

TITLE 20 ENVIRONMENTAL PROTECTION
CHAPTER 1 ENVIRONMENTAL PROTECTION GENERAL
PART 2 ADJUDICATORY PROCEDURES - ENVIRONMENTAL IMPROVEMENT BOARD

20.1.2.1 ISSUING AGENCY: Environmental Improvement Board.
[20.1.2.1 NMAC - Rp, 20 NMAC 1.2.I.100, 08/27/06]

20.1.2.2 SCOPE:

A. This part governs the following adjudicatory proceedings of the environmental improvement board:

- (1) proceedings for the granting of variances, or for the appeal from permitting actions, pursuant to the Air Quality Control Act, Sections 74-2-7(H) and 74-2-8 NMSA 1978 (“petition hearings”); and
- (2) any other adjudicatory proceedings under the jurisdiction of the board to which the board applies this part.

B. Uniform Licensing Act proceedings: Subparts I, III and IV of this part [now 20.1.2.1 through 20.1.2.7 NMAC, and 20.1.2.106 through 20.1.2.113 NMAC; 20.1.2.200 through 20.1.2.208 NMAC; and 20.1.2.400 through 20.1.2.405 NMAC] apply to any board adjudicatory proceedings conducted under the Uniform Licensing Act, Sections 61-1-1 NMSA 1978 et seq., (“ULA”), including proposed denial, suspension or revocation of certificates held or applied for under the Medical Radiation Health and Safety Act, Section 61-14E-11 NMSA 1978 (“ULA hearings”). Any conflict between this part and the ULA shall be resolved in favor of the ULA.
[20.1.2.2 NMAC - Rp, 20 NMAC 1.2.I.101, 08/27/06]

20.1.2.3 STATUTORY AUTHORITY: This part is adopted under the authority of the Air Quality Control Act, Sections 74-2-5, 74-2-7 and 74-2-8 NMSA 1978; the Medical Radiation Health and Safety Act, Section 61-14E-5 NMSA 1978; and the Environmental Improvement Act, Section 74-1-8 NMSA 1978, as amended.
[20.1.2.3 NMAC - Rp, 20 NMAC 1.2.I.102, 08/27/06]

20.1.2.4 DURATION: Permanent.
[20.1.2.4 NMAC - Rp, 20 NMAC 1.2.I.103, 08/27/06]

20.1.2.5 EFFECTIVE DATE: August 27, 2006, unless a later date is cited at the end of a paragraph.
[20.1.2.5 NMAC - Rp, 20 NMAC 1.2.I.104, 08/27/06]

20.1.2.6 OBJECTIVE: The objective of this part is to establish procedures that govern the adjudicatory proceedings of the environmental improvement board.
[20.1.2.6 NMAC - Rp, 20 NMAC 1.2.I.105, 08/27/06]

20.1.2.7 DEFINITIONS: GENERAL: As used in this part. 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 or regulations.

A. “Act” means, as the context requires:

- (1) the Air Quality Control Act, Chapter 74, Article 2 NMSA 1978, and its subsequent amendments and successor provisions;
- (2) the Medical Radiation Health and Safety Act, Chapter 61, Article 14E NMSA 1978, and its subsequent amendments and successor provisions; and
- (3) any other statute that includes authority for adjudicatory proceedings before the board when the board applies this part to such proceedings.

B. “Applicant” means the person who is the holder of, or the applicant for, the permit to which an appeal petition applies.

C. “Board” means the environmental improvement board or its successor agency under the act.

D. “Department” means the New Mexico environment department or its successor agency under the act.

E. “Board administrator” means the department employee designated by the secretary of environment to provide staff support to the board, and, further, is the person designated by the board to maintain the official record of the proceeding.

F. "Hearing officer" means the person designated under this part or appointed by the board to conduct a proceeding under this part.

G. "Interested participant" means any person, other than a party, who files an entry of appearance in accordance with Subsection A of 20.1.2.207 NMAC.

