1986, 11-408 is not admissible. [11-15-96]

B. EXAMINATION OF WITNESSES. Witnesses shall be examined orally, under oath or affirmation, except as otherwise provided in this Part or by the Hearing Officer. The Commission, Hearing Officer, parties and interested participants shall have the right to cross-examine a witness. The Hearing Officer may limit cross-examination that is unduly repetitious, harassing or beyond the scope of the witness' direct testimony. [11-15-96]

C. EXHIBITS. All exhibits offered in evidence shall be marked with a designation identifying the person by whom the exhibit is offered, and numbered serially in the sequence in which offered. Large charts and diagrams, models, and other bulky exhibits are discouraged. Exhibits should be limited to 8½ X 11 inches, or be capable of being folded to that size, unless otherwise necessary for adequate presentation of evidence. [11-15-96]

D. OFFICIAL NOTICE. Official notice may be taken of any matter that may be judicially noticed in the New Mexico courts. [11-15-96]

E. PREPONDERANCE OF EVIDENCE. Each matter of controversy shall be determined upon a preponderance of the evidence. [11-15-96]

503. OBJECTIONS AND OFFERS OF PROOF. --

A. OBJECTION. Any objection concerning the conduct of the hearing may be stated orally or in writing during the hearing. The party raising the objection must supply a short statement of its grounds. The ruling by the Hearing Officer on any objection and the reasons for it shall be part of the record. [11-15-96]

B. OFFER OF PROOF. Whenever evidence is excluded from the record, the party offering the evidence may make an offer of proof, which shall be included in the record. The offer of proof for excluded oral testimony shall consist of a brief statement describing the nature of evidence excluded and what such evidence would have proved. The offer of proof for excluded documents or exhibits shall consist of the insertion in the record of the documents or exhibits excluded. Where the Commission decides that the ruling of the Hearing Officer in excluding the evidence was both erroneous and prejudicial, the hearing may be reopened to permit the taking of such evidence. [11-15-96]

504. - 599. [Reserved]

SUBPART VI - POST-HEARING PROCEDURES

600. FILING THE TRANSCRIPT. -- If the hearing was transcribed and post-hearing submittals allowed, the Hearing Clerk shall, promptly following receipt of the transcript, transmit a copy to the Hearing Officer, and notify all parties and interested participants of its availability. Any person, other than the Commission, desiring a copy of a transcript must order a copy from the court reporter. If the hearing is not transcribed, any person, other than the Commission, desiring a copy of hearing tapes must arrange copying with the Hearing Clerk at their expense. [11-15-96]

601. PROPOSED FINDINGS AND CONCLUSIONS. -- Unless otherwise ordered by the Commission, within thirty (30) days after conclusion of the hearing, or within such time as may be fixed by the Hearing Officer, any party or interested participant may submit proposed findings of fact and conclusions of law and closing argument. All such submissions shall be in writing, served upon all parties, and shall contain adequate references to the record and authorities relied upon. No new evidence shall be presented unless specifically allowed by the Hearing Officer. [11-15-96]

602. RECOMMENDED DECISION.--

A. FILING AND CONTENTS. Unless otherwise ordered by the Commission, the Hearing Officer shall issue a recommended decision within thirty (30) days after the deadline for filing of proposed findings and conclusions under Section 601. The recommended decision shall contain the Hearing Officer's:

1. findings of fact;
2. conclusions regarding all material issues of law or discretion, as well as reasons therefor;
3. a proposed final order; and
4. for Order Hearings, if the Hearing Officer determines that a violation has occurred, the Hearing Officer shall review the proposed civil penalty to determine if the Department acted within its discretion in setting the penalty amount. If the Hearing Officer decides to recommend a penalty different in amount or nature from the Department's proposed

penalty, the Hearing Officer shall set forth the reasons for the change. [11-15-96]

B. COMMENT ON RECOMMENDED DECISION. At the Commission's discretion, any party or interested participant may file, within fifteen (15) days after service of the recommended decision, comments regarding the recommended decision, including arguments to adopt, reject or modify the recommended decision. [11-15-96]

C. ARGUMENT BEFORE THE COMMISSION. The Commission may, upon request of a party or its own initiative, allow oral argument on the recommended decision. If argument is allowed, the Commission shall specify the time and place for such oral argument after giving due consideration to the convenience of the parties and the need for expeditious resolution of the proceeding. [11-15-96]

603. FINAL ORDER BY COMMISSION. The Commission shall reach a final decision at a public meeting, but may deliberate on the decision in closed session in accordance with the Meetings Act. After reaching a decision, the Commission shall direct a member, its counsel or party to prepare a final order. The Commission may approve the order at a meeting or direct the Commission chair to sign the order. [11-15-96]

A. DECISION. The Commission may adopt, modify, or set aside the Hearing Officer's recommended decision, and shall set forth in the final order the reasons for its action. [11-15-96]

B. PENALTY. For an Order Hearing, the Commission may change the amount and nature of the civil penalty, if any, recommended by the Hearing Officer and shall set forth the reasons for the change. [11-15-96]

C. The Hearing Clerk shall send copies of the final order to each party and interested participant, and to all other persons who have made written requests for notification of the action taken. [11-15-96]

