

STATE OF NEW MEXICO
ALBUQUERQUE-BERNALILLO COUNTY AIR QUALITY CONTROL BOARD

IN THE MATTER OF THE PETITION FOR A HEARING ON THE MERITS
REGARDING AIR QUALITY PERMIT NO. 1655-M1-RV1, SMITH'S FOOD AND
DRUG CENTERS, INC.

Pat Toledo, as an individual,

Petitioner,

v.

AQCB Petition No. 2016-1

City of Albuquerque Environmental Health
Department, Air Quality Program,

Respondent

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BY: 

NOTICE OF DOCKETING

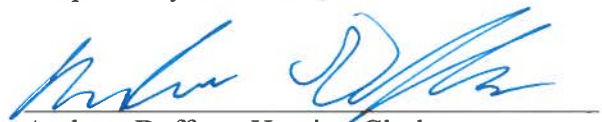
AQCB Docket No. 2016-1

AQCB Petition No. 2016-1 Received by Hearing Clerk:

March 4, 2016

The procedural rule that will be followed for this hearing is 20.11.81 NMAC, *Adjudicatory Procedures – Air Quality Control Board*, which is attached.

Respectfully submitted,



Andrew Daffern, Hearing Clerk
Air Quality Program
Environmental Health Department
P.O. Box 1293
One Civic Plaza NW, Room 3023
Albuquerque, New Mexico 87102

CERTIFICATE OF SERVICE

I hereby certify that I have e-mailed a true and correct copy of the foregoing NOTICE OF DOCKETING on this 8th day of March, 2016, to the following:

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Respectfully submitted,



Andrew Daffern, AQCB Hearing Clerk

NOTICE TO PERSONS WITH DISABILITIES: If you have a disability and require special assistance to participate in this process, please call 311 (Voice) and special assistance will be made available to you to receive any public meeting documents, including agendas and minutes. TTY users may request special assistance by calling 1-800-659-8331.

TITLE 20 ENVIRONMENTAL PROTECTION
CHAPTER 11 ALBUQUERQUE-BERNALILLO COUNTY AIR QUALITY CONTROL BOARD
PART 81 ADJUDICATORY PROCEDURES- -AIR QUALITY CONTROL BOARD

20.11.81.1 ISSUING AGENCY: Albuquerque-Bernalillo County Air Quality Control Board, c/o Environmental Health Department, P.O. Box 1293, Albuquerque, New Mexico 87103. Telephone: (505) 768-2600.
[20.11.81.1 NMAC - N, 12/16/06]

20.11.81.2 SCOPE:

A. 20.11.81 NMAC governs the following adjudicatory proceedings of the board, which are proceedings in which the board makes final, binding determinations that directly affect legal rights:

(1) petitions for hearings on the merits before the board made by permit applicants, permittees or other persons who participated in a permitting action before the department and who are adversely affected by the permitting action, as provided by the New Mexico Air Quality Control Act, Subsection H of Section 74-2-7 NMSA 1978; and

(2) any other adjudicatory proceeding subject to the jurisdiction of the board if the applicable board regulation establishes that 20.11.81 NMAC applies to the proceeding.

B. 20.11.81 NMAC does not govern the adjudicatory proceedings of the board regarding:

(1) administrative enforcement actions initiated pursuant to Air Quality Control Act 74-2-12 NMSA 1978, entitled "Enforcement; compliance orders; field citations", and any administrative enforcement action that is governed by the administrative enforcement provisions of another regulation adopted by the board;

(2) petitions for variance and related stays, which are governed by 20.11.7 NMAC, Variance Procedure; and

(3) adoption of, amendment to, and repeal of board regulations as authorized by 74-2-6 NMSA 1978, which are governed by rulemaking provisions of another regulation adopted by the board.

C. Exempt: 20.11.81 NMAC does not apply to sources within Bernalillo county that are located on Indian lands over which the board lacks jurisdiction.

[20.11.81.2 NMAC - N, 12/16/06]

20.11.81.3 STATUTORY AUTHORITY: 20.11.81 NMAC is adopted pursuant to the authority of the Air Quality Control Act, Chapter 74, Article 2 NMSA 1978, Sections 74-2-5 and 74-2-7.

[20.11.81.3 NMAC - N, 12/16/06]

20.11.81.4 DURATION: Permanent.

[20.11.81.4 NMAC - N, 12/16/06]

20.11.81.5 EFFECTIVE DATE: December 16, 2006, unless a later date is cited at the end of a section.

[20.11.81.5 NMAC - N, 12/16/06]

20.11.81.6 OBJECTIVE: The objective of 20.11.81 NMAC is to establish procedures that govern the adjudicatory proceedings of the board that are described in Subsection A of 20.11.81.2 NMAC.

[20.11.81.6 NMAC - N, 12/16/06]

20.11.81.7 DEFINITIONS: In addition to the definitions in 20.11.81 NMAC, the definitions in 20.11.1 NMAC apply unless there is a conflict between definitions, in which case the definition in 20.11.81 NMAC shall govern.

A. "30-day hearing procedure" means that the regulation that authorizes or requires the board to hold a hearing on the merits pursuant to 20.11.81 NMAC also requires the board to hold the hearing on the merits within 30 days of the timely filing of the petition for hearing.

B. "60-day hearing procedure" means that the regulation that authorizes or requires the board to hold a hearing on the merits pursuant to 20.11.81 NMAC also requires the board to hold the hearing on the merits within 60 days of the timely filing of the petition for hearing.

C. "Act" means the Air Quality Control Act, Chapter 74, Article 2 NMSA 1978, and its subsequent amendments and successor provisions.

