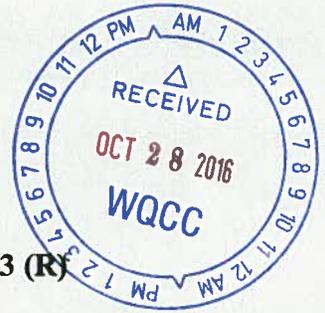


STATE OF NEW MEXICO
WATER QUALITY CONTROL COMMISSION

IN THE MATTER OF PROPOSED
RULEMAKING RULES FOR THE
COMMISSION, 20.1.6 NMAC

WQCC
No. 16-03 (R)



New Mexico Environment Department,

Petitioner.

ORDER AND STATEMENT OF REASONS

This matter comes before the New Mexico Water Quality Control Commission (Commission) upon a petition filed by the New Mexico Environment Department (NMED or Department), proposing rulemaking rules for the Commission. A public hearing was held in Santa Fe, New Mexico on October 11, 2016, with a quorum of the Commission present. The Commission heard technical testimony from the Department and from the New Mexico Mining Association and admitted exhibits into the record. The Commission deliberated on that date as well as on November 15, 2016, and voted to adopt the proposed rule (Rule) with changes as described below.

I. STATEMENT OF REASONS

1. On July 25, 2016 the Department filed a petition with the Commission proposing rulemaking rules for the Commission and requesting a public hearing in this matter. Exhibit 2 to the petition contained the proposed language of the Rule. See Petition, Exhibit 2.
2. At a meeting conducted in compliance with the Open Meetings Act and other applicable requirements, the Commission granted the Department's request for a hearing and scheduled the hearing for October 11, 2016. See Scheduling Order, WQCC 16-03(R).

3. Public notice of the hearing was published in the Albuquerque Journal on August 25, 2016 and in the New Mexico Register on August 31, 2016. The notice stated that the Commission may deliberate and reach a decision on the proposed rule at the conclusion of the hearing, or may convene at a later date to consider action on the proposal. See NMED Notice of Intent, Exhibit 5.
4. The Department filed a Notice of Intent to Present Technical Testimony (NOI) on September 21, 2016, in accordance with the Guidelines for Water Quality Control Commission Regulation Hearings (Guidelines).
5. An NOI was also filed by the New Mexico Mining Association (NMMA) on September 21, 2016.
6. A hearing in this matter was held in Santa Fe, New Mexico on October 11, 2016, at which a reasonable opportunity for all persons to be heard was provided. The hearing was transcribed by Kathy Townsend Court Reporters, and a transcript was entered into the record. See Transcript of Proceedings, Volume 1.
7. Mr. Jeffrey Holappa, the Department's Hearing Officer, provided written and oral testimony at the hearing in support of the Rule. See NMED NOI, Exhibit 2, and Tr. pp. 15-44 and 100-115.
8. Mr. Michael Bowen and Mr. Anthony J. Trujillo provided testimony during the hearing in support of the changes to the Rule proposed by the NMMA. See Tr. pp. 44-94.
9. The changes proposed by NMMA are contained in Exhibit A of its NOI in ten numbered paragraphs. See NMMA NOI, Exhibit A.
10. In paragraph one of its NOI, NMMA proposed to add language to section 20.1.6.7(P) to identify written pleadings as part of the record proper. See NMMA NOI, Exhibit A, paragraph 1.

11. The Commission finds that Section 7(P) of the Rule identifies “all documents . . . received . . . by the commission” as being part of the record proper, and that the change proposed in paragraph one of NMMA’s NOI is therefore not necessary. See Petition, Exhibit 2, p. 2, ln. 10-11.
12. Paragraph two of NMMA’s NOI proposed additions to the language of section 20.1.6.100(C)(2) specifying that a hearing officer may recuse themselves, clarifying that a hearing officer may obtain advice from the Commission’s counsel, and specifying that other parties may file a motion for disqualification of a hearing officer. See NMMA NOI, Exhibit A, paragraph 2.
13. The Commission finds that the changes proposed in paragraph two of NMMA’s NOI are not necessary, given the inherent right of a person appointed by the Commission as a hearing officer to recuse themselves, that the Rule already allows the filing of motions including a motion for disqualification, and the possibility that consultation between the Commission’s counsel and a hearing officer regarding disqualification could present a conflict of interest for the Commission’s counsel. See Petition, Exhibit 2, p. 6, ln. 22-40, and Tr. p. 101, ln. 22-25, p. 102, ln. 1-25, p. 103, ln. 1-8.
14. Paragraph three of NMMA’s NOI proposed changes specifying that the time period when ex parte communications are prohibited is from “the commission’s determination to hold a public hearing on a petition and before the issuance of the commission’s written decision.” See NMMA NOI, Exhibit A, paragraph 3.
15. The Commission finds that the changes proposed in paragraph three of NMMA’s NOI are unnecessary, and that the language in the Rule as proposed by the Department is sufficiently clear. See Petition, Exhibit 2, p. 3, ln. 52-55.

