

STATE OF NEW MEXICO
WATER QUALITY CONTROL COMMISSION
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*GUIDELINES FOR
WATER QUALITY CONTROL COMMISSION REGULATION HEARINGS*
(Approved November 10, 1992; Amended June 8, 1993)

PART I
GENERAL PROVISIONS

101. SCOPE. - - These guidelines govern the procedures to be followed by the Commission, and by participants before the Commission, in connection with all rulemaking hearings.

102. PURPOSE. - - The purposes of these guidelines, are:

A. to encourage participation in the hearings conducted by the, Commission for the promulgation of regulations;

B. to make possible the effective presentation of the evidence and points of view of parties and members of the general public;

C. to allow all interested participants a reasonable opportunity to submit data, views, arguments orally or in writing; and

D. to assure that Commission hearings are conducted in a fair and equitable manner.

103. DEFINITIONS. - - As used in these guidelines:

A. "Administrative Secretary" means the Department employee designated by the Secretary of Environment to provide staff support to the Commission;

B. "Commission" means the Water Quality Control Commission;

C. "constituent agency" means any or all agencies of the state defined as such under the Water Quality Act, Sections 74-6-1 et. Seq., NMSA 1978;

D. "Department" means the New Mexico Environment Department;

E. "exhibit" means any document or tangible item submitted for inclusion in the Hearing Record;

F. "general public" includes any person attending a hearing who has not submitted a notice of intent to present technical testimony;

G. "Hearing Officer" means the person designated by the Commission to conduct a hearing under these guidelines;

H. "Hearing Record" means:

1. the Transcript of Proceedings; and
2. the Record Proper;

I. "participant" means any person who participates in a rulemaking proceeding before the Commission;

J. "person" means an individual or any entity, including federal, state, and local government entities, however organized;

K. "petitioner" means the person who petitioned the Commission for the regulatory change that is the subject of the hearing;

L. "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. statements for the public record;
7. the Hearing Officer's report, if any;
8. post-hearing submissions, if allowed;
9. the audio tapes (or an appropriate extract of the tapes) of the meeting(s) at which the Commission deliberated on the adoption of the proposed regulatory change; and
10. the Commission's decision and the reasons therefor;

M. "regulation" means any rule, regulation, or standard promulgated by the Commission and affecting one or more persons besides the Commission or the constituent agencies, 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;

N. "regulatory change" means the adoption, amendment or repeal of a regulation;

O. "technical testimony" means scientific, engineering, economic or other specialized testimony but does not include legal argument, general comments, or statements of policy or position concerning matters at issue in the hearing; and

P. "Transcript of Proceedings" means the verbatim record (audio tape or stenographic) of the proceedings, testimony, and argument in the regulatory 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.

104. POWERS AND DUTIES OF COMMISSION AND HEARING OFFICER. - -

A. COMMISSION. The Commission shall exercise all powers and duties prescribed under these guidelines and not otherwise delegated to the Hearing Officer or the Administrative Secretary.

B. HEARING OFFICER. The Commission shall designate a Hearing Officer for each hearing who shall exercise all powers and duties prescribed or delegated under these guidelines. The Hearing Officer may be a member of the Commission. 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 these guidelines including, but not limited to:

1. conducting hearings under these guidelines;
2. taking, admitting or excluding evidence, examining witnesses and allowing post hearing submissions;
3. making such orders as may be necessary to preserve decorum and to protect the orderly hearing process; and
4. if requested by the Commission, preparing and filing a report of the hearing, with recommendations for action.

PART II
DOCUMENT REQUIREMENTS

201. FILING AND SERVICE OF DOCUMENTS. - -

A. The filing of any document as required by these guidelines shall be accomplished by delivering the document to the Administrative Secretary.

B. Any person filing any document shall:

1. provide the Administrative Secretary with the original and ten copies of the document; and

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

C. Whenever these guidelines require service of a document, service shall be made by delivering a copy of the document the person to be served or by mailing it to that person. 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.

202. 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 Administrative Secretary, as appropriate.

B. COST OF DUPLICATION. The cost of duplicating documents shall be borne by the person seeking copies of such documents.

PART III
PREHEARING PROCEDURES

301. 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. A copy of the proposed regulatory change, indicating any language proposed to be added or deleted, shall be included in the petition.

C. The Commission shall determine, at a public meeting occurring no later than ninety (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. The denial of a petition shall not be subject to judicial review.

D. If the Commission determines to hold a public hearing on the petition, it may issue such orders specifying procedures for the conduct of the hearing, in addition to those provided by these guidelines, 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 prehearing conferences, filing direct testimony in writing prior to the hearing, or limiting testimony and cross-examination.