D. "Applicant" means a person who has applied for or has been issued an air quality permit by the department, unless a different procedure is required by another board regulation.

E. **"Board"** means the Albuquerque-Bernalillo county air quality control board or its successor agency under the act.

F. **"Days"** means consecutive days except as otherwise specifically provided.

G. **"Department"** means the city of Albuquerque environmental health department, or the department's successor agency.

H. **"Docket"** means, when used as a noun, the list compiled by the hearing clerk, and includes all documents filed by or with the hearing clerk from the beginning to the end of the procedure authorized by 20.11.81 NMAC, but does not include the administrative record or the law of the case and, when used as a verb, also means the act of assigning an individual number to a newly-opened case or filing a document in and listing the document on the docket.

I. **"Document"** means any pleading, motion, response, memorandum, decision, order or other written material or tangible item that is filed or brought to or before the board for its consideration in a proceeding pursuant to 20.11.81 NMAC, but does not include the cover letter that accompanies a document transmitted for filing.

J. **"Ex parte contact"** means oral or other communication with a board member or a board hearing officer regarding the merits of an expected or pending petition or related proceeding if:

(1) the communication is made by a person who is not a board member, hearing clerk or hearing officer;

(2) the person communicating knows or has reason to know a petition will be or has been filed pursuant to 20.11.81 NMAC;

(3) the communication is made without all other parties being present or receiving the same communication received by the board member or board hearing officer; and

(4) the communication is intended to affect, or reasonably may be expected to affect the board member's or the hearing officer's opinion regarding the merits of the expected or pending petition or related proceeding.

K. **"Hearing clerk"** means the department employee designated by the director to provide staff support to the board, and is the person designated by the board to maintain the official record of the proceeding.

L. **"Hearing officer"** means the person who is appointed or otherwise authorized by the board to conduct a proceeding pursuant to 20.11.81 NMAC.

M. **"Interested participant"** means any person, other than a party, who files an entry of appearance in accordance with Paragraphs (1) and (2) of Subsection I of 20.11.81.14 NMAC.

N. **"Party"** means the petitioner, the applicant if the applicant is not the petitioner, the department, and any other person granted intervenor status by the hearing officer or board following a motion.

O. **"Petition"** means a petition filed pursuant to Subsection H of 74-2-7 NMSA 1978 and 20.11.81 NMAC.

P. **"Petitioner"** means a person who files a timely petition pursuant to Subsection H of NMSA 74-2-7 and 20.11.81 NMAC.

Q. **"Record proper" or "record"** means all documents filed by or with the hearing clerk during the proceeding authorized by 20.11.81 NMAC, and includes:

(1) the administrative record of the permitting action filed by the department;

(2) the verbatim record of the hearing (transcript or tapes, as applicable) and all exhibits offered into evidence at the hearing, whether or not admitted; and

(3) minutes or a summary of minutes, or the decision or order resulting from a hearing or board meeting at which the board deliberated or acted on any procedural or substantive issue in the proceeding.

R. **"Regulations"** means the rules promulgated by the board, as authorized by the act.

S. **"Service"** means delivering to a person that 20.11.81 NMAC requires to be served a copy of a document, exhibit or pleading by personally delivering it to that person, mailing it to that person, or, if that person agrees, by sending it by facsimile or electronic transmission to that person. If a person is represented by an attorney, service shall be made on the attorney. Service by mail is complete upon mailing the document unless service is made by mail to a party who must act within a prescribed period after being served, in which case three days shall be added to prescribed period. Service by facsimile or electronic transmission is accomplished when the transmission of the document is completed or upon acknowledgement by the recipient.

T. **"Technical evidence"** 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.

[20.11.81.7 NMAC - N, 12/16/06]

20.11.81.8 VARIANCES: The variance procedures provided by 20.11.7 NMAC shall not apply to 20.11.81 NMAC. No variance from the requirements of 20.11.81 NMAC shall be granted, unless the board is authorized by Subsection K of 20.11.2.18 NMAC, Fees, to grant a waiver from payment of the Board hearing fee.
[20.11.81.8 NMAC - N, 12/16/06]

20.11.81.9 SAVINGS CLAUSE: The filing of 20.11.81 NMAC, Adjudicatory Procedures-Air Quality Control Board, and the filing of any amendment to 20.11.81 NMAC with the state records center and archives shall not affect any action pending for violation of a city or county ordinance, a board regulation, or a permit, and shall not affect a petition filed pursuant to 20.11.81 NMAC. Prosecution for violation of a prior statute, ordinance, part or permit shall be governed and prosecuted under the statute, ordinance, part or permit wording in effect at the time the violation was committed.
[20.11.81.9 NMAC - N, 12/16/06]

20.11.81.10 SEVERABILITY: 20.11.81 NMAC shall be liberally construed to carry out its purposes. If for any reason any section, subsection, sentence, phrase, clause or wording of 20.11.81 NMAC is held to be unconstitutional or otherwise invalid by any court or the United States environmental protection agency, the decision shall not affect the validity of remaining portions of 20.11.81 NMAC.
[20.11.81.10 NMAC - N, 12/16/06]

20.11.81.11 DOCUMENTS: Documents incorporated and cited in 20.11.81 NMAC may be viewed at the Albuquerque environmental health department, Suite 3020, One Civic Plaza, 400 Marquette NW, Albuquerque, New Mexico.
[20.11.81.11 NMAC - N, 12/16/06]

20.11.81.12 GENERAL PROVISIONS:

A. Applicability of rules of civil procedure and rules of evidence: In the absence of a specific provision in 20.11.81 NMAC governing an action, the board and the board's hearing officer may look to the New Mexico Rules of Civil Procedure, NMRA 1-001 et seq., and the New Mexico Rules of Evidence, NMRA 11-101 et seq., for guidance. No provision of the rules of civil procedure shall be construed to extend or otherwise modify the authority and jurisdiction of the board.

