

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



**IN THE MATTER OF PROPOSED)
AMENDMENTS TO GROUND)
AND SURFACE WATER)
PROTECTION REGULATIONS,)
20.6.2 NMAC)**

No. WQCC 17-02(R)

**RESPONSE IN OPPOSITION TO AND MOTION TO DISMISS THE NEW MEXICO
ENVIRONMENT DEPARTMENT’S PETITION TO AMEND THE GROUND AND
SURFACE WATER PROTECTION REGULATIONS (20.6.2 NMAC)**

The New Mexico Environmental Law Center (“NMELC”) hereby submits its “Response in Opposition to and Motion to Dismiss the New Mexico Environment Department’s Petition to Amend the Ground and Surface Water Protection Regulations (20.6.2 NMAC) and Request for Hearing”.

NMELC is a non-profit, public interest law firm that provides free and low-cost legal services on environmental matters throughout New Mexico. Founded in 1987, the Law Center works with clients — often individuals, neighborhood associations, environmental organizations, Tribes and Pueblos — seeking to protect the environment. NMELC’s mission is to protect New Mexico’s natural environment and achieve environmental justice for New Mexico’s communities through legal representation, policy advocacy and public education. NMELC has worked with clients for nearly thirty years to protect New Mexico’s ground and surface waters from the negative impacts of mining, solid waste, and oil and gas development.

The New Mexico Environment Department (“NMED”), Ground Water Quality Bureau (“GWQB”) filed its “Petition to Amend the Ground and Surface Water Protection Regulations (20.6.2 NMAC) and Request for Hearing” (“Petition” or “Petition to amend the water protection

regulations”) on March 22, 2017, pursuant to the Water Quality Act, NMSA 1978, Sections 74-6-1 to -17 (1967, as amended through 2013) (“WQA”) and the Water Quality Control Commission (“WQCC”) “*Guidelines for Water Quality Control Commission Regulation Hearings*” (Approved November 10, 1992; Amended June 8, 1993) (“*Guidelines*”). NMED published notice of its intent to request that the WQCC set a hearing date and appoint a Hearing Officer for this matter at the scheduled April 11, 2017 WQCC meeting.

The WQCC recently determined that the *Guidelines* are no longer appropriate for rulemaking proceedings and issued an “Order and Statement of Reasons” adopting new rule 20.1.6 NMAC, “Rulemaking Procedures – Water Quality Control Commission”, on March 3, 2017. This new rule was filed with the State Records Center on March 30, 2017, will be published on April 11, 2017, and goes into effect on May 1, 2017. *See* attached Exhibit 1. This new rule will supersede the *Guidelines* and will govern rulemaking procedures starting May 1, 2017. However, the new rule will not be applied retroactively to petitions filed before May 1, 2017.

Given that the WQCC has determined that the new rule would better protect the interests of the public and will not be applied retroactively to petitions filed before the new rule’s effective date, NMELC is requesting that the WQCC dismiss NMED’s Petition without prejudice and instruct NMED to re-file its Petition after new rule 20.1.6 NMAC goes into effect.

I. Procedural History of New Rule, 20.1.6 NMAC, “Rulemaking Procedures – Water Quality Control Commission”.

NMED filed a “Petition to Adopt Rulemaking Procedures and Request for Hearing” (“Rulemaking Petition”) (No. WQCC 16-03(R)) on July 25, 2016 with the WQCC, pursuant to

NMSA 1978, Sections 74-6-4(E) and 74-6-6. NMED's reasons supporting adoption of its Rulemaking Petition were, in pertinent part:

1. *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.*
2. *The Guidelines do not have the force of law that the Proposed Rule would have as part of the New Mexico Administrative Code.*
3. *The Guidelines contain gaps and 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.*
4. *The Guidelines were not adopted by the commission through a formal rulemaking procedure, raising issues concerning public notice and comment that could become the basis of a legal challenge to the enforceability of the Guidelines.¹*
5. The Proposed 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.
6. The Proposed Rule employs modern terminology and includes templates showing the preferred format for documents to be filed before the commission.
7. *Adoption of the Proposed Rule will reduce confusion and uncertainty on the part of petitioners and other parties to rulemakings 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.*