16. Paragraph four of NMMA's NOI proposed changes to Section 104 of the Rule to allow the commission administrator to waive the requirement to provide 15 copies of each filed document under certain circumstances. See NMMA NOI, Exhibit A, paragraph 4.
17. The Commission finds that the changes proposed in paragraph four of NMMA's NOI are unnecessary, and could lead to confusion and additional workload for the commission administrator. See Tr. p. 105, ln. 2-25, p. 106, ln. 1-3.
18. Paragraphs five through eight of NMMA's NOI proposed changes to Sections 200 and 202 of the Rule which would allow the Commission to designate a rulemaking as either "simple" or "complex" and include additional procedures to be followed for a "complex" rulemaking. See NMMA NOI, Exhibit A, paragraphs 5-8.
19. The Commission finds that the changes proposed in paragraphs five through eight of NMMA's NOI are unnecessary because it is important for the Commission to maintain a degree of flexibility in its procedures, and the matters addressed by these proposed changes are best handled on a case-by-case basis, such as through the entry of a procedural order. See Tr. p. 106, ln. 9-25.
20. Paragraph nine of NMMA's NOI proposed changes to Section 302 of the Rule, specifying that the requirements of Subsection 302(A) would only apply to exhibits not filed and served to the Commission and other parties before the hearing. See NMMA NOI, paragraph 9.
21. The Commission finds that the changes proposed in paragraph nine of NMMA's NOI provide additional clarity, and should be added to the language of the Rule. See Tr. p. 108, ln. 1-9 and p. 63, ln. 6-12.

22. Paragraph 10 of NMMA's NOI proposed to include "revised proposed rule language" in Section 304 of the Rule to the list of post-hearing submittals for which the hearing officer may allow the record to remain open. See NMMA NOI, paragraph 10.
23. The Commission finds that the changes proposed in paragraph 10 of NMMA's NOI provide additional clarity, and should be added to the language of the Rule. See Tr. p. 108, ln. 15-25, p. 109, ln. 1-16.
24. During the hearing, the Commission heard public comment submitted by the San Juan Water Commission (San Juan) and by Los Alamos National Security (LANS), proposing the addition of certain language to the proposed rule. See Tr. p. 95-98.
25. San Juan Water Commission proposed the addition of the phrase "or opposing" to Section 305 of the Rule, describing the contents of a hearing officer's report. See Letter of October 5, 2016 from San Juan Water Commission to NM WQCC, received October 11, 2016.
26. The Commission finds that the language proposed by San Juan Water Commission is unnecessary because evidence put forth in favor of one party's position will necessarily be either in agreement or in opposition to other parties' positions. See Tr. p. 114, ln. 14-25, p. 115, ln. 1-6.
27. LANS proposed changes to Section 307 of the Rule, specifying that a hearing officer shall rule on motions "expeditiously" and narrowing the timeframe for responses and replies to motions. See LANS Comments for the Public Record, filed October 7, 2016.
28. The Commission finds that the changes proposed by LANS are unnecessary, because it is commonly understood that hearing officers shall rule on motions expeditiously, and the time frames for motion practice in the Rule should be consistent with time frames in the

Commission's adjudicatory rules, as well as other adjudicatory settings, such as the district courts. See Tr. p. 113, ln. 4-22.

29. The Commission has the authority to adopt the proposed rule pursuant to the Water Quality Act (WQA) NMSA 1978, §§ 74-6-4 through 74-6-6.
30. In considering the proposed rule, the Commission is required by Section 74-6-4(E) of the WQA to give weight it deems appropriate to all facts and circumstances, including but not limited to (1) character and degree of injury to or interference with health, welfare, environment, and property; (2) the public interest, including the social, and economic value of the sources of water contaminants; (3) technical practicability and economic reasonableness of reducing or eliminating water contaminants from the sources involved and previous experience with equipment and methods available to control the water contaminants involved; (4) successive uses, including but not limited to domestic, commercial, industrial, pastoral, agricultural, wildlife and recreational uses; (5) feasibility of a user or a subsequent user treating the water before a subsequent use; (6) property rights and accustomed uses; and (7) federal water quality requirements.
31. The Commission has previously conducted rulemakings utilizing the Guidelines since their adoption on November 10, 1992.
32. The Guidelines are more than 20 years old, and make no provision for modern methods of communication or document service, such as email or teleconferencing.
33. The Guidelines do not have the force of law that the Rule will have as part of the New Mexico Administrative Code.
34. The Guidelines do not address certain procedural issues that have arisen in recent rulemakings, particularly in relation to motion practice and the filing and service of documents.

