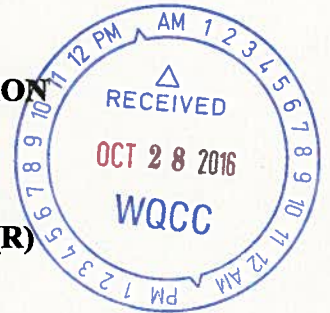


**STATE OF NEW MEXICO
BEFORE THE WATER QUALITY CONTROL COMMISSION**

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

No. 16-03 (R)



**NEW MEXICO MINING ASSOCIATION'S PROPOSED
STATEMENT OF REASONS**

The New Mexico Mining Association (“NMMA”) files this proposed Statement of Reasons in accordance with the Hearing Officer’s guidance during the October 11, 2016 public hearing on this matter. This proposed Statement of Reasons is composed of paragraphs that may be used as part of a Statement of Reasons for the Commission’s adoption of the changes to the Environment Department’s proposed rule as proposed by NMMA in Exhibit “A” to its Notice of Intent to Present Technical Testimony filed in this matter. Those changes, as modified to reflect the testimony at the hearing, are attached hereto as “Exhibit A.” This exhibit is based upon the proposed rule language offered by the Department, with the locations of the changes proposed by NMMA and described in the paragraphs below shown in highlighting for the Commission’s convenience.

1. NMMA recommended adding language to proposed section 20.1.6.7(P) NMAC to identify written pleadings as part of the record proper. Mr. Trujillo testified regarding the need for this proposed change. The Commission adopts this to ensure a complete record proper and because inclusion of pleadings in the record proper is customary.

2. NMMA proposed additions to the language of section 20.1.6.100(C)(2) NMAC to describe the procedures available to the Commission, hearing officer and parties to implement

the criteria for disqualification of a hearing officer contained in the proposed rule. Mr. Trujillo testified that the NMMA's change is needed so that there is a clear process for recusal or disqualification of a hearing officer based on the criteria specified in the rule as proposed by the Department. NMMA's proposed language gives a hearing officer the ability to recuse himself or herself, or if there is a question regarding whether the hearing officer should recuse himself or herself, clarifies that the hearing officer may obtain advice from the Commission's legal counsel or a ruling by the Commission. The proposed language also allows other parties to file a motion for disqualification.

3. NMMA recommended that proposed section 20.1.6.103 NMAC be clarified to define when a rulemaking proceeding is initiated and concluded for purposes of the provision on ex parte communications. Mr. Trujillo testified on behalf of NMMA that this clarity of the period when ex parte communications are prohibited is needed to avoid inadvertent non-compliance if there is uncertainty regarding the period when such communications are prohibited. A proceeding will be considered to be initiated, and ex parte communications prohibited, after the Commission decides to hold a public hearing. The proceeding is considered to be concluded when the Commission issues a decision. The Commission agrees that this clarity is needed.

4. NMMA recommended that section 20.1.6.104 NMAC be modified to provide the Commission Administrator discretion to waive the requirement to provide 15 copies of pre-filed documents. Mr. Trujillo testified in favor of this change, and during questioning, a question arose whether the language as proposed by NMMA would be interpreted to allow the Administrator to require some, but less than 15 copies. NMMA modified the proposed language in its post-hearing filing to make that clear. This change will avoid a requirement to file

unnecessary copies because some Commissioners prefer to receive electronic versions of documents rather than paper, documents.

5. NMMA proposed to add a requirement to proposed section 20.1.200 NMAC so that a petitioner must describe public or stakeholder proceedings used by the petitioner to obtain comments and information used to develop the rule as proposed by the petitioner and to identify to the Commission whether, based on those procedures, substantial opposition is anticipated. Mr. Trujillo testified in favor of this language. This information is useful to the Commission, and in the proposed rule as offered by NMMA, the Commission would use this information to identify the nature of the hearing, and to designate a proposed rule or rule changes as simple or complex.

6. NMMA proposed a change to subsection A of section 20.1.6.202 NMAC specifying that the Notice of Intent procedure as proposed by the Department will be used when the Commission designates a hearing as "simple." Mr. Trujillo testified in support of this change. He explained that a Commission typically would decide, in its discretion, to designate a hearing as "simple" because little or no opposition is expected or the proposed changes are relatively simple and not likely to involve considerable technical testimony. The Commission prefers to retain the more simple "Notice of Intent" procedure for such hearings, which has worked well in the past.