B. Board and hearing officer powers and duties-qualification, disqualification, recusal, withdrawal:

(1) Board: The board shall exercise all powers and duties authorized and required by the act, 20.11.81 NMAC and any other board regulation if the powers and duties are not otherwise delegated by 20.11.81 NMAC to a board staff member, a hearing officer or the hearing clerk. The board or a hearing officer appointed or authorized by the board may specify procedures in addition to, or that vary from the procedures provided in 20.11.81 NMAC in order to expedite the efficient resolution of the action or to avoid obvious injustice, if the procedures do not conflict with the act or the regulations, or prejudice the rights of any party.

(2) Hearing officer: The board may appoint a hearing officer or authorize the hearing clerk to secure one or more hearing officers to perform the functions described in Paragraph (2) of Subsection B of 20.11.81.12 NMAC. From the date a proceeding is initiated pursuant to 20.11.81 NMAC, the chair or acting chair of the board shall serve as hearing officer until another hearing officer is appointed or authorized by the board and is secured by the hearing clerk. The appointment of a hearing officer shall not prevent any board member from attending or participating in any proceeding.

(a) Qualifications: A hearing officer may be an independent contractor, board counsel or a member of the board and shall not be:

(i) an employee of the department, unless employed by the department as a hearing officer; or

(ii) a person who is disqualified as a result of a condition described in Subparagraph (a) of Paragraph (3) of Subsection B of 20.11.81.12 NMAC.

(b) Functions: The hearing officer shall exercise all powers and duties required by or delegated under the act and 20.11.81 NMAC. 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 adjudication of issues arising in proceedings governed by 20.11.81 NMAC, including, but not limited to:

(i) conducting hearings pursuant to 20.11.81 NMAC;
(ii) ruling upon motions and procedural requests that do not seek final resolution of the proceeding, and issuing all necessary orders;
(iii) issuing subpoenas, as authorized by law, for the attendance and testimony of witnesses and the production of documentary evidence;
(iv) administering oaths and affirmations, examining witnesses, and admitting or excluding evidence;
(v) requiring parties to attend conferences for the settlement or simplification of issues, or the expedition of proceedings;
(vi) imposing sanctions, subject to review and approval by the board, on parties and interested participants who cause undue delay and fail to cooperate with the board; and
(vii) filing with the hearing clerk all original documents received or generated by the hearing officer.

(c) **Notice of hearing officer assignment:** If a hearing officer other than a board member is assigned as a hearing officer, the hearing clerk shall notify the parties of the name and address of the hearing officer. At the same time, the hearing clerk also shall forward to the hearing officer copies of all documents related to the petition that have been filed to date.

(3) Board member and hearing officer disqualification-recusal-withdrawal:

(a) A board member or a hearing officer shall not perform any function authorized by 20.11.81 NMAC regarding any matter in which a board member or a hearing officer:

(i) has a personal bias or prejudice concerning a party or the outcome of a proceeding;
(ii) has personal knowledge of disputed facts concerning the proceeding;
(iii) is related to a party within the third degree of relationship;
(iv) is an officer, director or trustee of a party or interested participant in the proceeding;
(v) has a financial interest in the proceeding or facility that is the subject of the proceeding or has any other conflict of interest; or
(vi) has performed prosecutorial or investigative functions in connection with a permitting action at issue in the proceeding.

(b) In making its decision regarding whether a board member or hearing officer should be disqualified or recuse himself or herself, the board and hearing officer may rely on applicable legal authority

(c) Disqualification, recusal and withdrawal:

(i) Any party, for a cause included in Subparagraph (a) of Paragraph (3) of Subsection B of 20.11.81.12 NMAC, may file a motion requesting the disqualification of a board member at any time before the final order is filed, or requesting the disqualification of a hearing officer at any time prior to the completion of the evidentiary hearing.

(ii) If a motion is filed pursuant to Paragraph (3) of Subsection B of 20.11.81.12 NMAC, and the motion asks that a board member be disqualified, then, within five days after the hearing officer and the challenged board member receive the motion, the challenged board member may respond to the motion in writing. Within 10 days after the hearing officer and the challenged board member receive the motion regarding the challenged board member, the hearing officer shall file a recommended decision. The board shall vote on the motion. However, the vote of the board shall not include the vote of the challenged board member. If the vote of the majority of a quorum of the board, not including the vote of the challenged board member, determines that the challenged board member is disqualified, the disqualified board member will not participate in the proceeding thereafter.

(iii) If a motion is filed pursuant to Paragraph (3) of Subsection B of 20.11.81.12 NMAC, and the motion asks that a hearing officer be disqualified, then, within 10 days after the hearing officer receives the motion, the hearing officer may respond to the motion in writing. The board shall vote on the motion. If the vote of the majority vote of a quorum of the board members determines that the challenged hearing officer is disqualified, the disqualified hearing officer will not participate in the proceeding thereafter, and the board may appoint, or authorize the hearing clerk to secure a replacement hearing officer.

(iv) A board member may recuse himself or herself from a hearing, and a hearing officer may withdraw as hearing officer, by filing written notice with the hearing clerk or by making a statement on the record at a hearing or meeting of the board. In making a decision regarding whether to recuse or withdraw, a board member or a hearing officer may rely on applicable legal authority.