35. The Rule improves upon the Guidelines by adding language from the Commission's adjudicatory rules, as well as the rulemaking procedures for the Environmental Improvement Board.
36. The Commission finds that the Rule is consistent with the public notice and hearing location requirements of the WQA.
37. The Commission finds that the Rule will reduce confusion and uncertainty on the part of petitioners and other parties to rulemakings before the Commission by providing more specific guidance regarding the format, filing, and service of documents, as well as the timeframes for responses and replies during motion practice.
38. The Commission finds that the Rule should be adopted with the following changes:
 - a. The addition of the word "the" after the word "including" in Section 200(B) on line 37, page 4 of NMED Exhibit 2 of the Petition, such that the sentence reads "A copy of the entire rule, including the proposed regulatory change"
 - b. The word "proscribe" should be changed to "prescribe" in Section 205 on line 55, page 5 of NMED Exhibit 2 of the Petition, such that the sentence reads ". . . at other places the commission may prescribe."
 - c. The addition of the phrase "other than a document filed and served before the hearing" to Section 302(A) of the Rule after the word "hearing" on page 7, line 33 of NMED Exhibit 2 of the Petition, such that the sentence reads "Any person offering an exhibit at hearing, other than a document filed and served before the hearing"
 - d. The addition of the phrase "revised proposed rule language" to Section 304 of the Rule after the word "arguments" on page 7, line 52 of NMED Exhibit 2 of the Petition, such that the sentence reads ". . . for written submission of additional

evidence, comments and arguments, revised proposed rule language, and proposed statements of reasons.”

39. The Commission finds that the public interest will be served by the adoption of the Rule, with the changes described herein.
40. The Commission finds that the factors specified by NMSA 1978, Section 74-6-4(E) all weigh in favor of adopting the Rule with the changes described herein.
41. The Commission finds that the notice and hearing requirements of NMSA 1978, Section 74-6-6 and the Guidelines were satisfied in this rulemaking process.
42. The Rule as proposed by the Department in its Petition, and as modified herein, is adopted for any or all of the reasons stated above.

II. ORDER

By majority vote of a quorum of the Commission members, the proposed rule, as contained in the Department’s petition and as modified herein, was adopted by the Commission on November 15, 2016.

LARRY DOMINGUEZ, Chair
Water Quality Control Commission

Dated: _____

1 **TITLE 20 ENVIRONMENTAL PROTECTION**
2 **CHAPTER 1 ENVIRONMENTAL PROTECTION GENERAL**
3 **PART 6 RULEMAKING PROCEDURES – WATER QUALITY CONTROL COMMISSION**
4

5 **20.1.6.1 ISSUING AGENCY:** New Mexico Water Quality Control Commission.
6 [xx/xx/16]
7

8 **20.1.6.2 SCOPE:** This part governs the procedures to be followed by the commission, and by participants
9 before the commission, in connection with all rulemaking hearings before the commission, except to the extent this
10 part may be inconsistent with specific procedures in governing law. In cases where this part is inconsistent with any
11 rulemaking procedures specified in governing law, the procedures in governing law apply, rather than the
12 procedures in this part.
13 [xx/xx/16]
14

15 **20.1.6.3 STATUTORY AUTHORITY:** NMSA 1978, Section 74-6-4(E) directs the commission to adopt,
16 promulgate and publish regulations. Section 74-6-6 NMSA 1978 requires a public hearing prior to the adoption,
17 amendment or repeal of a regulation, and specifies requirements for such a hearing.
18 [xx/xx/16]
19

20 **20.1.6.4 DURATION:** Permanent.
21 [xx/xx/16]
22

23 **20.1.6.5 EFFECTIVE DATE:** xx/xx/16, unless a later date is cited at the end of a section.
24 [xx/xx/16]
25

26 **20.1.6.6 OBJECTIVE:** The purposes of this part are:
27 A. to standardize the procedures used in rulemaking proceedings before the commission;
28 B. to encourage participation in the hearings conducted by the commission for the promulgation of
29 regulations;
30 C. to make possible the effective presentation of the evidence and points of view of parties and
31 members of the general public;
32 D. to allow all interested persons a reasonable opportunity to submit data, views or arguments orally
33 or in writing; and
34 E. to assure that commission hearings are conducted in a fair and equitable manner.
35 [xx/xx/16]
36