7. NMMA recommended a more specific process for hearings that the Commission designates as "complex." Mr. Trujillo testified in support of this process. This Commission, in its discretion, would identify a hearing as "complex" when substantial opposition is expected and/or if considerable technical testimony is expected to be presented, allowing for a more extended time for the Commission to review the written technical testimony and exhibits in

advance of the hearing. Through this process, the parties would respond and reply with supplemental written technical testimony and exhibits, and all participants would use the advance-filed written testimony and exhibits to prepare for a more efficient hearing.

8. The Commission wishes to reduce the trial-like rulemaking hearings that have taken place in the past, which consume considerable resources of agencies, the Commission and parties and often have produced contentious debates during a hearing regarding matters such as the scope of cross-examination. The Commission finds that the procedures for complex hearings are authorized by and consistent with the Water Quality Act, Section 74-6-6 NMSA 1978. That section requires a public hearing for the adoption of a rule, and requires that the Commission allow a *reasonable* opportunity for all interested persons to submit data, views or arguments orally or in writing and to examine witnesses testifying at the hearing. The Commission finds that the procedures recommended by NMMA impose reasonable requirements, fair to all parties, for the presentation of technical testimony and for presentations and examination at the public hearing. To the extent that specific circumstances warrant adjustments by the Hearing Officer, the language allows those changes in the discretion of the Hearing Officer.

9. The procedures for complex hearings are similar to those used in complex cases such as triennial review of surface water quality standards, which have been governed by scheduling and procedural orders issued by hearing officers. The Commission finds that these procedures have generally been successfully implemented, and that they will be enhanced by the specific changes as proposed and explained by Mr. Trujillo and in the NMMA's Notice of Intent to Present Technical Testimony, which was adopted as part of Mr. Trujillo's testimony.

10. NMMA recommended a clarification to proposed section 20.1.6.302(A) NMAC to clarify that this provision applies to exhibits offered during a hearing and not pre-filed. Mr. Trujillo testified in favor of this change and the Department's witness did not oppose the change.

11. NMMA recommended a clarification to proposed 20.1.6.304 NMAC to add "revised proposed rule language" to the list of things that a hearing officer can allow in post-hearing submittals. Mr. Trujillo testified in favor of this change and the Department's witness did not oppose it.

RESPECTFULLY SUBMITTED this 28th day of October, 2016.

Submitted By:



Dalva L. Moellenberg
Gallagher & Kennedy, P.A.
1239 Paseo de Peralta
Santa Fe, New Mexico 87501
For the New Mexico Mining Association

CERTIFICATE OF SERVICE:

I hereby certify that a copy of this NMMA Proposed Statement of Reasons was sent by electronic mail, U.S. mail, and/or hand-delivery to the following parties this October 28, 2016:

Matthias Sayer, Hearing Officer
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- 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) all written pleadings, including motions and responsive pleadings, and orders;
 22 (7) statements for the public record;
 23 (8) the hearing officer's report, if any;
 24 (9) post-hearing submissions, if allowed;
 25 (10) the audio recordings (or an appropriate extract of the recordings) of the meeting(s) at
 26 which the commission deliberated on the adoption of the proposed regulatory change; and
 27 (10) the commission's decision and the reasons therefore;
- 28 Q. "regulation" means any rule, regulation or standard promulgated by the commission and affecting
 29 one or more persons, besides the commission and the department, except for any order or decision issued in
 30 connection with the disposition of any case involving a particular matter as applied to a specific set of facts;
- 31 R. "regulatory change" means the adoption, amendment or repeal of a regulation;
- 32 S. "service" means personally delivering a copy of the document, exhibit or pleading to the person
 33 required by this part to be served; mailing it to that person; or, if that person has agreed, sending it by electronic
 34 transmission; if a person is represented by an attorney, service of the document shall be made on the attorney;
 35 service by mail is complete upon mailing the document; service by electronic transmission is complete upon
 36 transmission of the document;
- 37 T. "technical testimony" means scientific, engineering, economic or other specialized testimony, but
 38 does not include legal argument, general comments, or statements of policy or position concerning matters at issue
 39 in the hearing; and
- 40 U. "transcript of proceedings" means the verbatim record (audio recording or stenographic) of the
 41 proceedings, testimony and argument in the matter, together with all exhibits proffered at the hearing, whether or not
 42 admitted into evidence, including the record of any motion hearings or prehearing conferences.

43 [xx/xx/16]

45 **20.1.6.8 LIBERAL CONSTRUCTION:** This part shall be liberally construed to carry out its purpose.

