

2012 MAR 16 PM 3:44

This is an amendment to 20.1.1 NMAC, Sections 7, 200, 302, 303, 304, 307, 400, 402, 403, 405, 407, 500 and 501, effective April 16, 2012.

**20.1.1.7 DEFINITIONS:** As used in this part:

- A. "board administrator" means the department employee designated by the secretary of environment to provide staff support to the board;
- B. "board" means the environmental improvement board;
- C. "department" means the New Mexico environment department;
- D. "document" means any paper, exhibit, pleading, motion, response, memorandum, decision, order or other written or tangible item that is filed in a proceeding under this part, or brought to or before the board for its consideration, but does not include a cover letter accompanying a document transmitted for filing;
- E. "exhibit" means any document or tangible item submitted for inclusion in the hearing record;
- F. "general public" includes any person attending a hearing who has not submitted a notice of intent to present technical testimony;
- G. "governing law" means the statute, including any applicable case law, which authorizes and governs the decision on the proposed regulatory change;
- H. "hearing officer" means the person designated by the board to conduct a hearing under this part;
- I. "hearing record" means:
- (1) the transcript of proceedings; and
  - (2) the record proper;
- J. "participant" means any person who participates in a rulemaking proceeding before the board;
- K. "party" means the petitioner; any person filing a notice of intent to present technical testimony, and any person filing an entry of appearance;
- L. "person" means an individual or any entity, including federal, state and local governmental entities, however organized;
- M. "petitioner" means the person who petitioned the board for the regulatory change that is the subject of the hearing;
- N. "record proper" means all documents related to the hearing and received or generated by the board prior to the beginning, or after the conclusion, of the hearing, including, but not limited to:
- (1) the petition for hearing and any response thereto;
  - (2) the minutes (or an appropriate extract of the minutes) of the meeting at which the petition for hearing was considered, and of any subsequent meeting at which the proposed regulatory change was discussed;
  - (3) the notice of hearing;
  - (4) affidavits of publication;
  - (5) notices of intent to present technical testimony;
  - (6) statements for the public record;
  - (7) the hearing officer's report, if any;
  - (8) post-hearing submissions, if allowed;
  - (9) the audio [~~tapes~~] recordings (or an appropriate extract of the [~~tapes~~] recordings) of the meeting(s) at which the board deliberated on the adoption of the proposed regulatory change; and
  - (10) the board's decision and the reasons therefore;
- O. "regulation" means any rule, regulation or standard promulgated by the board and affecting one or more persons, besides the board and the department, except for any order or decision issued in connection with the disposition of any case involving a particular matter as applied to a specific set of facts;
- P. "regulatory change" means the adoption, amendment or repeal of a regulation;
- Q. "service" means personally delivering a copy of the document, exhibit or pleading to the person required by this part to be served; mailing it to that person; or, if that person has agreed, 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 electronic transmission is accomplished when the transmission of the document is completed and upon acknowledgement by designated recipient;
- R. "technical testimony" 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; and

S. "transcript of proceedings" means the verbatim record (audio ~~[tape]~~ recording or stenographic) of the proceedings, testimony and argument in the matter, together with all exhibits proffered at the hearing, whether or not admitted into evidence, including the record of any motion hearings or prehearing conferences.  
[20.1.1.7 NMAC - Rp, 20 NMAC 1.1.1.106, 08/27/06; A, 04/16/12]

**20.1.1.200 DOCUMENT REQUIREMENTS - FILING AND SERVICE OF DOCUMENTS:**

A. The filing of any document as required by this part shall be accomplished by delivering the document to the board administrator and the board legal counsel.

B. Any person filing any document shall:

(1) provide the board administrator with the original and nine (9) copies of the document;

(2) if the document is a notice of intent to present technical testimony filed by any person other than the petitioner, serve a copy thereof on the petitioner;

(3) any document filed pursuant to this part shall be filed with the board administrator at least ~~[fifteen (15)]~~ twenty (20) days before any meeting at which the board will consider the document. If the document is a motion seeking an order from the hearing officer in a rules hearing, the motion must also be served at the same time with the hearing officer and the board legal counsel.

C. Whenever this part requires service of a document, service shall be made by delivering a copy to the person to be served by mailing it, or, if that person has agreed, by sending it by facsimile or by electronic transmission to that person. Agreement to be served by facsimile or electronic transmission may be evidenced by placing the person's facsimile number or email address on a document filed pursuant to this part service shall also be made upon the board's legal counsel. 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 electronic transmission is accomplished when the transmission of the document is completed and acknowledged by designated recipient.