37 **20.1.6.7 DEFINITIONS:** As used in this part:
38 A. "act" means the Water Quality Act, NMSA 1978, Sections 74-6-1 through 74-6-17.
39 B. "commission administrator" means the department employee designated by the secretary of
40 environment to provide staff support to the commission;
41 C. "commission" means the water quality control commission;
42 D. "constituent agency" means any or all agencies of the state defined as such under the
43 act;
44 E. "department" means the New Mexico environment department;
45 F. "document" means any paper, exhibit, pleading, motion, response, memorandum, decision, order
46 or other written or tangible item that is filed in a proceeding under this part, or brought to or before the commission
47 for its consideration, but does not include a cover letter accompanying a document transmitted for filing;
48 G. "exhibit" means any document or tangible item submitted for inclusion in the hearing record;
49 H. "general public" includes any person attending a hearing who has not submitted a notice of intent
50 to present technical testimony;
51 I. "governing law" means the statute, including any applicable case law, which authorizes and
52 governs the decision on the proposed regulatory change;
53 J. "hearing officer" means the person designated by the commission to conduct a hearing under this
54 part;
55
56

- 1 K. "hearing record" means:
2 (1) the transcript of proceedings; and
3 (2) the record proper;
4 L. "participant" means any person who participates in a rulemaking proceeding before the
5 commission;
6 M. "party" means the petitioner; any person filing a notice of intent to present technical testimony,
7 and any person filing an entry of appearance;
8 N. "person" means an individual or any entity, including federal, state and local governmental
9 entities, however organized;
10 O. "petitioner" means the person who petitioned the commission for the regulatory change that is the
11 subject of the hearing;
12 P. "record proper" means all documents related to the hearing and received or generated by the
13 commission prior to the beginning, or after the conclusion, of the hearing, including, but not limited to:
14 (1) the petition for hearing and any response thereto;
15 (2) the minutes (or an appropriate extract of the minutes) of the meeting at which the petition
16 for hearing was considered, and of any subsequent meeting at which the proposed regulatory change was
17 discussed;
18 (3) the notice of hearing;
19 (4) affidavits of publication;
20 (5) notices of intent to present technical testimony;
21 (6) statements for the public record;
22 (7) the hearing officer's report, if any;
23 (8) post-hearing submissions, if allowed;
24 (9) the audio recordings (or an appropriate extract of the recordings) of the meeting(s) at
25 which the commission deliberated on the adoption of the proposed regulatory change; and
26 (10) the commission's decision and the reasons therefore;
27 Q. "regulation" means any rule, regulation or standard promulgated by the commission and affecting
28 one or more persons, besides the commission and the department, except for any order or decision issued in
29 connection with the disposition of any case involving a particular matter as applied to a specific set of facts;
30 R. "regulatory change" means the adoption, amendment or repeal of a regulation;
31 S. "service" means personally delivering a copy of the document, exhibit or pleading to the person
32 required by this part to be served; mailing it to that person; or, if that person has agreed, sending it by electronic
33 transmission; if a person is represented by an attorney, service of the document shall be made on the attorney;
34 service by mail is complete upon mailing the document; service by electronic transmission is complete upon
35 transmission of the document;
36 T. "technical testimony" means scientific, engineering, economic or other specialized testimony, but
37 does not include legal argument, general comments, or statements of policy or position concerning matters at issue
38 in the hearing; and
39 U. "transcript of proceedings" means the verbatim record (audio recording or stenographic) of the
40 proceedings, testimony and argument in the matter, together with all exhibits proffered at the hearing, whether or not
41 admitted into evidence, including the record of any motion hearings or prehearing conferences.

42 [xx/xx/16]

43
44 **20.1.6.8 LIBERAL CONSTRUCTION:** This part shall be liberally construed to carry out its purpose.

45 [xx/xx/16]

46
47 **20.1.6.9 SEVERABILITY:** If any provision or application of this part is held invalid, the remainder of
48 this part, or its application to other situations or persons, shall not be affected.

49 [xx/xx/16]

50
51 **20.1.6.10 – 20.1.6.99 [RESERVED]**

52
53 **20.1.6.100 POWERS AND DUTIES OF THE COMMISSION AND HEARING OFFICER:**

54 A. Commission: The commission shall exercise all powers and duties prescribed under the act and
55 this part and not otherwise delegated to the hearing officer or the commission administrator.

1 (1) The commission may issue procedural orders that either impose additional procedural
2 requirements or simplify the procedures provided in this part. In no event may the commission eliminate any
3 procedural requirements of the act.

4 (2) The appointment of a hearing officer does not preclude the commissioners from attending
5 or participating in the proceeding.

6 B. Hearing officer: The commission shall designate a hearing officer for each hearing who shall
7 exercise all powers and duties prescribed or delegated under this part. The hearing officer shall conduct a fair and
8 impartial proceeding, assure that the facts are fully elicited and avoid delay. The hearing officer shall have authority
9 to take all measures necessary for the maintenance of order and for the efficient, fair and impartial consideration of
10 issues arising in proceedings governed by this part, including, but not limited to:

11 (1) conducting hearings under this part;

12 (2) ruling on motions and procedural requests that do not seek final resolution of the
13 proceeding and issuing all necessary orders;

14 (3) administering oaths and affirmations, admitting or excluding evidence, examining
15 witnesses and allowing post-hearing submissions;

16 (4) making such orders as may be necessary to preserve decorum and to protect the orderly
17 hearing process;

18 (5) if requested by the commission, preparing and filing a report of the hearing, with
19 recommendations for commission action;

20 (6) requesting parties to file original documents with the commission administrator; and

21 (7) requesting a party to submit a proposed statement of reasons in support of the
22 commission's decision.