46 [xx/xx/16]

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

50 [xx/xx/16]

52 **20.1.6.10 – 20.1.6.99 [RESERVED]**

54 **20.1.6.100 POWERS AND DUTIES OF THE COMMISSION AND HEARING OFFICER:**

55 A. Commission: The commission shall exercise all powers and duties prescribed under the act and
 56 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. A person being considered for or
30 designated as hearing officer shall either decline designation or recuse themselves if they would be disqualified
31 under this paragraph or may disclose to the commission or the commission's legal counsel any information
32 indicating a potential for disqualification under this paragraph, including any new information arising during the
33 proceeding, and request advice from the commission's legal counsel or a ruling from the commission. Any party
34 may move for disqualification of a hearing officer based on the criteria in this paragraph.

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

39 40 **20.1.6.101 GENERAL PROVISIONS - COMPUTATION OF TIME:**

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

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

50 [xx/xx/16]

51
52 **20.1.6.102 GENERAL PROVISIONS - RECUSAL:** No commission member shall participate in any
53 action in which his or her impartiality or fairness may reasonably be questioned, and the member shall recuse
54 himself or herself in any such action by giving notice to the commission and the general public by announcing this
55 recusal on the record. In making a decision to recuse himself or herself, the commission member may rely upon the

1 Governmental Conduct Act, NMSA 1978, Sections 10-16-1 through 10-16-18, the Financial Disclosures Act,
2 NMSA 1978, Sections 10-16A-1 through 10-16A-8, or any other relevant authority.
3 [xx/xx/16]

4
5 **20.1.6.103 GENERAL PROVISIONS - EX PARTE DISCUSSIONS:** At no time after the commission's
6 determination to hold a public hearing on a petition and before the issuance of the commission's written decision
7 under this part, shall the department, or any other party, interested participant or their representatives discuss ex
8 parte the merits of the proceeding with any commission member or the hearing officer.
9

10 **20.1.6.104 DOCUMENT REQUIREMENTS - FILING AND SERVICE OF DOCUMENTS:**

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

13 B. Any person filing any document shall:

14 (1) provide the commission administrator with the original of the document along with 15
15 copies, provided that the commission administrator may agree to reduce the number of required paper copies if an
16 electronic copy of the original is provided in a format acceptable for distribution to the commission members;

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

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

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

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

28 E. Documents issued by commission or hearing officer: All documents issued by the commission or
29 hearing officer shall be filed with the commission administrator, who shall promptly serve copies of the documents
30 upon all parties.
31

32 **20.1.6.105 EXAMINATION OF DOCUMENTS FILED:**

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

37 B. Cost of duplication: The cost of duplicating documents shall be borne by the person seeking
38 copies of such documents.
39 [xx/xx/16]

40
41 **20.1.6.106 - 20.1.1.199 [RESERVED]**
42

43 **20.1.6.200 PREHEARING PROCEDURES - PETITION FOR REGULATORY CHANGE:**

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

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

54 C. The commission shall determine, at a public meeting occurring at least 15 days and no later than
55 60 days after receipt of the petition, whether or not to hold a public hearing on the proposal. Any person may
56 respond to the petition either in writing prior to the public meeting or in person at the public meeting.

1 D. If the commission determines to hold a public hearing on the petition, it may issue such orders
2 specifying procedures for conduct of the hearing, in addition to those provided by this part, as may be necessary and
3 appropriate to fully inform the commission of the matters at issue in the hearing or control the conduct of the
4 hearing. Such orders may include requirements for giving additional public notice, holding pre-hearing conferences,
5 filing direct testimony in writing prior to the hearing, or limiting testimony or cross-examination.
6 [xx/xx/16]
7

8 **20.1.6.201 NOTICE OF HEARINGS:**

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

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

17 C. The petition shall describe any public notices, meetings, or other procedures utilized by the
18 petitioner to give public notice and obtain public comments on the proposed rule or rule changes, shall describe how
19 such public comments and input were addressed in the rule or rule changes as proposed in the petition, and shall
20 identify to the commission whether the petition anticipates substantial opposition to the proposed rule. On the basis
21 of this information and any responses to the petition, the commission shall determine whether to designate the
22 rulemaking hearing as "simple" or "complex" as provided in section 20.1.6.202 NMAC.

23 D. Public notice of the hearing shall state:

- 24 (1) the subject, including a description of the proposed regulatory change, time and place of
25 the hearing;
26 (2) the statutes, regulations and procedural rules governing the conduct of the hearing;
27 (3) the manner in which persons may present their views or evidence to the commission;
28 (4) the location where persons may secure copies of the proposed regulatory change; and
29 (5) if applicable, that the commission may make a decision on the proposed regulatory
30 change at the conclusion of the hearing.