H. "Party" means the petitioner, the applicant if different from the petitioner, the department, any person who is entitled, and who timely requests, to be heard under the ULA or any person who is permitted to intervene in the particular hearing pursuant to NMRA 1-024.

I. "Petition" means a variance petition filed pursuant to Section 74-2-8(D) NMSA 1978, or an appeal petition filed pursuant to Section 74-2-7(H) NMSA 1978.

J. "Petitioner" means any person who files a timely petition.

K. "Record proper" means all documents filed by or with the board administrator during the proceeding and also includes:

(1) the verbatim record of the hearing (transcript or tapes, as applicable) and all exhibits offered into evidence at the hearing, whether or not admitted;

(2) for an appeal petition proceeding, the administrative record of the department; and

(3) minutes, or an appropriate extract of minutes, of any board meeting where the board deliberated or acted on any procedural or substantive issue in the proceeding.

L. "Regulations" means any rules promulgated by the board to implement the act.

M. "Service" means personally delivering a copy of the document, exhibit or any pleading to the person required by these rules to be served; mailing it to that person, or, if that person agrees, by sending it by facsimile or electronic transmission. If a person is represented by an attorney, service of the document shall be made on the attorney. Service by mail is complete upon mailing the document; service by facsimile or by electronic transmission is accomplished when the transmission of the document is completed or upon acknowledgement by the recipient.

N. "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.

O. "ULA hearing" means a proceeding conducted by the board under the Uniform Licensing Act, Sections 61-1-1 NMSA 1978 et seq.

[20.1.2.7 NMAC - Rp, 20 NMAC 1.2.I.108, 08/27/06]

20.1.2.8 - 20.1.2.105 [RESERVED]

20.1.2.106 APPLICABILITY OF RULES OF CIVIL PROCEDURE AND RULES OF EVIDENCE: In the absence of a specific provision in this part governing an action, the board may look to the New Mexico Rules of Civil Procedure, NMRA 1-001 et seq., and the New Mexico Rules of Evidence, NMRA 11-101 et seq., for guidance. Any reference to the rules of civil procedure shall not be construed to extend or otherwise modify the authority and jurisdiction of the board under the act.

[20.1.2.106 NMAC - Rp, 20 NMAC 1.2.I.106, 08/27/06]

20.1.2.107 CONSTRUCTION, SEVERABILITY, SAVINGS CLAUSE: This part shall be liberally construed to carry out its purposes. If any part or application of this part is held invalid, the remainder of this part, or its application to other persons or situations, shall not be affected. This part does not apply to petitions filed prior to the effective date of this part, except as stipulated to by the parties to such proceeding.

[20.1.2.107 NMAC - Rp, 20 NMAC 1.2.I.107, 08/27/06]

20.1.2.108 [RESERVED]

20.1.2.109 POWERS AND DUTIES OF THE BOARD AND HEARING OFFICER:

A. Board: The board 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 board administrator. The board may specify procedures in addition to or that vary from those provided in this part in order to expedite the efficient resolution of the action or to avoid obvious injustice, so long as such procedures do not conflict with the act, the ULA or the regulations or prejudice the rights of any party.

B. Hearing officer: The board may appoint one or more hearing officers to perform the functions described in Paragraph (2) of Subsection B of 20.1.2.109 NMAC. From the date a proceeding is initiated under this

part, the chair of the board shall serve as hearing officer, until such time as another hearing officer is appointed. The board or the board chair may appoint another hearing officer. The appointment of a hearing officer does not preclude the board members from attending or participating in the proceeding.

(1) Qualifications: A hearing officer may be an independent contractor, board counsel or a member of the board and shall not be:

(a) an employee of the department, unless employed by the department as a hearing officer;

(b) a person who has a personal bias or prejudice concerning a party, 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 licensing or permitting action at issue in the hearing.