23 C. Qualifications: The hearing officer may be an independent contractor or a commissioner, shall be
24 knowledgeable of the laws of the state and of administrative hearing procedures, and shall not be:

25 (1) an employee of the department, except for the commissioners themselves or their
26 designees, or unless employed by the department as a hearing officer;

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

30 D. Notice of hearing officer assignment: If a hearing officer other than a commissioner is assigned,
31 the commission administrator shall notify the parties of the name and address of the hearing officer. The
32 commission administrator shall also, at that time, forward to the hearing officer copies of all documents filed to date.
33 [xx/xx/16]

34
35 **20.1.6.101 GENERAL PROVISIONS - COMPUTATION OF TIME:**

36 A. Computation of time: In computing any period of time prescribed or allowed by this part, except
37 as otherwise specifically provided, the day of the event from which the designated period begins to run shall not be
38 included. The last day of the computed period shall be included, unless it is a Saturday, Sunday, or legal state
39 holiday, in which event the time is extended until the end of the next day, which is not a Saturday, Sunday or legal
40 state holiday. Whenever a party must act within a prescribed period after service upon them, and service is by mail,
41 three days is added to the prescribed period.

42 B. Extension of time: The commission or hearing officer may grant an extension of time for the
43 filing of any document upon timely motion of a party to the proceeding, for good cause shown, and after
44 consideration of prejudice to other parties.

45 [xx/xx/16]

46
47 **20.1.6.102 GENERAL PROVISIONS - RECUSAL:** No commission member shall participate in any
48 action in which his or her impartiality of fairness may reasonably be questioned, and the member shall recuse
49 himself or herself in any such action by giving notice to the commission and the general public by announcing this
50 recusal on the record. In making a decision to recuse himself or herself, the commission member may rely upon the
51 Governmental Conduct Act, NMSA 1978, Sections 10-16-1 through 10-16-18, the Financial Disclosures Act,
52 NMSA 1978, Sections 10-16A-1 through 10-16A-8, or any other relevant authority.

53 [xx/xx/16]

54
55 **20.1.6.103 GENERAL PROVISIONS - EX PARTE DISCUSSIONS:** At no time after the initiation and
56 before the conclusion of a proceeding under this part, shall the department, or any other party, interested participant

1 or their representatives discuss ex parte the merits of the proceeding with any commission member or the hearing
2 officer.
3

4 **20.1.6.104 DOCUMENT REQUIREMENTS - FILING AND SERVICE OF DOCUMENTS:**

5 A. The filing of any document as required by this part shall be accomplished by delivering the
6 document to the commission administrator.

7 B. Any person filing any document shall:

8 (1) provide the commission administrator with the original and 15 copies of the document;

9 (2) serve a copy of the document on each other party. If a party is represented by an attorney,
10 service of the document shall be made on the attorney.

11 (3) include a certificate of service, as shown in appendix A.

12 C. Whenever this part requires service of a document, service shall be made by delivering a copy to
13 the person to be served by mailing it, or, if that person has agreed, by sending it by electronic transmission to that
14 person. Agreement to be served by electronic transmission may be evidenced by placing the person's email address
15 on a document filed pursuant to this part. Service by mail is complete upon mailing the document. Service by
16 electronic transmission is complete upon transmission of the document.

17 D. Form of documents: Unless otherwise ordered by the hearing officer, all documents, except
18 exhibits, shall be prepared on 8 1/2 x 11-inch white paper, printed single-sided, and where appropriate, the first page
19 of every document shall contain a heading and caption as shown in appendix A.

20 E. Documents issued by commission or hearing officer: All documents issued by the commission or
21 hearing officer shall be filed with the commission administrator, who shall promptly serve copies of the documents
22 upon all parties.
23

24 **20.1.6.105 EXAMINATION OF DOCUMENTS FILED:**

25 A. Examination allowed: Subject to the provisions of law restricting the public disclosure of
26 confidential information, any person may, during normal business hours, inspect and copy any document filed in any
27 rulemaking proceeding before the commission. Such documents shall be made available by the commission
28 administrator, as appropriate.

29 B. Cost of duplication: The cost of duplicating documents shall be borne by the person seeking
30 copies of such documents.