C. Recording of hearings: All hearings on the merits shall be recorded by a court reporter unless otherwise directed by the board. If a hearing will be tape recorded but a party prefers to have the hearing recorded

by a court reporter in another manner, then, before the hearing, the party requesting the alternate method of reporting shall pay the court reporter for the services or make satisfactory payment arrangements with the court reporter. If a hearing is recorded by a court reporter, the recording of the court reporter approved by the board or the hearing officer, or arranged by the hearing clerk will be the sole official recording of the hearing. If a transcription is made by the court reporter, then the person who requested the transcription shall pay the court reporter. Payment for the transcription shall include payment for delivery of the original transcription to the hearing clerk. The hearing clerk shall make the transcription part of the record proper, which is a public record except as otherwise provided by law.

D. Participation by conference, telephone or other similar device: A member of the board may participate in a meeting of the board by means of a conference telephone or other similar communications equipment when a medical or emergency situation exists that makes it extremely difficult or impossible for the member to attend the meeting in person, provided that each member participating by conference telephone or other device 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 are able to hear any member of the board who speaks at the meeting. A request to be present and vote by telephone or other similar device must be made by the member to the chair or acting chair of the board by the member. A board member who wishes to participate in a meeting in this manner must receive permission from the chair or acting chair of the board sufficiently in advance of the meeting so the hearing clerk can arrange for an adequate telephone hookup. The chair or acting chair shall determine whether a qualifying medical or emergency situation exists. A board member's participation by such means shall constitute presence in person at the meeting. This provision may be used only to allow a member to constitute a quorum for the purposes of choosing a hearing officer for a hearing or hearings; scheduling or rescheduling a meeting or hearing; and voting on those limited issues.

E. Ex parte contact: At no time before a petition is expected to be filed pursuant to 20.11.81 NMAC, and at no time between the filing of a petition and the final decision of the board or withdrawal of the petition or related permit action shall any person other than the hearing officer or hearing clerk have ex parte contact with a board member or the hearing officer regarding the merits of the expected or pending petition or related proceeding. This prohibition does not apply to a hearing officer's consideration of, and decision regarding a motion filed pursuant to 20.11.81 NMAC.

F. Computation and extension of time:

(1) **Computation of time:** In computing any period of time prescribed or allowed by 20.11.81 NMAC, 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 city of Albuquerque or Bernalillo county holiday, in which event, the time shall be extended until the end of the next day which is not a Saturday, Sunday, or legal city of Albuquerque or Bernalillo county holiday. Whenever a party must act within a prescribed period after service upon that party, and service is by mail, three days shall be added to the prescribed period. The three-day extension does not apply to a deadline established by the act. Whenever a party must act within a prescribed period after service upon that party, and service is by facsimile or electronic transmission, no days shall be added to the prescribed period.

(2) **Extension of time:** Upon timely motion of a party to the proceeding, for good cause shown, and after consideration of prejudice to other parties, the hearing officer or the board, as appropriate for the stage of the proceeding at the time, may grant an extension of time for filing any document. No extension shall be granted regarding a deadline established by the act or an applicable regulation, except the petitioner may waive the deadline for holding the hearing by the deadline established by the act or an applicable regulation.

G. Documents; filing, service, form and examination:

(1) **Filing of documents:** Except as otherwise provided, a party filing a document shall file the original and nine copies with the hearing clerk and shall serve a copy thereof upon the hearing officer, the board's legal counsel, and all other parties. If the hearing officer is also a board member, the party shall serve the document upon the board chair. All documents shall be filed at least five days (for a 30-day hearing procedure) or seven days (for a 60-day hearing procedure) before the hearing at which the hearing officer or the board will consider the matter. A certificate of service with the following heading or "caption", completed appropriately, shall accompany each filed document.

STATE OF NEW MEXICO
ALBUQUERQUE-BERNALILLO COUNTY
AIR QUALITY CONTROL BOARD

IN THE MATTER OF THE PETITION FOR

A HEARING ON THE MERITS REGARDING
AIR QUALITY PERMIT NO. ____

[Name of Petitioner:] _____, Petitioner

(2) **Service of documents:** Except as otherwise provided, all documents may be served personally, by facsimile or by express or first class mail. Delivery receipts shall be kept as proofs of service, and shall be produced immediately upon the request of the hearing officer, the board or an opposing party.

(3) **Form of documents:** Unless otherwise provided by order of the hearing officer or the board, all documents, except exhibits, shall be prepared on 8 1/2 x 11-inch white paper, printed double-sided if feasible, and, where appropriate, the first page of every document shall contain the caption or heading required by Paragraph (1) of Subsection G of 20.11.81.12 NMAC.

(4) **Documents issued by board or hearing officer:** All documents issued by the board or hearing officer shall be filed with the hearing clerk. The hearing clerk shall promptly serve copies of the documents upon all parties and interested participants.

(5) **Examination of documents filed-cost:**

(a) **Examination allowed:** Subject to the provisions of law restricting the public disclosure of confidential or other exempt or protected information, during normal business hours any person may inspect and copy any document filed in any proceeding filed pursuant to 20.11.81 NMAC. Inspection shall be allowed consistent with the requirements of the Inspection of Public Records Act, NMSA 1978, Sections 14-2-1 through 14-2-12, and may be limited as provided by the Air Quality Control Act, NMSA 1978, Sections 74-2-1 through 74-2-17. The hearing clerk shall make the appropriate documents available for inspection and copying.