(2) Functions: The hearing officer shall exercise all powers and duties prescribed or delegated 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 law, for the attendance and testimony of witnesses and the production of documentary evidence;

(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;

(f) impose sanctions, subject to review by the board, on parties and interested participants who cause undue delay and fail to cooperate with the board;

(g) file original documents with the board administrator.

C. Notice of hearing officer assignment: If a hearing officer, other than a board member, is assigned, the board administrator shall notify the parties of the name and address of the hearing officer. The board administrator shall also, at that time, forward to the hearing officer copies of all documents filed to date.

D. Participation by conference, telephone or other similar device: A member of the board may participate in a meeting or hearing of the board by means of a conference telephone or other similar communications equipment when it is otherwise difficult or impossible for the member to attend the meeting or hearing in person, provided that each member participating by conference telephone can be identified when speaking, all participants are able to hear each other at the same time and members of the public attending the meeting or hearing are able to hear any member of the board who speaks at the meeting or hearing. A board member's participation by such means shall constitute presence in person at the meeting or hearing. A board member who wishes to participate in a permit hearing in this manner must receive permission from the hearing officer sufficiently in advance of the permit hearing so as to permit the board administrator to arrange for an adequate telephone hookup.

[20.1.2.109 NMAC - Rp, 20 NMAC 1.2.I.109, 08/27/06]

20.1.2.110 EX PARTE DISCUSSIONS: At no time after the initiation and before the conclusion of a proceeding under this part, shall the department, any other party, interested participant or their representatives discuss ex parte the merits of the proceeding with any board member or the hearing officer. This prohibition does not preclude a hearing officer from considering and acting upon any motion filed pursuant to this part.

[20.1.2.110 NMAC - Rp, 20 NMAC 1.2.I.110, 08/27/06]

20.1.2.111 GENERAL PROVISIONS - COMPUTATION AND EXTENSION OF TIME:

A. Computation of time: Time shall be calculated in accordance with the Uniform Statute and Rule Construction Act, NMSA 1978, Section 12-2 A-7. In computing any period of time prescribed or allowed by this part, except as otherwise specifically provided, the day of the event from which the 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 (3) days is added to the prescribed period. The three-day extension does not apply to any deadline under the act.

B. Extension of time: The board 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.
[20.1.2.111 NMAC - Rp, 20 NMAC 1.2.I.111, 08/27/06]

20.1.2.112 GENERAL PROVISIONS - 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.

B. Filing of documents: Except as otherwise provided, a party filing documents shall file the originals and eight (8) copies with the board administrator and shall serve copies thereof upon the hearing officer, the board legal counsel, and all other parties. If there is no hearing officer the party shall serve the document upon the board chair. All documents shall be filed at least fifteen (15) days before the hearing at which the board will consider the matter. A certificate of service, as shown in Appendix A, (20.1.2.600 NMAC) shall accompany each filed document.

C. Service of documents: Except as otherwise provided, all documents may be served personally, by express or first class mail, or, if the person agrees, by facsimile or by electronic transmission.

D. Form of documents: Unless otherwise provided by this part or by order of the hearing officer, all documents, except exhibits, shall be prepared on 8 1/2 x 11-inch white paper, printed double-sided, if possible, and where appropriate, the first page of every document shall contain a heading and caption as illustrated in Appendix A, (20.1.2.600 NMAC).

E. Documents issued by board or hearing officer: All original documents issued by the board or hearing officer shall be filed with the board administrator. The board administrator shall promptly serve copies of the documents upon all parties and interested participants.

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. Inspection shall be permitted in accordance with the Inspection of Public Records Act, NMSA 1978, Sections 14-2-1 through 14-2-12, and may be limited by the Environmental Improvement Act, NMSA 1978, Section 74-2-11. Documents subject to inspection shall be made available by the board administrator, 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 the copies.
[20.1.2.112 NMAC - Rp, 20 NMAC 1.2.I.112, 08/27/06]

20.1.2.113 MOTIONS:

A. General: All motions, except those made orally during a hearing, shall be in writing, specify the grounds for the motion and state the relief sought. Each motion shall be accompanied by an affidavit, certificate or other evidence relied upon and shall be served as provided by 20.1.2.112 NMAC.