604. PAYMENT OF CIVIL PENALTY. -- The Respondent shall pay the full amount of the civil penalty, if any, assessed in the final order within sixty (60) days after receipt of the order unless otherwise ordered by the Commission. Payment shall be made by forwarding to the Hearing Clerk a cashier's check or certified check in the amount of the penalty assessed, payable to the Commission. [11-15-96]

605. JUDICIAL REVIEW. -- Judicial review of the final order shall be as provided by law. If the Petitioner did not request that a Petition hearing be recorded in accordance with Section 202, the decision of the Commission shall be final. The filing of an appeal does not stay any action or payment of penalty required by the final order, unless otherwise ordered by the Commission or a court. [11-15-96]

606. PREPARATION OF RECORD PROPER. -- The preparation of the Record Proper for an appeal or for any other reason shall be the responsibility of the Hearing Clerk. Appellant shall make satisfactory arrangements, including copying or transcript costs, with the Hearing Clerk. [11-15-96]

607. - 699. [Reserved]

SUBPART VII - ALTERNATE RESOLUTION

700. SUMMARY PROCEDURES. --

A. USE OF SUMMARY PROCEDURES. The Commission may dispose of a Petition or Request for Order Hearing after an expedited hearing if a party requests that the matter be decided solely on legal arguments presented in written briefs and oral arguments. [11-15-96]

B. EXPEDITED HEARING. If the Hearing Officer determines that the motion or request has a likelihood of success and could fairly expedite the resolution of the proceeding, the Hearing Officer may submit a recommended decision to the Commission based on briefs and oral arguments presented at an expedited hearing. If an expedited hearing is conducted, public notice shall be given in accordance with Section 202 or Section 402. For Petition Hearings, the Hearing Officer shall also:

1. include in the public notice instructions for persons other than parties who wish to participate in the oral argument to submit a statement of intent equivalent to the statement provided in Section 204; and

2. allow the public to attend the expedited hearing but may limit presentations at the hearing to oral arguments by parties and interested participants on the specific issue before the Commission. [11-15-96]

C. COMMISSION. Upon a referral of a recommended expedited decision, the Commission may either reach a final decision and issue a final order or remand to the Hearing Officer to proceed with a full hearing under this Part. [11-15-96]

701. SETTLEMENT.-- The Commission encourages the settlement of a proceeding at any time if the settlement is consistent with the provisions and objectives of the Act and Regulations. [11-15-96]

A. ORDER HEARING. The Commission may approve a stipulated final order signed by all parties. The stipulated final order shall include all the terms and conditions agreed to by the parties, and shall state that, for the purpose of this proceeding, the Respondent admits the jurisdictional allegations of the Compliance Order and consents to the relief specified, including assessment of the stated civil penalty, if any. [11-15-96]

B. APPEAL HEARING. The Commission may approve a settlement that modifies a permitting action only after evidence supporting such modification is presented at a hearing. The Department, however, may withdraw and reissue a modified permitting action under Section 702. [11-15-96]

C. DISAPPROVAL OF SETTLEMENT. If the Commission disapproves the settlement or stipulated final order, the matter shall proceed as if there had been no settlement or stipulated final order. [11-15-96]

702. WITHDRAWAL.--

A. NOTICE OF WITHDRAWAL. A Petitioner or Respondent may withdraw a Petition or Request for Order Hearing, or the Department may withdraw the Compliance Order or the permitting action which is the subject of the proceeding, at any time prior to a decision by the Commission by filing a Notice of Withdrawal with the Commission and serving the Notice on all other parties and interested participants. A party or interested participant may file a written objection to the Notice within ten (10) days after receipt. If an objection is filed, the Commission shall rule on the Notice. [11-15-96]

B. EFFECT OF WITHDRAWAL. An effective Notice of Withdrawal under this Section results in the following:

1. when a Petitioner withdraws an Appeal Petition, the permitting action becomes final;

2. when a Petitioner withdraws a Variance Petition, the Petitioner is barred from petitioning for the same variance without permission from the Commission;

3. when a Respondent withdraws a Request for Order Hearing, the Compliance Order becomes final;

4. when the Department withdraws a Compliance Order, the Request for Order Hearing is vacated; and

5. when the Department withdraws a permitting action, the Appeal Petition is vacated and the Department must issue a new permitting action within sixty (60) days unless either the Commission approves a different time period or the Applicant withdraws its application. Upon issuance of a new permitting action, the right to file a new Appeal Petition under the Act, Section 74-6-5(N), is available. [11-15-96]

703. - 799. [reserved]

800. APPENDIX A

[Preferred Format]

STATE OF NEW MEXICO
WATER QUALITY CONTROL COMMISSION

[A. Petition Hearing]

IN THE MATTER OF THE PETITION FOR
[A VARIANCE FROM]
[HEARING ON DISCHARGE PLAN NO.]
[HEARING ON ABATEMENT ACTION DATED]

[Name of Petitioner],
Petitioner

[B. Order Hearing]

[name of constituent agency issuing Compliance Order],
Complainant

v.

[Name of Respondent],
Respondent

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing [name of document] was
[hand-delivered] [faxed] [mailed first class] to all parties [and interested participants] on [

1
20 NMAC 1.3

25
20 NMAC 1.3



 [Return to Regulations Page](#)

 [Return to Home Page](#)

 **people have visited this page**

This page last updated March 24, 1997

For regulation assistance, send e-mail to Bill_Brancard@nmenv.state.nm.us
Questions or comments? Send e-mail to Webmaster@nmenv.state.nm.us