(b) **Cost of duplication:** The cost of duplicating documents or tapes filed in any proceeding shall be borne by the person seeking the copies. If the requested documents are available in an electronic format, the department will provide a copy by electronic transmission without charge, or the documents will be copied onto a CD, DVD, or other electronic media, if provided by the requester, without charge.

H. Motions:

(1) **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 written motion shall be accompanied by an affidavit, certificate or other evidence relied upon, and shall be filed and served as required by Paragraphs (1) and (2) of Subsection G of 20.11.81.12 NMAC.

(2) **Unopposed motions:** An unopposed motion shall state that the concurrence or agreement of all other parties was obtained. The party that filed the motion shall submit to the hearing officer for review a proposed order that has been approved by all parties.

(3) **Opposed motions:** Any opposed motion shall state either that concurrence or agreement of all other parties was sought and denied, or why concurrence was not sought. A memorandum brief in support of an opposed motion may be filed with the motion.

(4) **Response to motions:** Any party upon whom an opposed motion is served shall have 10 days (for a 30-day hearing procedure) or 15 days (for a 60-day hearing procedure) after service of the motion to file a response. Any other party who fails to file a timely response shall be deemed to have waived any objection to the granting of the motion.

(5) **Reply to response:** The moving party may submit, but is not required to submit a reply to any response within five days (for a 30-day hearing procedure), or 10 days (for a 60-day hearing procedure) after service of the response.

(6) **Decision regarding motions:** All motions may be decided by the hearing officer, in the hearing officer's sole discretion, without a hearing. Within five days (for a 30-day hearing procedure) or 10 days (for a 60-day hearing procedure) after being served with a copy of the motion, a party upon whom service has been made may file a written request asking that a hearing be held. However, the hearing officer shall refer all motions that would effectively dispose of the petition to the board for a decision.

(7) **The hearing officer may refer any motion to the board for decision.** A procedural motion may be ruled upon before the expiration of the time for response. Any response regarding the procedural motion received after the decision is made shall be treated as a request for reconsideration of the ruling.

[20.11.81.12 NMAC - N, 12/16/06]

20.11.81.13 [Reserved]

20.11.81.14 PREHEARING PROCEDURES:

A. Initiation of petition hearing; filing and content of petition: A petition for a hearing on the merits shall be initiated by filing a petition as required by Paragraph (1) of Subsection G of 20.11.81.12 NMAC. The petitioner shall:

- (1) sign the petition under oath or affirmation and attest to the truth of the information contained therein; and
- (2) file the original and nine copies of the petition with the board and serve a copy of the petition on the department.

B. Petition requirements and contents-fee:

(1) **Filing fee.** At the time the petition is filed, the petitioner shall pay the board hearing fee required by 20.11.2 NMAC.

(2) **Timing and contents:** A petition shall:

- (a) be filed with the board within 30 consecutive days from the date notice is given of the permitting action taken by the department, and regarding which the petition objects;
- (b) state the petitioner's name, address, telephone number, and if available, facsimile number, cellular telephone number and other contact information;
- (c) either state in what manner the petitioner participated in the permitting action that was pending before the department and how the petitioner is adversely affected by the permitting action taken by the department, or cite a board regulation other than 20.11.81 NMAC that authorizes the petitioner to request a hearing on the merits pursuant to 20.11.81 NMAC, and state how, under the other regulation, the petitioner qualifies for a hearing on the merits conducted pursuant to 20.11.81 NMAC;
- (d) if a permitting action is being challenged, identify the specific permitting action appealed from, specify the portions of the permitting action to which petitioner objects, and state the factual and legal basis of petitioner's objections to the permitting action taken by the department;
- (e) state the remedy petitioner is seeking, the legal basis for the remedy, and how granting the remedy is within the air quality jurisdiction of the board; and
- (f) attach a copy of the permitting action or other action regarding which petitioner is filing a petition.

C. Hearing delay and waiver: A petitioner may waive petitioner's right to have the hearing begin by the deadline established by the act or applicable regulation in order to negotiate with the department or for other good reason as determined by either the hearing officer or the board, as appropriate for the stage of the proceeding. The petitioner's waiver must be filed seven days (whether for a 30-day hearing procedure or for a 60-day hearing procedure) before expiration of the deadline for beginning the hearing. The waiver will stay all deadlines established in 20.11.81 NMAC for up to an additional 30 days (whether for a 30-day hearing procedure or for a 60-day hearing procedure), as determined by the hearing officer or the board, as appropriate for the stage of the proceeding. The stay of deadlines may be extended for an additional period for good reason as determined by the hearing officer or the board, as appropriate for the stage of the proceeding.

D. Response of department: Within 15 days (for a 30-day hearing procedure) or 30 days (for a 60-day hearing procedure) after receipt of a petition filed pursuant to 20.11.81 NMAC, if a permitting action is being challenged, the department shall perform the following actions.

(1) The department shall file with the hearing clerk the administrative record of the permitting action that is the subject of the petition. Before the department files the administrative record, the parties may stipulate in writing to the portions of the record that the department will file with the board. The department shall serve only the index of the record on the other parties.

(2) The department shall deliver to the hearing clerk a list of all persons who, within the preceding 12 months, have expressed in writing to the department an interest in the facility or the permitting action that is the subject of the petition or who participated in a public information meeting or hearing on the permitting action and who have provided a legible written name and current mailing address at the public information meeting or hearing.

(3) The department shall file an answer to the petition, responding to each objection in the petition.

E. Notice of docketing:

(1) **Docketing Notice:** As soon as practicable after receipt of a petition, the hearing clerk shall issue and serve upon the parties and each board member a notice of docketing, which shall include the caption required by Paragraph (1) of Subsection G of 20.11.81.12 NMAC, the docket number of the case, and the date the petition was received by the hearing clerk. A copy of 20.11.81 NMAC shall be included with the notice of docketing sent to the petitioner.