31 [xx/xx/16]
32

33 **20.1.6.106 - 20.1.1.199 [RESERVED]**
34

35 **20.1.6.200 PREHEARING PROCEDURES - PETITION FOR REGULATORY CHANGE:**

36 A. Any person may file a petition with the commission to adopt, amend or repeal any regulation
37 within the jurisdiction of the commission.

38 B. The petition shall be in writing and shall include a statement of the reasons for the regulatory
39 change. The petition shall cite the relevant statutes that authorize the commission to adopt the proposed rules and
40 shall estimate the time that will be needed to conduct the hearing. A copy of the entire rule, including the proposed
41 regulatory change, indicating any language proposed to be added or deleted, shall be attached to the petition. The
42 entire rule and its proposed changes shall be submitted to the commission in redline fashion, and shall include line
43 numbers. Any document that does not include all the items required to be in a petition shall be returned to the
44 petitioner along with a copy of these rules and a check-off list of required items, and the petitioner will be asked to
45 resubmit their petition in the form required by these rules.

46 C. The commission shall determine, at a public meeting occurring at least 15 days and no later than
47 60 days after receipt of the petition, whether or not to hold a public hearing on the proposal. Any person may
48 respond to the petition either in writing prior to the public meeting or in person at the public meeting.

49 D. If the commission determines to hold a public hearing on the petition, it may issue such orders
50 specifying procedures for conduct of the hearing, in addition to those provided by this part, as may be necessary and
51 appropriate to fully inform the commission of the matters at issue in the hearing or control the conduct of the
52 hearing. Such orders may include requirements for giving additional public notice, holding pre-hearing conferences,
53 filing direct testimony in writing prior to the hearing, or limiting testimony or cross-examination.

54 [xx/xx/16]
55
56

1 **20.1.6.201 NOTICE OF HEARINGS:**

2 A. Unless otherwise allowed by governing law and specified by the commission, the commission
3 shall give public notice of the hearing at least 60 days prior to the hearing. Public notice shall include publication in
4 at least one newspaper of general circulation in the state, publication in the New Mexico Register, and such other
5 means of providing notice as the commission may direct or are required by law.

6 B. The commission shall make reasonable efforts to give notice to persons who have made a written
7 request to the commission for advance notice of regulatory change hearings. Requests for such notice shall be
8 addressed to the commission administrator, and shall designate those areas of commission activity which are of
9 interest.

10 C. Public notice of the hearing shall state:

11 (1) the subject, including a description of the proposed regulatory change, time and place of
12 the hearing;

13 (2) the statutes, regulations and procedural rules governing the conduct of the hearing;

14 (3) the manner in which persons may present their views or evidence to the commission;

15 (4) the location where persons may secure copies of the proposed regulatory change; and

16 (5) if applicable, that the commission may make a decision on the proposed regulatory

17 change at the conclusion of the hearing.

18 [xx/xx/16]

19
20 **20.1.6.202 TECHNICAL TESTIMONY:**

21 A. Any person, including the petitioner, who intends to present technical testimony at the hearing
22 shall, no later than 20 days prior to the hearing, file a notice of intent to present technical testimony. The notice
23 shall:

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

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

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

29 (4) include a copy of the direct testimony of each technical witness in narrative form, and
30 state the estimated duration of the direct oral testimony of that witness;

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

33 (6) list and attach all exhibits anticipated to be offered by that person at the hearing.

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

39 [xx/xx/16]

40
41 **20.1.6.203 ENTRY OF APPEARANCE:** Any person may file an entry of appearance as a party. The entry
42 of appearance shall be filed no later than 20 days before the date of the hearing on the petition. In the event of
43 multiple entries of appearance by those affiliated with one interest group, the hearing officer may consolidate the
44 entries, or divide the service list to avoid waste of resources.

45 [xx/xx/16]

46
47 **20.1.6.204 PARTICIPATION BY GENERAL PUBLIC:**

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

51 B. A member of the general public who wishes to submit a written statement for the record, in lieu of
52 providing oral testimony at the hearing, shall file the written statement prior to the hearing or submit it at the
53 hearing. Written comment must be mailed or delivered to the commission administrator.

54 [xx/xx/16]

55

1 **20.1.6.205 LOCATION OF HEARING:** Unless otherwise provided by governing law, the commission
2 shall hold hearings on proposed regulatory changes of statewide application in Santa Fe, and at other places the
3 commission may prescribe. Hearings on proposed regulatory changes that are not of statewide application may be
4 held within the area substantially affected by the proposal.