31 [xx/xx/16]
32

33 **20.1.6.202 TECHNICAL TESTIMONY:**

34 A. For a hearing designated by the Commission as a simple hearing, any person, including the
35 petitioner, who intends to present technical testimony at the hearing shall, no later than 20 days prior to the hearing,
36 file a notice of intent to present technical testimony. The notice shall:

- 37 (1) identify the person for whom the witness(es) will testify;
38 (2) identify each technical witness the person intends to present and state the qualifications
39 of that witness, including a description of their educational and work background;
40 (3) if the hearing will be conducted at multiple locations, indicate the location or locations at
41 which the witnesses will be present;
42 (4) include a copy of the direct testimony of each technical witness in narrative form, and
43 state the estimated duration of the direct oral testimony of that witness;
44 (5) include the text of any recommended modifications to the proposed regulatory change;
45 and
46 (6) list and attach all exhibits anticipated to be offered by that person at the hearing.

47 B. For a public hearing designated by the commission as a complex hearing, the following
48 procedures shall be followed, except as may be modified by the hearing officer:

49 (1) No less than sixty (60) days before the hearing, the petitioner shall file and serve on all
50 parties who have entered an appearance (i) the text of the proposed rule, specifically identifying any changes to
51 language from that submitted with the Petition, (ii) a concise summary of the reasons for the proposed rule or rule
52 changes in the form of numbered paragraphs, (iii) all written technical testimony and exhibits offered in support of
53 the proposed rule or rule amendments and reasons.

54 (2) No less than thirty (30) days before the hearing, any party who opposes the petition or
55 seeks a change to the proposed rule language shall file and serve on all parties who have appeared (i) the text of any
56 recommended changes to the proposed rule, (ii) a concise summary of the reasons for opposition to the petition

1 and/or reasons for any proposed changes to the rule language in the form of numbered paragraphs, and (iii) all
2 written and technical testimony and exhibits offered in opposition to the petition or to support any recommended
3 change to the proposed rule language and the reasons. Any party other than the petitioner who supports the petition
4 and wishes to offer technical testimony and exhibits in support of the proposed rule or rule amendments shall file
5 such at this time.

6 (3) No less than ten (10) days before the hearing, the petitioner or any other party may file (i)
7 written technical testimony and exhibits responding to the written technical testimony and exhibits filed in
8 accordance with paragraph (2) of this subsection, (ii) the text of any additional recommended changes to the rule and
9 (iii) a concise summary of the reasons for the changes in the form of numbered paragraphs.

10 (4) Each written testimony shall be signed by the witness and notarized under oath and shall
11 state the qualifications of that witness, including a description of their educational and work background.

12 (5) Within two days of any filing under paragraphs (1), (2) or (3), the department or other
13 constituent agency, as applicable, shall post the complete filing on its website.

14 (6) Any party filing written technical testimony shall be deemed to have offered to make the
15 witness available at the hearing for questioning by the commission and cross-examination. No later than five days
16 before the hearing, the hearing officer, after consultation with the commission, shall notify the parties in writing of
17 each witness whom the hearing officer or commission will call for questioning. No later than five business days
18 before the hearing, each party shall file and serve a list of witnesses that they wish to cross-examine and shall
19 identify the topics on which they wish to cross-examine each of the identified witnesses. Failure to identify a
20 witness for questioning or cross-examination shall constitute a waiver of such right.

21 (7) Cross-examination of a witness is limited to thirty (30) minutes per party or participant,
22 except by permission of the hearing officer.

23 (8) Any of the timeframes specified in this section may be modified in a scheduling order
24 issued by the hearing officer.

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

30 [xx/xx/16]

31
32 **20.1.6.203 ENTRY OF APPEARANCE:** Any person may file an entry of appearance as a party. The entry
33 of appearance shall be filed no later than 20 days before the date of the hearing on the petition. In the event of
34 multiple entries of appearance by those affiliated with one interest group, the hearing officer may consolidate the
35 entries, or divide the service list to avoid waste of resources.

36 [xx/xx/16]

37
38 **20.1.6.204 PARTICIPATION BY GENERAL PUBLIC:**

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

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

45 [xx/xx/16]

46
47 **20.1.6.205 LOCATION OF HEARING:** Unless otherwise provided by governing law, the commission
48 shall hold hearings on proposed regulatory changes of statewide application in Santa Fe, and at other places the
49 commission may prescribe. Hearings on proposed regulatory changes that are not of statewide application may be
50 held within the area substantially affected by the proposal.