(2) **Untimeliness:** The hearing clerk shall docket every petition, without regard to whether it appears to be timely. However, the board or any party may move to dismiss an untimely petition.

F. Scheduling the hearing on the merits:

(1) **Hearing date:** The hearing officer shall schedule the hearing on the merits to begin no later than the deadline required by the act or applicable regulation, unless a waiver is filed by the petitioner and a stay of deadlines is granted pursuant to Subsection C of 20.11.81.14 NMAC. The waiver must be filed with the board, and served as required by 20.11.81 NMAC before the expiration of the deadline for beginning the hearing on the merits.

(2) **Scheduling order:** Unless the deadline for beginning the hearing on the merits has been waived and a stay of deadlines is granted, no later than 20 days (for a 30-day hearing procedure) or 30 days (for a 60-day hearing procedure) before the hearing begins, the hearing officer shall issue a scheduling order setting the date, time and location of the hearing. The scheduling order may include other procedural matters. Jointly or singly, and before the hearing officer issues the scheduling order, the parties may submit to the hearing officer, at least five days (for a 30-day hearing procedure) or 10 days (for 60-day hearing procedure) before the deadline for issuing the scheduling order, a request regarding the date and location of the hearing and other procedural matters, such as the assignment of a non-board-member hearing officer. At a board meeting, the hearing officer may consult with the board regarding procedural matters.

G. Public notice of hearing:

(1) **Publication:** Upon direction from the board or hearing officer, the hearing clerk shall prepare a notice of hearing setting forth the date, time and location of the hearing, a brief description of the petition, and information on the requirements for entry of appearance and for submitting a statement of intent to present evidence, and

(a) no later than 10 days (for a 30-day hearing procedure) or 15 days (for a 60-day hearing procedure) before the hearing date, send a copy of the notice of hearing, with a request for publication, to at least one newspaper of general circulation that is distributed at least weekly in Bernalillo county;

(b) no later than 10 days (for a 30-day hearing procedure) or 15 days (for a 60-day hearing procedure) before the hearing date, mail a copy of the notice of hearing to each party, to each interested participant who has filed an entry of appearance, and to each person who within the previous 12 months has expressed in writing to the department or the board an interest in the facility or permitting action that is the subject of the petition; and

(c) immediately upon receipt of an entry of appearance that is received after the initial mailing, mail a copy of the notice of hearing to each additional interested participant.

(2) **Certification:** After the notice of hearing has been distributed as required by Subsection G of 20.11.81.14 NMAC, the hearing clerk shall file with the record proper an affidavit certifying how and when notice was given and shall attach to the affidavit a copy of the notice of hearing and affidavits of publication.

H. Statement of intent to present technical evidence:

(1) **Requirement to file:** No later than 10 days (for a 30-day hearing procedure) or 15 days (for 60-day hearing procedure) days before the hearing, any person who wishes to present technical evidence at the hearing shall file with the hearing clerk and serve on all parties a statement of intent to present technical evidence.

(2) **The statement of intent to present technical evidence shall include:**

(a) the name of the person filing the statement;

(b) a statement clarifying whether the person filing the statement supports or opposes the petition at issue;

(c) the name of each witness;

(d) an estimate of the length of the direct testimony of each witness;

(e) a summary or outline of the anticipated direct testimony of each witness;

(f) a list of exhibits, if any, to be offered into evidence at the hearing on the merits; and

(g) a copy of each exhibit to be offered into evidence at the hearing on the merits.

I. Participation by persons other than parties:

(1) **Interested participants; entry of appearance:** No later than seven days (for a 30-day hearing procedure) or 10 days (for a 60-day hearing procedure) before the beginning of the hearing on the merits, any person who wishes to be treated as an interested participant and to cross-examine witnesses at the hearing shall file an entry of appearance with the hearing clerk and serve the entry of appearance upon all parties. For purposes of Paragraph (1) of Subsection I of 20.11.81.14 NMAC, a statement of intent to present technical evidence filed pursuant to Subsection H of 20.11.81.14 NMAC shall be considered an entry of appearance if the person has not previously filed a separate entry of appearance. The entry of appearance shall identify the person wishing to be treated as an interested participant, provide the address of the person wishing to be treated as an interested participant, and list each individual who may appear on behalf of that person.

(2) **Participation by the general public; General non-technical statement:** Any person who has not timely filed either an entry of appearance as an interested participant pursuant to Subsection I of 20.11.81.14 NMAC or a statement of intent to present technical evidence pursuant to Subsection H of 20.11.81.14 NMAC, may present a general non-technical statement by meeting the following conditions.

(a) Any member of the general public may testify at the hearing. No prior notification is required to present general non-technical statements in support of or in opposition to the petition. A member of the general public also may offer exhibits related to his testimony, as long as the exhibit is non-technical in nature and does not unduly repeat other 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 with the hearing clerk before the hearing begins. If a member of the general public who testified or submitted a written statement wants to receive written notice of the decision of the board, then, at the hearing at which the member of the general public testified or submitted the written statement, the member of the general public must provide the hearing clerk with a legible written name and current mailing address.

J. Pre-hearing discovery: Discovery shall be guided by the provisions of the New Mexico rules of civil procedure in effect at the time of the hearing. Formal discovery is not a right, and, therefore, is discouraged and shall only be allowed by order of the hearing officer if the following conditions exist.