5 [xx/xx/16]
6

7 **20.1.6.206 PARTICIPATION BY CONFERENCE TELEPHONE OR OTHER SIMILAR DEVICE:**

8 A. A member of the commission may participate in a meeting or hearing of the commission by means
9 of a conference telephone or other similar communications equipment when it is otherwise difficult or impossible
10 for the member to attend the meeting or hearing in person, provided that each member participating by conference
11 telephone can be identified when speaking, all participants are able to hear each other at the same time and members
12 of the public attending the meeting or hearing are able to hear any member of the commission who speaks at the
13 meeting or hearing. A commission member's participation by such means shall constitute presence in person at the
14 meeting or hearing. A commission member who needs to participate in this manner must notify the commission
15 administrator sufficiently in advance so as to permit the commission administrator to arrange for the appropriate
16 communications equipment.

17 B. A witness may participate in a hearing of the commission by means of a conference telephone or
18 other similar communications equipment when an emergency or circumstances make it impossible for the witness to
19 attend the hearing in person. A witness who needs to participate in this manner must receive permission from the
20 hearing officer sufficiently in advance of the hearing so as to permit the commission administrator to arrange for the
21 appropriate communications equipment. Each witness participating in this manner must be identified when
22 speaking, all participants must be able to hear each other at the same time and members of the public attending the
23 hearing must be able to hear any witness who speaks during the hearing.

24 [xx/xx/16]
25

26 **20.1.6.207 MOTIONS:**

27 A. General: All motions, except those made orally during a hearing, shall be in writing, specify the
28 grounds for the motion and state the relief sought. Each motion shall be accompanied by an affidavit, certificate or
29 other evidence relied upon and shall be served as provided by 20.1.6.104 NMAC.

30 B. Unopposed motions: An unopposed motion shall state that the concurrence of all other parties
31 was obtained. The moving party shall submit a proposed order approved by all parties for the hearing officer's
32 review.

33 C. Opposed motions: Any opposed motion shall state either that concurrence was sought and denied,
34 or why concurrence was not sought. A memorandum brief in support of such motion may be filed with the motion.

35 D. Response to motions: Any party upon whom an opposed motion is served shall have 15 days after
36 service of the motion to file a response. A non-moving party failing to file a timely response shall be deemed to
37 have waived any objection to the granting of the motion.

38 E. Reply to response: The moving party may, but is not required to, submit a reply to any response
39 within 10 days after service of the response.

40 F. Decision: Non-dispositive motions may be decided by the hearing officer without a hearing. The
41 hearing officer shall refer any motion that would effectively dispose of the matter to the commission for a decision,
42 and may refer any other motion to the commission. A procedural motion may be ruled upon prior to the expiration
43 of the time for response; any response received thereafter shall be treated as a request for reconsideration of the
44 ruling. The hearing officer shall file all original documents with the commission administrator.

45 [xx/xx/16]
46

47 **20.1.6.208 - 20.1.6.299 [RESERVED]**
48

49 **20.1.6.300 HEARING PROCEDURES - CONDUCT OF HEARINGS:**

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

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

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

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

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

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

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

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

12 (7) At the close of the hearing, the hearing officer shall determine whether to keep the record
13 open for written submittals in accordance with 20.1.6.304 NMAC. If the record is kept open, the hearing officer
14 shall determine and announce the subject(s) on which submittals will be allowed and the deadline for filing the
15 submittals.

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

20 [xx/xx/16]

21
22 **20.1.6.301 TESTIMONY AND CROSS-EXAMINATION:**

23 A. All testimony will be taken under oath or affirmation which may be accomplished in mass or
24 individually.

25 B. The hearing officer shall admit any relevant evidence, unless the hearing officer determines that
26 the evidence is incompetent or unduly repetitious. The hearing officer shall require all oral testimony be limited to
27 the position of the witness in favor of or against the proposed rule.

28 C. Any person who testifies at the hearing is subject to cross-examination on the subject matter of his
29 or her direct testimony and matters affecting his or her credibility. Any person attending the hearing is entitled to
30 conduct such cross-examination as may be required for a full and true disclosure of matters at issue in the hearing.
31 The hearing officer may limit cross-examination to avoid harassment, intimidation, needless expenditure of time or
32 undue repetition.

33 [xx/xx/16]

34
35 **20.1.6.302 EXHIBITS:**

36 A. Any person offering an exhibit at hearing, other than a document filed and served before the
37 hearing, shall provide at least an original and 15 copies for the commission, and a sufficient number of copies for
38 every other party.

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

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

44 [xx/xx/16]

45
46 **20.1.6.303 TRANSCRIPT OF PROCEEDINGS:**

47 A. A verbatim transcript shall be made of the hearing, including any deliberations. The cost of the
48 original transcript of the proceeding and of providing a copy for each commission member shall be borne by the
49 petitioner.

50 B. Any person may obtain a copy of the transcript of a proceeding. It shall be obtained directly from
51 the court reporter, and the cost of the transcript shall be paid directly to the source.