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 all parties for the hearing officer’s review.

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.

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 of the motion.

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.

F. Decision: All motions shall be decided by the hearing officer without a hearing, unless otherwise ordered by the hearing officer sua sponte or upon written request of any party. The hearing officer shall refer any motion that would effectively dispose of the matter, and may refer any other motion to the board for a 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. The hearing officer shall file all original documents with the board administrator.

G. Recusal: No board member shall participate in any action in which his or her impartiality or fairness may reasonably be questioned, and the member shall recuse himself or herself in any such action by giving notice to the board and the general public by announcing this recusal on the record. In making a decision to recuse himself or herself, the board member may rely upon the Governmental Conduct Act, NMSA 1978, Sections 10-16A-1 through 10-16A-8, The Uniform Financial Disclosure Act or any other relevant legal authority.
[20.1.2.113 NMAC - Rp, 20 NMAC 1.2.I.113, 08/27/06]

20.1.2.114 - 20.1.2.199 [RESERVED]

20.1.2.200 PREHEARING PROCEDURES - INITIATION OF PETITION HEARING: A petition hearing shall be initiated by the filing of a variance petition or an appeal petition. The petitioner shall:

- A. sign the petition under oath or affirmation and attest to the truth of the information contained therein; and
- B. file the original and eight (8) copies of the petition with the board and serve a copy on the department.

[20.1.2.200 NMAC - Rp, 20 NMAC 1.2.II.200, 08/27/06]

20.1.2.201 VARIANCE PETITION:

- A. Contents: A variance petition shall comply with Subsection B of 20.2.1.114 NMAC.
- 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 board 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.

C. Hearing requirement: If the department recommends granting the variance request, or any part of the variance request, with or without conditions, the board shall hold a hearing on those requests recommended for approval. If the department recommends denial of all or part of the variance request, the board 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 board and shall not be subject to review.

D. 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.

[20.1.2.201 NMAC - Rp, 20 NMAC 1.2.II.201, 08/27/06]

20.1.2.202 APPEAL PETITION:

- A. Timing and contents: An appeal petition shall:
 - (1) be filed with the board 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 the act 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; and

- (4) attach a copy of the permitting action.
- B. Hearing delay: A petitioner may delay a hearing to negotiate with the department by waiving in the petition the right to a hearing within sixty (60) days. The waiver will stay all other deadlines under this part for sixty (60) days; the stay may be extended by a stipulated or unopposed motion. Any such stipulated or unopposed motion must be filed with the board, and served as required by this part, at least fifteen (15) days before the expiration of the sixty (60) day period.

C. Response of department: The department shall, within thirty (30) days after receipt of an appeal petition:

- (1) file with the board 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 board;

- (2) deliver to the board administrator a list of all persons who have expressed in writing an interest in the facility or the permitting action that is the subject of the petition or who participated in a public hearing on the permitting action; and

- (3) file an answer to the petition responding to each objection in the petition.

[20.1.2.202 NMAC - Rp, 20 NMAC 1.2.II.202, 08/27/06]

20.1.2.203 NOTICE OF DOCKETING:

A. Docketing notice: The board administrator shall, as soon as practicable after receipt of a petition, issue and serve upon the parties, each board member, and the board legal counsel a notice of docketing, containing the caption and docket number of the case, and the date upon which the petition was received by the board administrator. A copy of this part shall be included with a notice of docketing sent to a petitioner or applicant.

B. Untimeliness: The board administrator shall docket any petition, without regard to whether it appears to be timely; but the board or any party may move to dismiss an untimely petition.