(1) **Grounds for discovery:** Formal discovery shall only be authorized if the hearing officer determines:

(a) the type of discovery sought will not unreasonably delay the proceeding and is not unreasonably burdensome or unreasonably expensive; and

(b) the information to be obtained is relevant and is not otherwise reasonably obtainable, or may be lost, or may become unavailable.

(2) **Order for discovery:** Upon motion for discovery by a party and determination by the hearing officer that the motion should be granted, the hearing officer shall issue an order for the taking of discovery. The order shall include all terms and conditions imposed by the hearing officer.

[20.11.81.14 NMAC - N, 12/16/06]

20.11.81.15 [Reserved]

20.11.81.16 HEARING PROCEDURES:

A. Hearing on the merits:

(1) **Location of the hearing on the merits:** Unless otherwise ordered by the board or hearing officer, the hearing on the merits normally shall be held in the Vincent E. Griego Chambers, on the lower level of the Albuquerque-Bernalillo County Government Center located at One Civic Plaza, near the intersection of Fourth Street and Marquette Avenue NW, in Albuquerque, New Mexico, or in another adequate city of Albuquerque, county of Bernalillo, or other publicly-owned location.

(2) **Postponement of hearing:** No request for postponement of a hearing shall be granted unless the hearing officer or the board determines either that all parties consent or that good cause has been proved.

B. Conduct of hearing on the merits:

(1) The hearing officer shall conduct the hearing on the merits in a manner that provides a reasonable opportunity for all parties and interested persons to be heard without making the hearing unreasonably lengthy or cumbersome or burdening the record with unnecessary repetition.

(2) The hearing officer shall establish the order of testimony, except that the petitioner shall present its case first. The hearing officer may allow brief opening and closing statements.

C. Burden of persuasion: In a hearing on the merits, the petitioner has the burden of proof, the burden of going forward with the evidence and the burden of proving by a preponderance of the evidence the facts relied upon by the petitioner to justify the relief sought in the petition. Following the establishment of a prima facie case by the petitioner, any person opposed to the relief sought in the petition has the burden of going forward with any adverse evidence and showing why the relief should not be granted.

D. Evidence:

(1) **General:** The hearing officer shall admit any relevant evidence, unless the hearing officer determines that the evidence is unduly repetitious, otherwise unreliable or of little probative value.

(2) **Examination of witnesses:** Witnesses shall be examined orally, under oath or affirmation, and may be examined by the hearing officer and members of the board. At the hearing on the merits, the board members, hearing officer, parties and interested participants shall have the right to cross-examine a witness. The

hearing officer may limit cross-examination that is unduly repetitious, harassing or beyond the scope of the direct testimony of the witness.

(3) **Exhibits:** All exhibits offered in evidence shall be marked with a designation identifying the person offering the exhibit, and shall be individually numbered serially. Large charts and diagrams, models and other bulky exhibits are discouraged. Exhibits should be limited to 8 1/2 X 11 inches, or be capable of being folded to that size, unless otherwise necessary for adequate presentation of evidence. Any person offering an exhibit shall provide at least an original and 15 copies for the board, the other parties and persons attending the hearing.

(4) **Official notice:** The hearing officer may take official notice of any matter that may be judicially noticed in the New Mexico courts. In the hearing, parties shall be given adequate opportunity to show that such facts have been erroneously noticed.

E. Objections and offers of proof:

(1) **Objection:** Any objection concerning the conduct of the hearing on the merits may be stated during the hearing, either orally or in writing. The party raising the objection must make a short statement of the grounds for the objection. The ruling by the hearing officer on any objection and the reasons given for the ruling shall be part of the record.

(2) **Offer of proof:** Whenever the hearing officer excludes evidence from the record, the party offering the evidence may make an offer of proof, which shall be included in the record. The offer of proof for excluded oral testimony shall consist of a brief statement describing the nature of the evidence excluded and what such evidence would have proven. The offer of proof for excluded documents or exhibits shall consist of the insertion in the record of the documents or exhibits excluded.

[20.11.81.16 NMAC - N, 12/16/06]

20.11.81.17 [Reserved]

20.11.81.18 POST-HEARING PROCEDURES:

A. Filing the transcript: Unless the board orders the hearing to be tape recorded, or recorded by other means, the hearing shall be transcribed verbatim by a court reporter. Any person, other than the board, who wants a copy of a transcript from the court reporter, shall pay the court reporter for the transcript copy. Any person, other than the board, who wants a copy of hearing tapes must arrange with the hearing clerk to have the tapes copied and shall pay for the copy of the tapes before the hearing clerk delivers the copy of the tapes to the person requesting the copy.

B. Proposed findings of fact and conclusions of law: The hearing officer may allow the record to remain open for a reasonable period of time after the conclusion of the hearing on the merits in order to allow any party or interested participant to submit proposed findings of fact and conclusions of law and a closing argument, but the hearing officer shall not allow the record to remain open solely because closing arguments will be made before the board. At the conclusion of the evidentiary hearing held by the hearing officer, the hearing officer shall state whether the parties may submit findings, conclusions and closing arguments and the deadlines for submission. All such submissions shall be in writing, shall be served upon all parties, and shall contain adequate references to the record and authorities relied upon. After the conclusion of the evidentiary hearing before the hearing officer, no new evidence shall be presented unless specifically allowed by the hearing officer for good cause.

C. Recommended decision: If the board directs, the hearing officer shall issue a recommended decision within a period established by the board. The recommended decision shall contain the hearing officer's findings of fact, conclusions regarding all material issues of law or discretion, reasons for the recommended decision, and a proposed final order. Upon receipt of the hearing officer's recommended decision, the hearing clerk shall forward a copy to all parties and to the board. At the board's or the hearing officer's discretion, any party or interested participant may file comments regarding the hearing officer's recommended decision.