¹ NMED has conceded that the outdated WQCC Guidelines were "not adopted by the commission through a formal rulemaking procedure, raising issues concerning public notice and comment that could become the basis of a legal challenge to the enforceability of the Guidelines." The Water Quality Act ("WQA") requires the WQCC to hold a public hearing before it can adopt a regulation. NMSA 1978, Section 74-6-6.A. The WQA also provides that, "No regulation...adopted by the commission shall become effective until thirty days after its filing in accordance with the provisions of the State Rules Act [14-4-1 NMSA 1978]." NMSA 1978, Section 74-6-6.E; *New Energy Econ. v. Martinez*, 2011-NMSC-006, 12; *Bokum Res. Corp. v. N.M. Water Quality Control Commission*, 1979-NMSC-090, 42. New Mexico case law makes clear that the *Guidelines* have no efficacy, validity or enforceability.

8. The Proposed Rule specifies procedures governing the appeal of a rule adopted by the commission, as well as procedures for the commission's consideration of a motion to stay application of a rule during the pendency of an appeal.

NMED's Rulemaking Petition, Exhibit 1 (July 25, 2016) (emphasis added). NMED essentially argued that the *Guidelines* were no longer appropriate and are arguably unenforceable for WQCC rulemaking proceedings.

The WQCC agreed with NMED's reasons supporting adoption of 20.1.6 NMAC. WQCC "Order and Statement of Reasons", paragraphs 40-44 (March 3, 2017). In particular, the WQCC "finds that the Rule will reduce confusion and uncertainty on the part of petitioners and other parties to rulemaking proceedings before the Commission." *Id.* at ¶ 44. By adopting new rule 20.1.6 NMAC, the WQCC found that the *Guidelines* were no longer appropriate for rulemaking proceedings and ensured that a legally enforceable rule for rulemaking proceedings would be in place.

The WQCC submitted its adopted rule 20.1.6 NMAC to the New Mexico Records Center on March 30, 2017, pursuant to NMSA 1978, Section 14-4-3. This new rule governing WQCC rulemaking procedures will be published in the New Mexico Register on April 11, 2017, becoming effective on May 1, 2017. *See* attached Exhibit 1. This new rule will not be applied retroactively to petitions filed before May 1, 2017. *Id.*

II. ARGUMENT.

A. The WQCC Has Determined that the *Guidelines* Are No Longer Appropriate for Rulemaking Proceedings by Adopting New Rule 20.1.6 NMAC, Which Supersede the *Guidelines* on May 1, 2017.

NMED filed its "Petition to Adopt Rulemaking Procedures and Request for Hearing" to address how the *Guidelines* are no longer appropriate for WQCC rulemaking procedures and how they are arguably unenforceable. NMED's Rulemaking Petition, Exhibit 1 (July 25, 2016).

The WQCC, in turn, adopted 20.1.6 NMAC to have an appropriate, legally enforceable rule for rulemaking procedures in place. WQCC “Order and Statement of Reasons”, paragraphs 40-44 (March 3, 2017).

NMED was aware, at the time it filed its recent Petition to amend the water protection regulations, that it had petitioned the WQCC to adopt a new rule for rulemaking on the grounds that the *Guidelines* were no longer appropriate for rulemaking proceedings. NMED was also aware that the WQCC had adopted new rule 20.1.6 NMAC to govern rulemaking proceedings. NMED should also be aware that the new rule becomes effective on May 1, 2017 and will supersede the inappropriate, arguably unenforceable *Guidelines*, yet not be applied retroactively. However, NMED has confusingly filed its recent Petition pursuant to *Guidelines* it has stated are arguably unenforceable and no longer appropriate for WQCC rulemaking proceedings.