[20.1.2.203 NMAC - Rp, 20 NMAC 1.2.II.203, 08/27/06]

20.1.2.204 SCHEDULING THE HEARING:

A. Hearing date: The hearing shall be scheduled to begin no later than sixty (60) days after the date an appeal petition was received, or for a variance petition, within the sixty (60) day period set forth in Subsection D of 20.1.2.201 NMAC, unless a stipulated or unopposed motion is filed requesting that the ninety day deadline be waived. The stipulated or unopposed motion must be filed with the board, and served as required by this part, at least fifteen (15) days prior to the expiration of the sixty (60) day deadline.

B. Scheduling order: Unless the sixty (60) day hearing deadline has been waived, the hearing officer shall, no later than forty-five (45) days prior to the hearing deadline, issue a scheduling 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, at least fifteen (15) days prior to the deadline for the issuance of the scheduling order, a request regarding the date and location of the hearing and other procedural matters, such as the assignment of a non-board member hearing officer. The hearing officer may consult with the board on procedural matters at a board meeting.

[20.1.2.204 NMAC - Rp, 20 NMAC 1.2.II.204, 08/27/06]

20.1.2.205 PUBLIC NOTICE OF HEARING:

A. Publication: The board administrator shall, upon direction from the board 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 statement of intent to present evidence, and:

(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 at least 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 filed an entry of appearance, and to each person who participated in the department's permitting proceeding or who has expressed, in writing to the department or the board, an interest in the facility or permitting action that is the subject of the petition; and

(3) immediately upon receipt of an entry of appearance that is received after the initial mailing, mail a copy to such interested participant and participant in the department's permitting proceeding.

B. Certification: After the notice of hearing has been distributed in accordance with this section, the board administrator shall file an affidavit certifying how and when notice was given with a copy of the notice of hearing and affidavits of publication attached.

[20.1.2.205 NMAC - Rp, 20 NMAC 1.2.II.205, 08/27/06]

20.1.2.206 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 fifteen (15) days prior to the hearing, file a statement of intent.

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.

[20.1.2.206 NMAC - Rp, 20 NMAC 1.2.II.206, 08/27/06]

20.1.2.207 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 fifteen (15) days prior to the hearing. For purposes of this subsection, a statement of intent to present evidence filed under 20.1.2.206 NMAC 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 and any individual who may appear on behalf of that person.

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.

[20.1.2.207 NMAC - Rp, 20 NMAC 1.2.II.207, 08/27/06]

20.1.2.208 DISCOVERY: For a ULA hearing, discovery shall be governed by the provisions of the ULA. For other board adjudicatory proceedings, formal discovery is not a right, and therefore, formal discovery is discouraged and shall only be allowed by order of the hearing officer under the following procedures:

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.

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.

[20.1.2.208 NMAC - Rp, 20 NMAC 1.2.II.208, 08/27/06]

20.1.2.209 - 20.1.2.299 [RESERVED]

20.1.2.300 HEARING PROCEDURES - HEARING:

A. Location of the hearing: Unless otherwise ordered by the board or hearing officer, the hearing shall be in Santa Fe.

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.

[20.1.2.300 NMAC - Rp, 20 NMAC 1.2.III.300, 08/27/06]

20.1.2.301 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.

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 or closing statements.

[20.1.2.301 NMAC - Rp, 20 NMAC 1.2.III.301, 08/27/06]

20.1.2.302 BURDEN OF PERSUASION: In a petition 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 a prima 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.

[20.1.2.302 NMAC - Rp, 20 NMAC 1.2.III.302, 08/27/06]

20.1.2.303 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. The department shall formally move into evidence the administrative record filed by the department pursuant to Subparagraph (a) of Paragraph (3) of Subsection C of 20.1.2.200 NMAC. In a ULA hearing involving the suspension or revocation of a license, rules of privilege shall be applicable to the same extent as in proceedings before the courts of this state.

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 board members, 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.

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 8 1/2 x 11 inches, or be capable of being folded to that size, unless otherwise necessary for adequate presentation of evidence. Any person offering an exhibit shall provide at least an original and twenty (20) copies for the board and for persons attending the hearing.

D. Official notice: Official notice may be taken of any matter that may be judicially noticed in the New Mexico courts. In a ULA hearing, parties shall be given adequate opportunity to show that such facts are erroneously noticed.

[20.1.2.303 NMAC - Rp, 20 NMAC 1.2.III.303, 08/27/06]

20.1.2.304 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 given for it shall be part of the record.

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 the evidence excluded and what such evidence would have proven. The offer of proof for excluded documents or exhibits shall consist of the insertion in the record of the documents or exhibits excluded.

[20.1.2.304 NMAC - Rp, 20 NMAC 1.2.III.304, 08/27/06]

20.1.2.305 - 20.1.2.399 [RESERVED]

20.1.2.400 POST-HEARING PROCEDURES - FILING THE TRANSCRIPT: Unless the board orders the hearing to be tape recorded, the hearing shall be transcribed verbatim. Any person, other than the board, desiring a copy of a transcript must order a copy from the court reporter. Any person, other than the board, desiring a copy of hearing tapes must arrange copying with the board administrator at their expense.

[20.1.2.400 NMAC - Rp, 20 NMAC 1.2.IV.400, 08/27/06]

20.1.2.401 PROPOSED FINDINGS AND CONCLUSIONS: The hearing officer may allow the record to remain open for a reasonable period of time after the conclusion of the hearing to allow any party or interested participant to submit proposed findings of fact and conclusions of law and closing argument. The hearing officer's determination shall be announced at the conclusion of the hearing. All such submissions shall be in writing, shall be served upon all parties, and shall contain adequate references to the record and authorities relied on. No new evidence shall be presented unless specifically allowed by the hearing officer.

[20.1.2.401 NMAC - Rp, 20 NMAC 1.2.IV.401, 08/27/06]

20.1.2.402 RECOMMENDED DECISION: If the board directs, the hearing officer shall issue a recommended decision within a period established by the board. The recommended decision shall contain the hearing officer's findings of fact; conclusions regarding all material issues of law or discretion, as well as reasons therefor; and a proposed final order. Upon receipt of a recommended decision, the board administrator shall forward a copy to all parties and to the board. At the board's discretion, the board may allow any party or interested participant to file comments regarding the recommended decision.

[20.1.2.402 NMAC - Rp, 20 NMAC 1.2.IV.402, 08/27/06]

20.1.2.403 DELIBERATION AND DECISION:

A. Deliberation: The board shall reach a final decision on each adjudicatory matter at a public meeting. If allowed by the Open Meetings Act, Sections 10-15-1 NMSA 1978 et seq., the board may deliberate in closed session; however, any final action must occur in an open meeting.

(1) If a quorum of the board attended the hearing and the hearing notice indicated that the board may act at the conclusion of the hearing, the board may immediately deliberate and act on the matter.

(2) If the board does not reach a decision at the hearing, the board administrator shall, following receipt of the transcript, promptly provide copies to board members who did not attend the hearing and, if requested, to other board members, board counsel and the hearing officer. The board administrator shall also notify all parties and interested participants of the availability of the transcript.

(3) In a ULA hearing, the board shall leave the record open to receive any advice and recommendation required by the act. The board shall reach its decision within the time period established by the ULA.

B. Order: After reaching a decision, the board shall direct a member, its counsel or a party to prepare a final order. The board may approve the order at a meeting or direct the board chair to sign the order.

(1) The final order shall contain findings of fact, conclusions of law, an order based on the findings and conclusions, and a statement as to the availability of judicial review. If a recommended decision was prepared, the board may adopt, modify or set aside the recommended decision and provide reasons therefor.

(2) In a ULA hearing, if the board takes any action specified in the ULA against the licensee, the final order shall specify that the licensee shall bear all costs of the proceeding.