D. Deliberation and decision:

(1) **Deliberation:** At the end of the hearing on the merits or at a board meeting, the board shall reach a final decision on each adjudicatory matter.

(a) If allowed by the Open Meetings Act, Chapter 10, Article 15 NMSA 1978, the board may deliberate in closed session. However, any final action must occur in an open meeting.

(b) If a quorum of the board attended the hearing and the hearing notice indicated that the board may act at the conclusion of the hearing, the board may immediately deliberate and act on the matter.

(c) If the board does not reach a decision at the hearing on the merits or at a board meeting held promptly after the hearing, then, after the hearing clerk receives the transcript, the hearing clerk shall promptly provide a copy of the transcript and exhibits to the hearing officer and to board members who did not attend the

hearing and who are qualified to vote on the decision. If requested, the hearing clerk shall provide a copy of the transcript to other board members and board counsel. The hearing clerk shall notify all parties and interested participants of the availability of the transcript.

(2) **Final order of the board:** After the board has reached a decision regarding the petition, the board shall direct a board member, the hearing officer, the board's counsel or a party to prepare a final order.

(a) The board may approve the final order at the conclusion of the hearing on the merits if a quorum of the board members is present and a majority of the board members present votes in favor of the final order; at a meeting of the board; or, after a decision of the board, by signature of the final order by the board chair.

(b) The final order shall contain findings of fact, conclusions of law, an order based on the findings and conclusions, and a statement regarding the availability of appeal, as authorized by 74-2-9 NMSA 1978. If a recommended decision was prepared, the board may adopt, modify or set aside the recommended decision and state the board's reasons for adopting, modifying or setting aside the recommended decision.

(c) The hearing clerk shall promptly send copies of the final order to each party and interested participant, and to all other persons who have made written requests for notification of the action taken.

E. Judicial review: Judicial review of the final order shall be as provided by law. The filing of an appeal pursuant to 74-2-9 NMSA 1978 does not stay the final order, unless otherwise ordered by the board or a court, as appropriate, depending on which entity has jurisdiction at the time the stay is requested.

F. Preparation of record proper: The preparation of the record proper for an appeal or for any other reason shall be the responsibility of the hearing clerk. The appellant shall make satisfactory arrangements with the hearing clerk, including paying for copying, including transcript costs, before the hearing clerk prepares the record proper.

[20.11.81.18 NMAC - N, 12/16/06]

20.11.81.19 [Reserved]

20.11.81.20 ALTERNATE RESOLUTION:

A. Summary procedures:

(1) **Use of summary procedures:** The board may dispose of a petition after an expedited public hearing if a party makes a written request that the board decide the merits of the petition solely on legal arguments presented in written briefs and oral arguments.

(2) **Expedited hearing:** If the hearing officer determines that the request has a likelihood of success and could fairly expedite the resolution of the proceeding, the hearing officer may allow the parties and interested participants to brief the issue and present oral arguments at an expedited public hearing, and then present the issue to the board for a decision. If an expedited hearing is conducted, the hearing officer shall:

(a) assure that public notice is given in accordance with Subsection G of 20.11.81.14 NMAC, and include in the public notice instructions for persons other than parties who wish to participate in the oral argument to submit a statement of intent equivalent to the statement provided in Paragraph (2) of Subsection H of 20.11.81.14 NMAC; and

(b) allow the public to attend the expedited hearing but may limit presentations at the hearing to oral arguments by parties and interested participants regarding the specific issue before the board.

(3) **Decision:** After an expedited hearing, the board may either decide the matter and issue a final order, or, if the board decides not to dispose of the matter, the board shall proceed with a full hearing as provided by 20.11.81.16 NMAC.

B. Withdrawal:

(1) **Notice of withdrawal:** At any time before a final decision is made by the board, the petitioner may withdraw the petition or the department may withdraw the permitting action that is the subject of the proceeding. Withdrawal may be accomplished by filing a notice of withdrawal with the board and serving a copy of the notice on all other parties and interested participants. Within five days (for a 30-day hearing procedure) or 10 days (for a 60-day hearing procedure) after receipt of the notice of withdrawal, a party or interested participant may file a written objection to the notice of withdrawal. If an objection is filed, the hearing officer or the board, depending on the stage of the hearing, shall rule on the notice of withdrawal.

(2) **Effect of withdrawal:** The result of a notice of withdrawal that is not opposed or has been approved by the board is that:

(a) when a petitioner withdraws a petition for a hearing on the merits, the permitting action becomes final; and

(b) when the department withdraws a permitting action, the petition is vacated and the agency must issue a new permitting action within 60 days unless either the board approves a different deadline or the applicant withdraws its application. When a new permitting action occurs, a new right to file a petition for hearing on the merits is available pursuant to 20.11.81 NMAC.

C. Settlement: The board encourages the settlement of a proceeding at any time if the settlement is consistent with the provisions and objectives of the act and the regulations. The parties may ask the board to stay a proceeding authorized by 20.11.81 NMAC while settlement negotiations are being held. The board may approve a settlement that modifies a permitting action only after evidence supporting such modification is presented at a public hearing. The department, however, may withdraw a disputed permitting action and take another permitting action, which will give rise to a new right to file a petition for hearing on the merits pursuant to 20.11.81 NMAC. [20.11.81.20 NMAC - N, 12/16/06]

HISTORY OF 20.11.81 NMAC

Pre-NMAC History: None

History of Repealed Material: [Reserved]

NMAC History: [Reserved]