D. The petitioner and any person who has filed a timely notice of intent to present technical testimony under this part may inspect all documents that have been filed in a proceeding in which they are involved as participants. Such inspection shall be permitted in accordance with the Inspection of Public Records Act, NMSA 1978, Sections 14-2-1 through 14-2-12. The board administrator shall notify by email the petitioner and all persons who have filed a timely notice of intent to present technical testimony whenever any document is filed in a proceeding under this part. Any such person who does not provide an email address shall instead be notified by mail.

E. All documents filed under this part shall be made available for inspection upon request and shall, to the extent possible, be made available on the department's website.

F. The board administrator shall provide copies of all documents to each board member at least ~~[seven]~~ fifteen (15) days before the meeting at which the board will consider the documents. With regard to those documents filed in conjunction with any rules hearing, the hearing officer may make exception to this requirement.  
[20.1.1.200 NMAC - Rp, 20 NMAC 1.1.II.200, 08/27/06; A, 04/16/12]

**20.1.1.302 TECHNICAL TESTIMONY:**

A. Any person, including the petitioner, who intends to present technical testimony at the hearing shall, no later than ~~[fifteen (15)]~~ twenty (20) days prior to the hearing, file a notice of intent to present technical testimony. The notice shall:

(1) identify the person for whom the witness(es) will testify;

(2) identify each technical witness the person intends to present and state the qualifications of that witness, including a description of their educational and work background;

(3) if the hearing will be conducted at multiple locations, indicate the location or locations at which the witnesses will be present;

(4) ~~[summarize or]~~ include a copy of the direct testimony of each technical witness ~~[and state the anticipated duration of the testimony of that witness]~~ in narrative form;

(5) include the text of any recommended modifications to the proposed regulatory change; and

(6) list and ~~[describe, or]~~ attach~~[s]~~ all exhibits anticipated to be offered by that person at the hearing, including any proposed statement of reasons for adoption of rules.

B. The hearing officer may enforce the provisions of this section through such action as ~~[he]~~ the hearing officer deems appropriate, including, but not limited to, exclusion of the technical testimony of any witness for whom a notice of intent was not timely filed. If such testimony is admitted, the hearing officer may keep the record open after the hearing to allow responses to such testimony. The hearing officer may also require that written rebuttal testimony be submitted prior to hearing.

[20.1.1.302 NMAC - Rp, 20 NMAC 1.1.III.302, 08/27/06; A, 04/16/12]

**20.1.1.303 ENTRY OF APPEARANCE:** Any person who is or may be affected by the proposed regulatory change may file an entry of appearance as a party. The entry of appearance shall be filed no later than ~~fifteen (15)~~ twenty (20) days before the date of the hearing on the petition. In the event of multiple entries of appearance by those affiliated with one interest group, the hearing officer may consolidate the entries, or divide the service list to avoid waste of resources.

[20.1.1.303 NMAC - N, 08/27/06; A, 04/16/12]

**20.1.1.304 PARTICIPATION BY GENERAL PUBLIC:**

A. Any member of the general public may testify at the hearing. No prior notification is required to present non-technical testimony at the hearing. Any such member may also offer non-technical exhibits in connection with his testimony, so long as the exhibit is not unduly repetitious of the testimony.

B. 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 the hearing or submit it at the hearing. Written comment must be mailed or delivered to the board administrator; e-mail comments will not be accepted. However, comments may be submitted on the board webpage.

[20.1.1.304 NMAC - Rp, 20 NMAC 1.1.III.303, 08/27/06; A, 04/16/12]

**20.1.1.307 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 20.1.1.200 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.

[20.1.1.307 NMAC - N, 04/16/12]

**20.1.1.400 HEARING PROCEDURES - CONDUCT OF HEARINGS:**

A. The rules of civil procedure and the rules of evidence shall not apply.

B. The hearing officer shall conduct the hearing so as to provide a reasonable opportunity for all persons to be heard without making the hearing unreasonably lengthy or cumbersome, or burdening the record with unnecessary repetition. The hearing shall proceed as follows.

(1) The hearing shall begin with an opening statement from the hearing officer. The statement shall identify the nature and subject matter of the hearing and explain the procedures to be followed.

(2) The hearing officer may allow a brief opening statement by any ~~person~~ party who wishes to make one.

(3) Unless otherwise ordered, the petitioner shall present its case first.

(4) The hearing officer shall establish an order for the testimony of other participants. The order may be based upon notices of intent to present technical testimony, sign-in sheets and the availability of witnesses who cannot be present for the entire hearing.

(5) If the hearing continues for more than one day, the hearing officer shall provide an opportunity each day for testimony from members of the general public. Members of the general public who wish to present testimony should indicate their intent on a sign-in sheet.

(6) The hearing officer may allow a brief closing argument by any person who wishes to make one.