(3) The board administrator shall promptly 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.

[20.1.2.403 NMAC - Rp, 20 NMAC 1.2.IV.403, 08/27/06]

20.1.2.404 JUDICIAL REVIEW: Judicial review of the final order shall be as provided by law. The filing of an appeal does not stay the final order, unless otherwise ordered by the board or a court.

[20.1.2.404 NMAC - Rp, 20 NMAC 1.2.IV.404, 08/27/06]

20.1.2.405 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. The appellant shall make satisfactory arrangements, including copying or transcript costs, with the board administrator.

[20.1.2.405 NMAC - Rp, 20 NMAC 1.2.IV.405, 08/27/06]

20.1.2.406 - 20.1.2.499 [RESERVED]

20.1.2.500 ALTERNATE RESOLUTION - SUMMARY PROCEDURES:

A. Use of summary procedures: The board may dispose of a petition after an expedited hearing if a party requests that the merits of the petition be decided solely on legal arguments presented in written briefs and oral arguments.

B. Expedited hearing: If the hearing officer determines that the request has a likelihood of success and could fairly expedite the resolution of the proceeding, the hearing officer may allow the parties and interested participants to brief the issue and present oral arguments at an expedited hearing, and then present the issue to the board for a decision. If an expedited hearing is conducted, the hearing officer shall:

(1) assure that public notice is given in accordance with 20.1.2.205 NMAC and 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 20.1.2.206 NMAC; 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 board.

C. Decision: After an expedited hearing, the board may decide to either dispose of the matter and issue a final order, or decide not to dispose of the matter and proceed with a full hearing under this part.

[20.1.2.500 NMAC - Rp, 20 NMAC 1.2.V.500, 08/27/06]

20.1.2.501 WITHDRAWAL:

A. Notice of withdrawal: A petitioner may withdraw a petition, or the department may withdraw the permitting action which is the subject of the proceeding, at any time prior to a decision by the board by filing a notice of withdrawal with the board 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 board shall rule on the notice.

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 board; and
- (3) when the department withdraws a permitting action, the appeal petition is vacated and the agency must issue a new permitting action within sixty (60) days, unless either the board 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 is available.

[20.1.2.501 NMAC - Rp, 20 NMAC 1.2.V.501, 08/27/06]

20.1.2.502 SETTLEMENT: The board encourages the settlement of a proceeding at any time if the settlement is consistent with the provisions and objectives of the act and regulations. The parties may request that the board stay a proceeding under this part while settlement negotiations are being held. The board 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 20.1.2.501 NMAC.

[20.1.2.502 NMAC - Rp, 20 NMAC 1.2.V.502, 08/27/06]

20.1.2.503 - 20.1.2.599 [RESERVED]

20.1.2.600

APPENDIX A

[PREFERRED FORMAT]

**STATE OF NEW MEXICO
ENVIRONMENTAL IMPROVEMENT BOARD**

[A. Petition Hearing]

**IN THE MATTER OF THE PETITION FOR
[A VARIANCE FROM _____]
[HEARING ON AIR QUALITY PERMIT NO. ____]**

**[Name of Petitioner],
Petitioner**

[B. ULA Hearing]

NEW MEXICO ENVIRONMENT DEPARTMENT

v.

[Name of Licensee or Applicant]

[20.1.1.600 NMAC - Rp, 20 NMAC 1.2.600, 08/27/06]

HISTORY OF 20.1.2 NMAC:

Pre-NMAC History: none.

History of Repealed Material:

20 NMAC 1.2, Adjudicatory Procedures - Environmental Improvement Board (filed 10/31/1996) repealed 08/27/06.

NMAC History:

20 NMAC 1.2, Adjudicatory Procedures - Environmental Improvement Board (filed 10/31/1996) was renumbered, reformatted, and replaced by 20.1.2 NMAC, Adjudicatory Procedures - Environmental Improvement Board, effective 08/27/06.