52 [xx/xx/16]

53
54 **20.1.6.304 POST-HEARING SUBMISSIONS:** The hearing officer may allow the record to remain open
55 for a reasonable period of time following the conclusion of the hearing for written submission of additional
56 evidence, comments and arguments, revised proposed rule language, and proposed statements of reasons. The

1 hearing officer's determination regarding post-hearing submissions shall be announced at the conclusion of the
2 hearing. In considering whether the record will remain open, the hearing officer shall consider the reasons why the
3 material was not presented during the hearing, the significance of the material to be submitted and the necessity for a
4 prompt decision.

5 [xx/xx/16]
6

7 **20.1.6.305 HEARING OFFICER'S REPORT:** If the commission directs, the hearing officer shall file a
8 report of the hearing. The report shall identify the issues addressed at the hearing, identify the parties' final
9 proposals and the evidence supporting those proposals, including discussion or recommendations as requested by the
10 commission, and shall be filed with the commission administrator within the time specified by the commission. The
11 commission administrator shall promptly notify each party that the hearing officer's report has been filed and shall
12 provide a copy of the report along with a notice of any deadline set for comments on that report.

13 [xx/xx/16]
14

15 **20.1.6.306 DELIBERATION AND DECISION:**

16 A. If a quorum of the commission attended the hearing, and if the hearing notice indicated that a
17 decision might be made at the conclusion of the hearing, the commission may immediately deliberate and make a
18 decision on the proposed regulatory change.

19 B. If the commission does not reach a decision at the conclusion of the hearing, the commission
20 administrator, following receipt of the transcript, will promptly furnish a copy of the transcript to each commission
21 member that did not attend the hearing and, if necessary, to other commission members, commission counsel and
22 the hearing officer. Exhibits provided to those persons at the time of the hearing need not be supplied again.

23 C. The commission shall reach its decision on the proposed regulatory change within 60 days
24 following the close of the record or the date the hearing officer's report is filed, whichever is later.

25 D. If, during the course of its deliberations, the commission determines that additional testimony or
26 documentary evidence is necessary for a proper decision on the proposed regulatory change, the commission may,
27 consistent with the requirements of due process, reopen the hearing for such additional evidence only.

28 E. The commission shall issue its decision on the proposed regulatory change in a suitable format,
29 which shall include its reasons for the action taken.

30 F. The commission's written decision is the official version of the commission's action, and the
31 reasons for that action. Other written or oral statements by commission members are not recognized as part of the
32 commission's official decision or reasons.

33 [xx/xx/16]
34

35 **20.1.6.307 NOTICE OF COMMISSION ACTION:** The commission administrator shall provide notice of
36 the commission's action to each of the parties, to any person heard or represented at the hearing, and to all other
37 persons who have made a written request to the commission for notification of the action taken.

38 [xx/xx/16]
39

40 **20.1.6.308 - 20.1.6.399 [RESERVED]**

41
42 **20.1.6.400 APPEAL OF REGULATIONS:**

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

45 B. The appellant shall serve a copy of the notice of appeal on the commission and on each party.

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

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

50 [xx/xx/16]
51

52 **20.1.6.401 STAY OF COMMISSION REGULATIONS:**

53 A. Any person who is or may be affected by a rule adopted by the commission may file a motion with
54 the commission seeking a stay of that rule or regulatory change. The motion shall include the reason for, and the
55 legal authority supporting, the granting of a stay. The movant shall file and serve the motion in accordance with the

1 requirements of Section 104 of this part at least 30 days before the meeting at which the commission will consider
2 the motion. The commission chair will decide at which meeting the motion will be heard.

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

6 C. In determining whether good cause is present for the granting of a stay, the commission, upon at
7 least a two-thirds vote of the members voting shall consider:

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

12 D. If no action is taken within 60 days after filing of the motion, the commission shall be deemed to
13 have denied the motion for stay.

14 [xx/xx/16]

15
16 **20.1.6.402- 20.1.6.499 [RESERVED]**

17
18 **20.1.6.500 APPENDIX A:**

[Preferred Format]

19
20
21 **STATE OF NEW MEXICO**
22 **WATER QUALITY CONTROL COMMISSION**

23
24 **IN THE MATTER OF PROPOSED**
25 **AMENDMENTS TO _____ NMAC**

26
27 **[Name of Petitioner],**
28 **Petitioner.**

29 **CERTIFICATE OF SERVICE**

30
31 I hereby certify that a true and correct copy of the foregoing [name of document] was served by [hand-delivery]
32 [first class mail] [email] to all parties on [date].
33

34
35 **HISTORY OF 20.1.6 NMAC:**

36 **Pre-NMAC History:** The material in this part was derived from Guidelines for Water Quality Control Commission
37 Regulation Hearings (Approved November 10, 1992; Amended June 8, 1993).
38

39 **History of Repealed Material:**

40
41 **Other History:**