302. NOTICE OF HEARINGS. - -

A. The Commission shall give public notice of the hearing at least thirty (30) days prior to the hearing. Public notice shall include publication in at least one newspaper of general circulation in the area affected by the regulation publication in the New Mexico Register, and such other means of providing notice as the Commission may direct or are required by law.

B. The Commission shall mail the notice to persons who have made a written request to the Commission for advance notice of regulatory change hearings and who have provided the commission with a mailing address. Requests for such notice shall be addressed to the Administrative Secretary, and shall designate those areas of Commission activity which are of interest.

C. Public notice of the hearing shall state:

1. the subject, including a description of the proposed regulatory change, time, and place of the hearing;

2. the statutes, regulations, and procedural guidelines 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.

303. TECHNICAL TESTIMONY. - -

A. Any person including the petitioner, who intends to present technical testimony at the hearing shall, no later than ten (10) working 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 witness(es) will be present;

4. summarize, or include a copy of, the direct testimony of each technical witness and state the anticipated duration of the testimony of that witness;

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

6. list and describe, or attach, all exhibits anticipated to be offered by the person at the hearing.

B. The Hearing Officer may enforce the provisions of this rule through such action as he 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.

304. PARTICIPATION BY GENERAL PUBLIC. - -

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

B. A member of the general public who wishes to submit a written statement for the record, in lieu of providing oral testimony at the hearing, shall file the written statement prior to the hearing, or submit it at the hearing.

305. LOCATION OF THE HEARING. - - 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 of

local application within the area substantially affected by the proposal.

PART IV
HEARING PROCEDURES

401. 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 hearing and explain the procedures to be followed;

2. the Hearing Officer may allow a brief opening statement by any person 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; and

7. at the close of the hearing, the Hearing Officer shall determine whether to keep the record open for written submittals in accordance with Section 405. If the record is kept open, the Hearing Officer shall determine and announce the subject(s) on which such 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.

402. 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.

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.

403. EXHIBITS. - -

A. Any person offering an exhibit shall provide at least an original and ten copies, plus a reasonable number of additional copies for persons attending the hearing.

B. All exhibits offered at the hearing shall be marked with a designation identifying the person offering the exhibit and shall be numbered sequentially.

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.

404. TRANSCRIPT OF PROCEEDING. - -

A. Unless specified by the Commission, a verbatim transcript shall be made of the hearing. The cost of the original Transcript of Proceeding and of providing a copy for each Commission member and the Commission counsel shall be borne by the petitioner.

B. Any person may obtain a copy of the Transcript of Proceeding. It shall be obtained directly from the court reporter or, if no reporter was employed, the Administrative Secretary. The cost of the Transcript shall be paid directly to the source.

405. 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, arguments, and proposed statements of reasons. The Hearing Officer's determination 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.

406. 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, explain the testimony and make a recommendation for Commission action and shall be filed with the Administrative Secretary within the time specified by the Commission. The Administrative Secretary shall promptly notify each participant that the Hearing Officer's report has been filed and shall provide a copy of the report upon request.

407. 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 Administrative Secretary, 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. 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.

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

E. The Commission's written decision is the official version of the Commission 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.

408. NOTICE OF COMMISSION ACTION. - - The Administrative Secretary shall provide notice of the Commission's action to each of the participants, and to all other persons who have made a written request to the Commission for notification of the action taken.

PART V
APPEALS AND STAYS

501. APPEAL OF REGULATIONS. - -

A. Appeal of any regulatory change of the Commission shall be taken to the Court of Appeals within thirty (30) days after the regulation is filed in accordance with the State Rules Act.

B. The appellant shall serve a copy of the Notice of Appeal on the Commission and on each participant.

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

D. The filing of an appeal shall not act as a stay of the regulatory change being appealed.

502. STAY OF COMMISSION REGULATIONS. - -

A. The Commission may grant a stay pending appeal of any regulatory change promulgated by the Commission. The Commission may only grant a stay if a motion is filed, a hearing is held and good cause is shown.

B. In determining whether good cause is present for the granting of a stay, the Commission 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.

C. If no action is taken within ninety (90) days after filing of the motion, the Commission shall be deemed to have denied the motion for stay.

PART VI
MISCELLANEOUS PROVISIONS

601. LIBERAL CONSTRUCTION. - - These guidelines shall be liberally construed to carry out their purpose.

602. SEVERABILITY. - - If any part or application of these guidelines is held invalid, the remainder of these guidelines, or their application to other persons or situations, shall not be affected.

603. SAVINGS CLAUSE. - - These guidelines do not:

A. apply to any rulemaking hearing for which notice has been given prior to the effective date of these guidelines; nor

B. affect any regulation promulgated prior to the effective date of these guidelines, except for any amendment, supersession, or repeal thereof requested after the effective date of these guidelines.