For these reasons, the WQCC should dismiss NMED’s Petition to amend the water protection regulations without prejudice and instruct NMED to re-file its Petition after new rule 20.1.6 NMAC goes into effect on May 1, 2017.

B. The Public Would Receive Fairer Treatment Under New Rule 20.1.6 NMAC.

One substantial difference between the WQCC’s arguably unenforceable, inappropriate *Guidelines* and new rule 20.1.6 NMAC that results in fairer treatment of the public pertains to public notice. NMED has requested that the WQCC set a hearing on its Petition pursuant to the *Guidelines* that NMED argued were arguably unenforceable and no longer appropriate for rulemaking proceedings. NMED Petition, page 3 (March 22, 2017). Section 302 of the *Guidelines* provides that, “The Commission shall give public notice of the hearing at least thirty (30) days prior to the hearing.” WQCC *Guidelines*, page 5 (Approved November 10, 1992; Amended June 8, 1993). Whereas new rule 20.1.6 NMAC provides that the commission “shall

give public notice of the hearing *at least 60 days prior to the hearing*". Section 20.1.6.201.A NMAC (May 1, 2017) (emphasis added).

The WQCC found "that the public interest will be served" by adopting this greatly expanded public notice requirement. WQCC "Order and Statement of Reasons", paragraph 47 (March 3, 2017). Though NMED has requested an October 10, 2017 hearing date, the WQCC, under the *Guidelines*, only has to provide thirty (30) days' notice to the public of a scheduled hearing on a petition for regulatory change. Therefore, the WQCC could set a hearing on NMED's petition as early as May 12, 2017 (thirty days from the date the WQCC would grant NMED's request for a hearing on its petition, which NMED will make on April 11, 2017).

If the WQCC does not deny NMED's Petition without prejudice and sets a public hearing pursuant to Section 302 of the arguably unenforceable, inappropriate *Guidelines*, only providing the public with thirty (30) days' notice, the public will have thirty (30) days less to prepare for the public hearing.

The WQCC corrected this severely limited, arguably unenforceable public notice requirement by adopting Section 20.1.6.201.A NMAC. Because the public would receive fairer treatment under new rule 20.1.6 NMAC, the WQCC should deny NMED's Petition without prejudice and instruct NMED to re-file its Petition after the new rule goes into effect on May 1, 2017.

III. CONCLUSION.

New rule 20.1.6 NMAC was adopted by the WQCC to achieve the following objectives:

- A. to standardize the procedures used in rulemaking proceedings before the commission;
- B. to encourage participation in the hearings conducted by the commission for the promulgation of regulations;
- C. to make possible the effective presentation of the evidence and points of view of parties and members of the general public;

- D. to allow all interested persons a reasonable opportunity to submit data, views or arguments orally or in writing; and
- E. to assure that commission hearings are conducted in a fair and equitable manner.

Section 20.1.6.6 NMAC. Because this new rule will not be applied retroactively to petitions filed before May 1, 2017, and for the reasons discussed above, NMELC requests that the WQCC dismiss NMED's Petition to amend the water protection regulations with prejudice and instruct NMED to re-file its Petition after new rule 20.1.6 NMAC become effective on May 1, 2017.

Dated: April 7, 2017.

NEW MEXICO ENVIRONMENTAL LAW CENTER



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Certificate of Service

I certify that a copy of this “Response in Opposition To and Motion to Dismiss”, including attachments as indicated, was served on the following via hand delivery on April 7, 2017:

Ms. Pam Castaneda, Administrator
Water Quality Control Commission
Room N-2168, Runnels Building
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Santa Fe, New Mexico 87505

I certify that on April 7, 2017 copies of this “Response in Opposition To and Motion to Dismiss” were sent by electronic mail to:

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

**IN THE MATTER OF PROPOSED)
AMENDMENTS TO GROUND)
AND SURFACE WATER)
PROTECTION REGULATIONS,)
20.6.2 NMAC)**

No. WQCC 17-02(R)

ORDER DISMISSING PETITION

The New Mexico Water Quality Control Commission (“Commission”), through its duly appointed Chairperson, hereby orders that the Petition filed by the New Mexico Environment Department, Ground Water Quality Bureau (“Bureau”), as referenced above, be dismissed without prejudice.

The Commission has determined that the *Guidelines for Water Quality Control Commission Regulation Hearings* (June 8, 1993) (“Guidelines”) are inappropriate and has adopted new rule 20.1.6 NMAC to govern Commission rulemaking proceedings. Rule 20.1.6 NMAC will supersede the *Guidelines* on May 1, 2017.

The Bureau should re-file its Petition after new rule 20.1.6 NMAC becomes effective on May 1, 2017.

NOW ORDERED, this the ____ day of April, 2017, by the Commission and as attested by the Chairperson’s signature below.

Larry Dominguez, Chair

TITLE 20 ENVIRONMENTAL PROTECTION
CHAPTER 1 ENVIRONMENTAL PROTECTION GENERAL
PART 6 RULEMAKING PROCEDURES - WATER QUALITY CONTROL COMMISSION

20.1.6.1 ISSUING AGENCY: New Mexico Water Quality Control Commission.
[20.1.6.1 NMAC - N, 05/01/17]

20.1.6.2 SCOPE: This part governs the procedures to be followed by the commission, and by participants before the commission, in connection with all rulemaking hearings before the commission, except to the extent this part may be inconsistent with specific procedures in governing law. In cases where this part is inconsistent with any rulemaking procedures specified in governing law, the procedures in governing law apply, rather than the procedures in this part.

[20.1.6.2 NMAC - N, 05/01/17]

20.1.6.3 STATUTORY AUTHORITY: Subsection E of Section 74-6-4 NMSA 1978 directs the commission to adopt, promulgate and publish regulations. Section 74-6-6 NMSA 1978 requires a public hearing prior to the adoption, amendment or repeal of a regulation, and specifies requirements for such a hearing.

[20.1.6.3 NMAC - N, 05/01/17]

20.1.6.4 DURATION: Permanent.

[20.1.6.4 NMAC - N, 05/01/17]

20.1.6.5 EFFECTIVE DATE: May 1, 2017, unless a later date is cited at the end of a section.

[20.1.6.5 NMAC - N, 05/01/17]

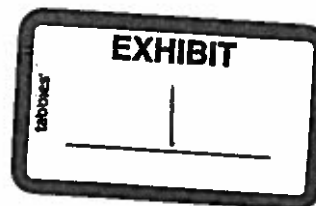
20.1.6.6 OBJECTIVE: The objectives of this rule are:

- A. to standardize the procedures used in rulemaking proceedings before the commission;
- B. to encourage participation in the hearings conducted by the commission for the promulgation of regulations;
- C. to make possible the effective presentation of the evidence and points of view of parties and members of the general public;
- D. to allow all interested persons a reasonable opportunity to submit data, views or arguments orally or in writing; and
- E. to assure that commission hearings are conducted in a fair and equitable manner.

[20.1.6.6 NMAC - N, 05/01/17]

20.1.6.7 DEFINITIONS: As used in this part:

- A. "Act" means the Water Quality Act, Sections 74-6-1 through 74-6-17 NMSA 1978.
- B. "Commission administrator" means the department employee designated by the secretary of environment to provide staff support to the commission.
- C. "Commission" means the water quality control commission.
- D. "Constituent agency" means any or all agencies of the state defined as such under the act.
- E. "Department" means the New Mexico environment department.
- F. "Document" means any paper, exhibit, pleading, motion, response, memorandum, decision, order or other written or tangible item that is filed in a proceeding under this part, or brought to or before the commission for its consideration, but does not include a cover letter accompanying a document transmitted for filing.
- G. "Exhibit" means any document or tangible item submitted for inclusion in the hearing record.
- H. "General public" means any person attending a hearing who has not submitted a notice of intent to present technical testimony.
- I. "Governing law" means the statute, including any applicable case law, which authorizes and governs the decision on the proposed regulatory change.
- J. "Hearing officer" means the person designated by the commission to conduct a hearing under this part.
- K. "Hearing record" means:
 - (1) the transcript of proceedings; and
 - (2) the record proper.



- L. "Participant" means any person who participates in a rulemaking proceeding before the commission.
- M. "Party" means the petitioner, any person filing a notice of intent to present technical testimony, and any person filing an entry of appearance.
- N. "Person" means an individual or any entity, including federal, state and local governmental entities, however organized.
- O. "Petitioner" means the person who petitioned the commission for the regulatory change that is the subject of the hearing.
- P. "Record proper" means all documents related to the hearing and received or generated by the commission prior to the beginning, or after the conclusion, of the hearing, including, but not limited to:
- (1) the petition for hearing and any response thereto;
 - (2) the minutes (or an appropriate extract of the minutes) of the meeting at which the petition for hearing was considered, and of any subsequent meeting at which the proposed regulatory change was discussed;
 - (3) the notice of hearing;
 - (4) affidavits of publication;
 - (5) notices of intent to present technical testimony;
 - (6) all written pleadings, including motions and responsive pleadings, and orders;
 - (7) statements for the public record;
 - (8) the hearing officer's report, if any;
 - (9) post-hearing submissions, if allowed;
 - (10) the audio recordings (or an appropriate extract of the recordings) of the meeting(s) at which the commission deliberated on the adoption of the proposed regulatory change; and
 - (11) the commission's decision and the reasons therefore.
- Q. "Regulation" means any rule, regulation or standard promulgated by the commission and affecting one or more persons, besides the commission and the department, except for any order or decision issued in connection with the disposition of any case involving a particular matter as applied to a specific set of facts.
- R. "Regulatory change" means the adoption, amendment or repeal of a regulation.
- S. "Service" means personally delivering a copy of the document, exhibit or pleading to the person required by this part to be served; mailing it to that person; or, if that person has agreed, sending it by electronic transmission; if a person is represented by an attorney, service of the document shall be made on the attorney; service by mail is complete upon mailing the document; service by electronic transmission is complete upon transmission of the document.
- T. "Technical testimony" means scientific, engineering, economic or other specialized testimony, but does not include legal argument, general comments, or statements of policy or position concerning matters at issue in the hearing.
- U. "Transcript of proceedings" means the verbatim record (audio recording or stenographic) of the proceedings, testimony and argument in the matter, together with all exhibits proffered at the hearing, whether or not admitted into evidence, including the record of any motion hearings or prehearing conferences.
[20.1.6.7 NMAC - N, 05/01/17]

20.1.6.8 LIBERAL CONSTRUCTION: This part shall be liberally construed to carry out its purpose.
[20.1.6.8 NMAC - N, 05/01/17]

20.1.6.9 SEVERABILITY: If any provision or application of this part is held invalid, the remainder of this part, or its application to other situations or persons, shall not be affected.
[20.1.6.9 NMAC - N, 05/01/17]

20.1.6.10 - 20.1.6.99 [RESERVED]

20.1.6.100 POWERS AND DUTIES OF THE COMMISSION AND HEARING OFFICER:

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

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

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

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

- (1) conducting hearings under this part;
- (2) ruling on motions and procedural requests that do not seek final resolution of the proceeding, and issuing all necessary orders;
- (3) administering oaths and affirmations, admitting or excluding evidence, examining witnesses and allowing post-hearing submissions;
- (4) making such orders as may be necessary to preserve decorum and to protect the orderly hearing process;
- (5) if requested by the commission, preparing and filing a report of the hearing, with recommendations for commission action;
- (6) requesting parties to file original documents with the commission administrator; and
- (7) requesting a party to submit a proposed statement of reasons in support of the commission's decision.

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

- (1) an employee of the department, except for the commissioners themselves or their designees, or unless employed by the department as a hearing officer;
- (2) a person who has a personal bias or prejudice concerning a party or a party's lawyer or consultant, or has personal knowledge of disputed facts concerning the proceeding, or is related to a party within the third degree of relationship, or has a financial interest in the proceeding.

D. Notice of hearing officer assignment: If a hearing officer other than a commissioner is assigned, the commission administrator shall notify the parties of the name and address of the hearing officer. The commission administrator shall also, at that time, forward to the hearing officer copies of all documents filed to date. [20.1.6.100 NMAC - N, 05/01/17]

20.1.6.101 GENERAL PROVISIONS - COMPUTATION OF TIME:

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

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

[20.1.6.101 NMAC - N, 05/01/17]

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

[20.1.6.102 NMAC - N, 05/01/17]

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

[20.1.6.103 NMAC - N, 05/01/2017]

20.1.6.104 DOCUMENT REQUIREMENTS - FILING AND SERVICE OF DOCUMENTS:

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

B. Any person filing any document shall:

(1) provide the commission administrator with the original along with up to 15 copies of the document, provided that the commission administrator may waive the requirement to provide up to 15 copies if an electronic copy of the original is provided in a format acceptable for distribution to the commission members;

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

(3) include a certificate of service, as shown in Section 500 of this rule.

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

D. Form of documents: Unless otherwise ordered by the hearing officer, all documents, except exhibits, shall be prepared on 8 1/2 x 11-inch white paper, printed single-sided, and where appropriate, the first page of every document shall contain a heading and caption as shown in Section 500 of this rule.

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

[20.1.6.104 NMAC - N, 05/01/2017]

20.1.6.105 EXAMINATION OF DOCUMENTS FILED:

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

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

[20.1.6.105 NMAC - N, 05/01/17]

20.1.6.106 - 20.1.1.199 [RESERVED]

20.1.6.200 PREHEARING PROCEDURES - PETITION FOR REGULATORY CHANGE:

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

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

C. The commission shall determine, at a public meeting occurring no later than 90 days after receipt of the petition, whether or not to hold a public hearing on the proposal. Any person may respond to the petition either in writing prior to the public meeting or in person at the public meeting.

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

[20.1.6.200 NMAC - N, 05/01/17]

20.1.6.201 NOTICE OF HEARINGS:

- A. Unless otherwise allowed by governing law and specified by the commission, the commission shall give public notice of the hearing at least 60 days prior to the hearing.
- B. Public notice for proposed regulatory changes of general application to the state shall include publication in at least one newspaper of general circulation in the state, publication in the New Mexico register, and such other means of providing notice as the commission may direct or are required by law. Notice for proposed regulatory changes that are confined in effect to a specific geographic area shall also be published in a newspaper of general circulation in the area affected.
- C. The commission shall make reasonable efforts to give notice to persons who have made a written request to the commission for advance notice of regulatory change hearings. Requests for such notice shall be addressed to the commission administrator, and shall designate those areas of commission activity which are of interest.
- D. Public notice of the hearing shall state:
- (1) the subject, including a description of the proposed regulatory change, and the time and place of the hearing;
 - (2) the statutes, regulations and procedural rules governing the conduct of the hearing;
 - (3) the manner in which persons may present their views or evidence to the commission;
 - (4) the location where persons may secure copies of the proposed regulatory change; and
 - (5) if applicable, that the commission may make a decision on the proposed regulatory change at the conclusion of the hearing.
- [20.1.6.201 NMAC - N, 05/01/17]

20.1.6.202 TECHNICAL TESTIMONY:

- A. Any person, including the petitioner, who intends to present technical testimony at the hearing shall, no later than 20 days prior to the hearing, file a notice of intent to present technical testimony. The notice shall:
- (1) identify the person for whom the witness(es) will testify;
 - (2) identify each technical witness the person intends to present, and state the qualifications of that witness, including a description of their educational and work background;
 - (3) if the hearing will be conducted at multiple locations, indicate the location or locations at which the witnesses will be present;
 - (4) include a copy of the direct testimony of each technical witness in narrative form, and state the estimated duration of the direct oral testimony of that witness;
 - (5) include the text of any recommended modifications to the proposed regulatory change; and
 - (6) list and attach all exhibits anticipated to be offered by that person at the hearing.
- B. The hearing officer may enforce the provisions of this section through such action as the hearing officer deems appropriate, including, but not limited to, exclusion of the technical testimony of any witness for whom a notice of intent was not timely filed. If such testimony is admitted, the hearing officer may keep the record open after the hearing to allow responses to such testimony. The hearing officer may also require that written rebuttal testimony be submitted prior to hearing.
- [20.1.6.202 NMAC - N, 05/01/17]

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

[20.1.6.203 NMAC - N, 05/01/17]

20.1.6.204 PARTICIPATION BY GENERAL PUBLIC:

- A. Any member of the general public may testify at the hearing. No prior notification is required to present non-technical testimony at the hearing. Any such member may also offer non-technical exhibits in connection with their testimony, so long as the exhibit is not unduly repetitious of the testimony.
- B. A member of the general public who wishes to submit a written statement for the record, in lieu of providing oral testimony at the hearing, shall file the written statement prior to the hearing or submit it at the hearing. Written comment must be mailed or delivered to the commission administrator.

[20.1.6.204 NMAC - N, 05/01/17]

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

[20.1.6.205 NMAC - N, 05/01/17]

20.1.6.206 PARTICIPATION BY CONFERENCE TELEPHONE OR OTHER SIMILAR DEVICE:

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

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

[20.1.6.206 NMAC - N, 05/01/17]

20.1.6.207 MOTIONS:

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

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

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

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

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

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

[20.1.6.207 NMAC - N, 05/01/17]

20.1.6.208 - 20.1.6.299 [RESERVED]

20.1.6.300 HEARING PROCEDURES - CONDUCT OF HEARINGS:

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

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

- (1) The hearing shall begin with an opening statement from the hearing officer. The statement shall identify the nature and subject matter of the hearing and explain the procedures to be followed.
 - (2) The hearing officer may allow a brief opening statement by any party who wishes to make one.
 - (3) Unless otherwise ordered, the petitioner shall present its case first.
 - (4) The hearing officer shall establish an order for the testimony of other participants. The order may be based upon notices of intent to present technical testimony, sign-in sheets and the availability of witnesses who cannot be present for the entire hearing.
 - (5) If the hearing continues for more than one day, the hearing officer shall provide an opportunity each day for testimony from members of the general public. Members of the general public who wish to present testimony should indicate their intent on a sign-in sheet.
 - (6) The hearing officer may allow a brief closing argument by any person who wishes to make one.
 - (7) At the close of the hearing, the hearing officer shall determine whether to keep the record open for written submittals in accordance with 20.1.6.304 NMAC. If the record is kept open, the hearing officer shall determine and announce the subject(s) on which submittals will be allowed and the deadline for filing the submittals.
- C. If the hearing is conducted at multiple locations, the hearing officer may require the petitioner's witnesses to summarize their testimony or be available for cross-examination at each location. Other participants are not required to testify at more than one location, and the hearing officer may prohibit a witness from testifying at more than one location.
- [20.1.6.300 NMAC - N. 05/01/17]

20.1.6.301 TESTIMONY AND CROSS-EXAMINATION:

- A. All testimony will be taken under oath or affirmation which may be accomplished in mass or individually.
 - B. The hearing officer shall admit any relevant evidence, unless the hearing officer determines that the evidence is incompetent or unduly repetitious. The hearing officer shall require all oral testimony be limited to the position of the witness in favor of or against the proposed rule.
 - C. Any person who testifies at the hearing is subject to cross-examination on the subject matter of his or her direct testimony and matters affecting his or her credibility. Any person attending the hearing is entitled to conduct such cross-examination as may be required for a full and true disclosure of matters at issue in the hearing. The hearing officer may limit cross-examination to avoid harassment, intimidation, needless expenditure of time or undue repetition.
- [20.1.6.301 NMAC - N. 05/01/17]

20.1.6.302 EXHIBITS:

- A. Any person offering an exhibit at hearing other than a document filed and served before the hearing shall provide at least an original and 15 copies for the commission, and a sufficient number of copies for every other party.
 - B. All exhibits offered at the hearing shall be marked with a designation identifying the person offering the exhibit and shall be numbered sequentially. If a person offers multiple exhibits, he shall identify each exhibit with an index tab or by other appropriate means.
 - C. Large charts and diagrams, models, and other bulky exhibits are discouraged. If visual aids are used, legible copies shall be submitted for inclusion in the record.
- [20.1.6.302 NMAC - N. 05/01/17]

20.1.6.303 TRANSCRIPT OF PROCEEDINGS:

- A. A verbatim transcript shall be made of the hearing, including any deliberations. The cost of the original transcript of the proceeding and of providing a copy for each commission member shall be borne by the petitioner.
 - B. Any person may obtain a copy of the transcript of a proceeding. It shall be obtained directly from the court reporter, and the cost of the transcript shall be paid directly to the source.
- [20.1.6.303 NMAC - N. 05/01/17]

20.1.6.304 POST-HEARING SUBMISSIONS: The hearing officer may allow the record to remain open for a reasonable period of time following the conclusion of the hearing for written submission of additional evidence, comments and arguments, revised proposed rule language, and proposed statements of reasons. The hearing officer's determination regarding post-hearing submissions shall be announced at the conclusion of the hearing. In considering whether the record will remain open, the hearing officer shall consider the reasons why the material was not presented during the hearing, the significance of the material to be submitted and the necessity for a prompt decision.
[20.1.6.304 NMAC - N, 05/01/17]

20.1.6.305 HEARING OFFICER'S REPORT: If the commission directs, the hearing officer shall file a report of the hearing. The report shall identify the issues addressed at the hearing, identify the parties' final proposals, and the evidence supporting or opposing those proposals, including discussion or recommendations as requested by the commission, and shall be filed with the commission administrator within the time specified by the commission. The commission administrator shall promptly notify each party that the hearing officer's report has been filed and shall provide a copy of the report along with a notice of any deadline set for comments on that report.
[20.1.6.305 NMAC - N, 05/01/17]

20.1.6.306 DELIBERATION AND DECISION:

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

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

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

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

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

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

[20.1.6.306 NMAC - N, 05/01/17]

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

[20.1.6.307 NMAC - N, 05/01/17]

20.1.6.308 - 20.1.6.399 [RESERVED]

20.1.6.400 APPEAL OF REGULATIONS:

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

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

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

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

[20.1.6.400 NMAC - N, 05/01/17]

20.1.6.401 STAY OF COMMISSION REGULATIONS:

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

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

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

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

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

[20.1.6.401 NMAC - N, 05/01/17]

20.1.6.402 - 20.1.6.499 [RESERVED]

20.1.6.500 PREFERRED FORMAT:

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

**IN THE MATTER OF PROPOSED
AMENDMENTS TO _____ NMAC**

[Name of Petitioner],
Petitioner.

CERTIFICATE OF SERVICE

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

HISTORY OF 20.1.6 NMAC:

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

History of Repealed Material: [RESERVED]

Other History: [RESERVED]