(7) At the close of the hearing, the hearing officer shall determine whether to keep the record open for written submittals in accordance with 20.1.1.404 NMAC. If the record is kept open, the hearing officer shall determine and announce the subject(s) on which submittals will be allowed and the deadline for filing the submittals.

C. If the hearing is conducted at multiple locations, the hearing officer may require the petitioner's witnesses to summarize their testimony or be available for cross-examination at each location. Other participants are not required to testify at more than one location, and the hearing officer may prohibit a witness from testifying at more than one location.

[20.1.1.400 NMAC - Rp, 20 NMAC 1.1.IV.400, 08/27/06; A, 04/16/12]

**20.1.1.402 EXHIBITS:**

A. Any person offering an exhibit at hearing shall provide at least an original and ~~twenty (20)~~ nine (9) copies for the board, and ~~for persons attending the hearing~~ a sufficient number of copies for every other party.

B. All exhibits offered at the hearing shall be marked with a designation identifying the person offering the exhibit and shall be numbered sequentially. If a person offers multiple exhibits, he shall identify each exhibit with an index tab or by other appropriate means.

C. Large charts and diagrams, models and other bulky exhibits are discouraged. If visual aids are used, legible copies shall be submitted for inclusion in the record.

[20.1.1.402 NMAC - Rp, 20 NMAC 1.1.IV.402, 08/27/06; A, 04/16/12]

**20.1.1.403 TRANSCRIPT OF PROCEEDINGS:** Unless specified by the board or hearing officer, a verbatim transcript shall be made of the hearing. The cost of the original transcript of the proceeding and of providing a copy for each board member shall be borne by the petitioner.

[20.1.1.403 NMAC - Rp, 20 NMAC 1.1.IV.403, 08/27/06; A, 04/16/12]

**20.1.1.405 HEARING OFFICER'S REPORT:** If the board directs, the hearing officer shall file a report of the hearing. The report shall identify the issues addressed at the hearing, ~~explain the testimony and make a recommendation for board action~~ identify the parties' final proposals and the evidence supporting those proposals, including discussion or recommendations as requested by the board, and shall be filed with the board administrator within the time specified by the board. The board administrator shall promptly notify each ~~participant~~ party that the hearing officer's report has been filed and shall provide a copy of the report ~~upon request,~~ along with a notice of any deadline set for comments on that report.

[20.1.1.405 NMAC - Rp, 20 NMAC 1.1.IV.405, 08/27/06; A, 04/16/12]

**20.1.1.407 NOTICE OF BOARD ACTION:** The board administrator shall provide notice of the board's action to each of the ~~participants~~ parties, and to all other persons who have made a written request to the board for notification of the action taken.

[20.1.1.407 NMAC - Rp, 20 NMAC 1.1.IV.407, 08/27/06; A, 04/16/12]

**20.1.1.500 APPEALS AND STAYS - APPEAL OF REGULATIONS:**

A. Appeal of any regulatory change by the board shall be taken in accordance with governing law.

B. The appellant shall serve a copy of the notice of appeal on the board and on each ~~participant~~ party.

C. The appellant shall be responsible for preparation of a sufficient number of copies of the hearing record at the expense of appellant.

D. Unless otherwise provided by governing law, the filing of an appeal shall not act as a stay of the regulatory change being appealed.

[20.1.1.500 NMAC - Rp, 20 NMAC 1.1.V.500, 08/27/06; A, 04/16/12]

**20.1.1.501 STAY OF BOARD REGULATIONS:**

A. Any person who is or may be affected by a rule adopted by the board may file a motion with the board seeking a stay of that rule or regulatory change. The motion shall include the reason for, and the legal

authority supporting, the granting of a stay. The movant shall file the motion at least [~~fifteen (15)~~] thirty (30) days before the meeting at which the board will consider the motion. The movant shall serve the motion for a stay as provided by this part, and shall further serve all [~~participants~~] parties in the rulemaking proceeding. The board chair will decide at which meeting the stay motion will be heard.

B. Unless otherwise provided by governing law, the board may grant a stay pending appeal of any regulatory change promulgated by the board. The board may only grant a stay if good cause is shown after a motion is filed and a hearing is held.

C. In determining whether good cause is present for the granting of a stay, the board, upon at least a two-thirds (2/3) vote of the members voting shall consider:

- (1) the likelihood that the movant will prevail on the merits of the appeal;
- (2) whether the moving party will suffer irreparable harm if a stay is not granted;
- (3) whether substantial harm will result to other interested persons; and
- (4) whether harm will ensue to the public interest.

D. If no action is taken within sixty (60) days after filing of the motion, the board shall be deemed to have denied the motion for stay.

[20.1.1.501 NMAC - Rp, 20 NMAC 1.1.V.501, 08/27/06; A, 04/16/12]