51 [xx/xx/16]

52
53 **20.1.6.206 PARTICIPATION BY CONFERENCE TELEPHONE OR OTHER SIMILAR DEVICE:**

54 A. A member of the commission may participate in a meeting or hearing of the commission by means
55 of a conference telephone or other similar communications equipment when it is otherwise difficult or impossible
56 for the member to attend the meeting or hearing in person, provided that each member participating by conference

1 telephone can be identified when speaking, all participants are able to hear each other at the same time and members
2 of the public attending the meeting or hearing are able to hear any member of the commission who speaks at the
3 meeting or hearing. A commission member's participation by such means shall constitute presence in person at the
4 meeting or hearing. A commission member who needs to participate in this manner must notify the commission
5 administrator sufficiently in advance so as to permit the commission administrator to arrange for the appropriate
6 communications equipment.

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

14 [xx/xx/16]

15
16 **20.1.6.207 MOTIONS:**

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

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

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

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

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

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

35 [xx/xx/16]

36
37 **20.1.6.208 - 20.1.6.299 [RESERVED]**

38
39 **20.1.6.300 HEARING PROCEDURES - CONDUCT OF HEARINGS:**

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

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

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

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

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

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

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

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

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

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

9 [xx/xx/16]

10
11 **20.1.6.301 TESTIMONY AND CROSS-EXAMINATION:**

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

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

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

22 [xx/xx/16]

23
24 **20.1.6.302 EXHIBITS:**

25 A. Any person offering an exhibit at hearing shall provide at least an original and 15 copies for the
26 commission, and a sufficient number of copies for every other party.

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

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

32 [xx/xx/16]

33
34 **20.1.6.303 TRANSCRIPT OF PROCEEDINGS:**

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

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

40 [xx/xx/16]

41
42 **20.1.6.304 POST-HEARING SUBMISSIONS:** The hearing officer may allow the record to remain open
43 for a reasonable period of time following the conclusion of the hearing for written submission of additional
44 evidence, comments and arguments, revised proposed rule language, and proposed statements of reasons. The
45 hearing officer's determination regarding post-hearing submissions shall be announced at the conclusion of the
46 hearing. In considering whether the record will remain open, the hearing officer shall consider the reasons why the
47 material was not presented during the hearing, the significance of the material to be submitted and the necessity for a
48 prompt decision.

49 [xx/xx/16]

50
51 **20.1.6.305 HEARING OFFICER'S REPORT:** If the commission directs, the hearing officer shall file a
52 report of the hearing. The report shall identify the issues addressed at the hearing, identify the parties' final
53 proposals and the evidence supporting those proposals, including discussion or recommendations as requested by the
54 commission, and shall be filed with the commission administrator within the time specified by the commission. The
55 commission administrator shall promptly notify each party that the hearing officer's report has been filed and shall
56 provide a copy of the report along with a notice of any deadline set for comments on that report.

1 [xx/xx/16]

2
3 **20.1.6.306 DELIBERATION AND DECISION:**

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

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

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

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

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

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

21 [xx/xx/16]

22
23 **20.1.6.307 NOTICE OF COMMISSION ACTION:** The commission administrator shall provide notice of
24 the commission's action to each of the parties, to any person heard or represented at the hearing, and to all other
25 persons who have made a written request to the commission for notification of the action taken.

26 [xx/xx/16]

27
28 **20.1.6.308 - 20.1.6.399 [RESERVED]**

29
30 **20.1.6.400 APPEAL OF REGULATIONS:**

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

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

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

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

38 [xx/xx/16]

39
40 **20.1.6.401 STAY OF COMMISSION REGULATIONS:**

41 A. Any person who is or may be affected by a rule adopted by the commission may file a motion with
42 the commission seeking a stay of that rule or regulatory change. The motion shall include the reason for, and the
43 legal authority supporting, the granting of a stay. The movant shall file and serve the motion in accordance with the
44 requirements of Section 104 of this part at least 30 days before the meeting at which the commission will consider
45 the motion. The commission chair will decide at which meeting the motion will be heard.

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

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

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

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

1 [xx/xx/16]

2
3 20.1.6.402- 20.1.6.499 [RESERVED]

4
5 20.1.6.500 APPENDIX A:

6 [Preferred Format]

7
8 STATE OF NEW MEXICO
9 WATER QUALITY CONTROL COMMISSION

10
11 IN THE MATTER OF PROPOSED
12 AMENDMENTS TO _____ NMAC

13
14 [Name of Petitioner],
15 Petitioner.

16 CERTIFICATE OF SERVICE

17
18 I hereby certify that a true and correct copy of the foregoing [name of document] was served by [hand-delivery]
19 [first class mail] [email] to all parties on [date].

20
21
22 HISTORY OF 20.1.6 NMAC:

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

25
26 History of Repealed Material:

27
28 Other History: