

ALBUQUERQUE-BERNALILLO COUNTY RECEIVED
AIR QUALITY CONTROL BOARD ENVIRONMENTAL HEALTH

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**IN THE MATTER OF THE PETITION TO ADOPT A NEW REGULATION,
20.11.80 NMAC, *ADJUDICATORY PROCEDURES – ENVIRONMENTAL
HEALTH DEPARTMENT – ADMINISTRATIVE ENFORCEMENT – HEARINGS
BY DIRECTOR.***

AQCB Petition No. 2011-4

**City of Albuquerque,
Petitioner.**

**Petition to Adopt 20.11.80 NMAC, *Adjudicatory Procedures – Environmental Health
Department – Administrative Enforcement – Hearings by Director***

The City of Albuquerque (“City”), by and through the Air Quality Division (“Division”) of the City Environmental Health Department (“Department”), asks the Albuquerque-Bernalillo County Air Quality Control Board (“Air Board”) to adopt a new regulation, 20.11.80 NMAC, *Adjudicatory Procedures – Environmental Health Department – Administrative Enforcement – Hearings by Director*. This Petition includes a request for a hearing on these matters, and for permission to provide a court reporter and hearing officer for the hearing. The Air Board has the authority to adopt, amend or replace air quality regulations pursuant to NMSA 1978, Sections 74-2-5.B(1) and 74-2-12.

Adoption of proposed 20.11.80 NMAC is requested for the following reasons. When the Division has initiated an administrative enforcement action against a Respondent for an alleged violation of an air quality permit or air quality act, ordinance, regulation or standard, and the Division and Respondent have not been able to resolve the alleged violation, the Department Director may issue an administrative Compliance Order as authorized by the New Mexico Air Quality Control Act (Air Act), Chapter 74,

Article 2, at NMSA, Section 74-2-12(A)(1). The Compliance Order initiates an administrative enforcement action, as opposed to a civil or criminal action filed in court.

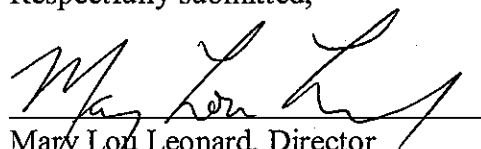
In the past, when a Respondent has received an administrative Compliance Order and requested an administrative enforcement hearing on the merits, the parties have referred to New Mexico Environmental Improvement Board (EIB) procedural regulation 20.1.5 NMAC, *Adjudicatory Procedures* - [NM] *Environment Department*. The EIB regulation was adopted to establish administrative adjudicatory procedures for at least six separate state acts, including the New Mexico Air Quality Control Act, the Hazardous Waste Act, the Solid Waste Act, the Groundwater Protection Act and the Tire Recycling Act. Because the EIB regulation addresses a wide range of subjects, laws and terminology, some confusion has arisen regarding the procedures and terminology that should be applied to administrative enforcement actions initiated by the City's Environmental Health Department Director.

Proposed 20.11.80 NMAC provides the procedures that will apply to adjudicatory enforcement proceedings that are conducted by or on behalf of the Environmental Health Department Director, as authorized and required by the NM Air Quality Control Act at NMSA 1978, Sections 74-2-4, 74-2-5 and 74-2-12; the Joint Air Quality Control Board Ordinance, Bernalillo County Ordinance 94-5 Sections, 4, 5 and 13; and the Joint Air Quality Control Board Ordinance, Revised Ordinances of Albuquerque 1994 Sections 9-5-1-4, 9-5-1-5 and 9-5-1-98.

The proposed Public Review Draft of 20.11.80 NMAC, *Adjudicatory Procedures – Environmental Health Department – Administrative Enforcement – Hearings by Director* is attached as AQD Exhibit #1a.

It is anticipated that the hearing will take approximately 1 hour or less.

Respectfully submitted,



Mary Lou Leonard, Director
Environmental Health Department
City of Albuquerque

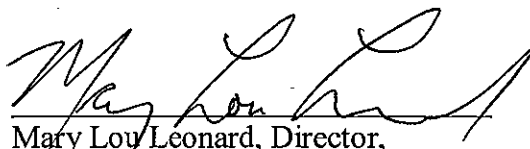
CERTIFICATION

I hereby certify that on April 26, 2011, an original and nine photocopies of this Petition to Adopt 20.11.80 NMAC, *Adjudicatory Procedures – Environmental Health Department – Administrative Enforcement – Hearings by Director*, were delivered to the following person:

Margaret Nieto
Secretary to the Air Quality Control Board
Environmental Health Department
One Civic Plaza, NW, Room 3023
Albuquerque, New Mexico 87103

and that a copy was provided to

Bill Grantham, Attorney to the Air Quality Control Board
at bill.grantham@state.nm.us.



Mary Lou Leonard, Director,
Environmental Health Department
City of Albuquerque

1 **TITLE 20 ENVIRONMENTAL PROTECTION**
2 **CHAPTER 11 ALBUQUERQUE-BERNALILLO COUNTY AIR QUALITY CONTROL BOARD**
3 **PART 80 ADJUDICATORY PROCEDURES - ENVIRONMENTAL HEALTH DEPARTMENT -**
4 **ADMINISTRATIVE ENFORCEMENT - HEARINGS BY DIRECTOR**
5

6 **20.11.80.1 ISSUING AGENCY:** Albuquerque-Bernalillo County Air Quality Control Board, c/o Environmental
7 Health Department, P.O. Box 1293, Albuquerque, New Mexico 87103. Telephone: (505) 768-2601.
8 [20.11.80.1 NMAC - N, __/__/11]
9

10 **20.11.80.2 SCOPE:**

11 A. Except as otherwise specifically provided by statute or by another applicable board regulation,
12 20.11.80 NMAC governs:

13 (1) administrative appeals of administrative compliance orders as defined in Subsection D of
14 20.11.80.7 NMAC; and

15 (2) all other adjudicatory enforcement proceedings conducted by or on behalf of the department
16 director if a board regulation establishes that 20.11.80 NMAC governs the proceeding.

17 B. 20.11.80 NMAC does not govern adjudicatory proceedings of the board regarding:

18 (1) petitions for variance and related stays, which are governed by 20.11.7 NMAC, *Variance*
19 *Procedure*, as authorized by Section 74-2-8 NMSA 1978;

20 (2) petitions for a hearing on the merits before the board made by a permit applicant, permittee or
21 person who participated in a permitting action before the department and who believes that the petitioner is
22 adversely affected by the permitting action, which are governed 20.11.81 NMAC, *Adjudicatory Procedures - Air*
23 *Quality Control Board*, as authorized by Section 74-2-7 NMSA 1978; and

24 (3) adoption, amendment and repeal of board regulations, which are governed by 20.11.82 NMAC,
25 *Rulemaking Procedures - Air Quality Control Board*, as authorized by Section 74-2-6 NMSA 1978.

26 C. **Exempt:** 20.11.80 NMAC does not apply to sources within Bernalillo county that are located on
27 Indian lands over which the board lacks jurisdiction, or to administrative enforcement actions that involve air care
28 inspection stations, fleet air care stations, air care inspectors or the decentralized or centralized motor vehicle
29 inspection program, which are governed by 20.11.100 NMAC and 20.11.101 NMAC respectively.

30 [20.11.80.2 NMAC - N, __/__/11]
31

32 **20.11.80.3 STATUTORY AUTHORITY:** 20.11.80 NMAC is adopted pursuant to the authority of the Air
33 Quality Control Act, Chapter 74, Article 2 NMSA 1978, specifically Sections 74-2-5, 74-2-5.1 and 74-2-12 NMSA
34 1978.

35 [20.11.80.3 NMAC - N, __/__/11]
36

37 **20.11.80.4 DURATION:** Permanent.

38 [20.11.80.4 NMAC - N, __/__/11]
39

40 **20.11.80.5 EFFECTIVE DATE:** [Date: _____], 2011, unless a later date is cited at the end of a section.

41 [20.11.80.5 NMAC - N, __/__/11]
42

43 **20.11.80.6 OBJECTIVE:** To govern the adjudicatory proceedings of the department and the director
44 regarding administrative enforcement, provide due process for all parties and give an orderly structure to the
45 proceedings.

46 [20.11.80.6 NMAC - N, __/__/11]
47

48 **20.11.80.7 DEFINITIONS:** In addition to the definitions in 20.11.80 NMAC, the definitions in 20.11.1
49 NMAC apply unless there is a conflict between definitions, in which case the definitions in 20.11.80 NMAC shall
50 govern.

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

53 B. "Air program" means the board program within the municipal limits of Albuquerque and within the
54 boundaries of Bernalillo county with a staff that is authorized to administer and enforce air quality pursuant to the
55 Air Quality Control Act, Chapter 74, Article 2 NMSA 1978.

1 C. "Board" means the Albuquerque-Bernalillo county air quality control board or its successor board
2 under the act.

3 D. "Compliance order" means a written administrative compliance order, compliance determination or
4 other administrative order or document that is issued by the manager of the air program or by the department, and
5 which may include any combination of an allegation of violation, demand for penalty payment, or suspension or
6 revocation of all or part of a permit as authorized by the Air Quality Control Act, Section 74-2-12 NMSA 1978.

7 E. "Complainant" means the manager of the air program, also known as the air program manager, or
8 other person designated by the director of the department to perform the functions of an air program manager.

9 F. "Days" means consecutive days except as otherwise specified.

10 G. "Department" means the city of Albuquerque environmental health department or the successor local
11 agency as defined and authorized by the act.

12 H. "Director" means the administrative head of the department, the director's designee or a person who
13 assumes the role of the director for purposes of 20.11.80 NMAC in the event of the director's disqualification or
14 withdrawal.

15 I. "Division" means the air quality division of the department or the division's successor organizational
16 unit.

17 J. "Hearing clerk" means the department employee designated by the director to provide staff support to
18 the hearing officer and the director regarding the proceedings, issue subpoenas, and maintain the official record of
19 the proceeding.

20 K. "Hearing officer" means the person appointed by the director to conduct a proceeding pursuant to
21 20.11.80 NMAC.

22 L. "Party" means the respondent, the air program and any person who is allowed by the hearing officer
23 or director to intervene in the hearing pursuant to Rule 1-024 NMRA of the New Mexico rules of civil procedure for
24 the district courts.

25 M. "Record proper" or "record" means all documents filed by or with the hearing clerk during the
26 proceeding authorized by 20.11.80 NMAC and includes:

27 (1) the verbatim record of the hearing in the form of a transcript, tapes or other digital recording, as
28 applicable, and all exhibits offered into evidence at the hearing, whether or not admitted;

29 (2) the hearing officer's findings of fact and conclusions regarding all material issues of law and
30 discretion and the reasons therefor, the recommended decision and the proposed final order, as required by
31 Subsection C of 20.11.80.16 NMAC; and

32 (3) the director's final order and reasons, as required by Subsection D of 20.11.80.16 NMAC.

33 N. "Regulations" means the rules promulgated by the board pursuant to the act.

34 O. "Request for hearing" means a written request to the department director for review of a compliance
35 order pursuant to Subsection A of 20.11.80.13 NMAC.

36 P. "Respondent" means the person to whom the air program manager has issued a compliance order.
37 [20.11.80.7 NMAC - N, __/__/11]

38
39 20.11.80.8 VARIANCES: The variance procedures established in 20.11.7 NMAC shall not apply to 20.11.80
40 NMAC. [20.11.80.8 NMAC - N, __/__/11]

41
42 20.11.80.9 SAVINGS CLAUSE: The filing of 20.11.80 NMAC, *Adjudicatory Procedures - Environmental*
43 *Health Department - Administrative Enforcement - Hearings by Director*, and the filing of an amendment to
44 20.11.80 NMAC with the state records center and archives shall not affect an action pending for violation of the act,
45 a city or county ordinance, a board regulation or a permit and shall not affect a compliance order that has been filed
46 pursuant to 20.11.80 NMAC. Prosecution for violation of a prior statute, ordinance, regulation, part or permit shall
47 be governed and prosecuted under the statute, ordinance, regulation, part or permit wording in effect at the time the
48 violation was committed.

49 [20.11.80.9 NMAC - N, __/__/11]

50
51 20.11.80.10 SEVERABILITY: If for any reason any section, subsection, sentence, phrase, clause or wording of
52 20.11.80 NMAC is held to be unconstitutional or otherwise invalid by any court or the United States environmental
53 protection agency, the decision shall not affect the validity of remaining portions of 20.11.80 NMAC.

54 [20.11.80.10 NMAC - N, __/__/10]

1 **20.11.80.11 DOCUMENTS:** Documents incorporated and cited in 20.11.80 NMAC may be viewed at the
2 Albuquerque environmental health department, Suite 3023, One Civic Plaza, 400 Marquette NW, Albuquerque,
3 New Mexico.
4 [20.11.80.11 NMAC – N, __/__/11]
5

6 **20.11.80.12 GENERAL PROVISIONS:**

7 {Based on 20.11.81.12.A NMAC, Adjudicatory Procedures- -AQCB (re: permit challenges)}

8 **A. Applicability of rules of civil procedure and rules of evidence:** In the absence of a specific
9 provision in 20.11.80 NMAC governing an action, the hearing officer may look to the New Mexico Rules of Civil
10 Procedure, NMRA 1-001 et seq., and the New Mexico Rules of Evidence, NMRA 11-101 et seq., for guidance. No
11 provision of the rules of civil procedure shall be construed to extend or otherwise modify the authority and
12 jurisdiction of the board.

13 **B. Liberal construction:** 20.11.80 NMAC shall be liberally construed to carry out its purpose.

14 **C. Director and hearing officer - Powers and duties - disqualification and withdrawal:**

15 (1) **Director:** The director shall exercise all powers and duties authorized and required by the act and
16 20.11.80 NMAC that are not otherwise delegated by 20.11.80 NMAC to the hearing officer or the hearing clerk.
17 The director and hearing officer may specify procedures in addition to, or that vary from, the procedures provided in
18 20.11.80 NMAC in order to expedite the efficient resolution of the action or to avoid obvious injustice.

19 (2) **Hearing officer:** The director shall appoint a hearing officer or hearing officers to perform the
20 functions described in Subparagraph (b) of Paragraph (2) of Subsection C of 20.11.80.12 NMAC.

21 (a) **Qualifications and disqualifications:** A hearing officer may be an independent contractor,
22 a hearing officer at the city of Albuquerque office of administrative hearings or similar successor city organizational
23 unit, an employee of the department who is not air program staff, or an employee of a different city department. A
24 hearing officer shall not be:

- 25 (i) an employee of or staff for the air program;
- 26 (ii) an employee of or staff for the department unless employed by the department as a
27 hearing officer;
- 28 (iii) a person who has a personal bias or prejudice concerning a party, has personal
29 knowledge of disputed facts concerning the proceeding, is related to a party within the third degree of relationship or
30 has a financial interest in the proceeding;
- 31 (iv) a person who has performed prosecutorial or investigative functions in connection
32 with the matter at issue in the proceeding; or
- 33 (v) an officer, director or trustee of a party to the proceeding.

34 (b) **Hearing officer functions:** The hearing officer shall exercise all powers and duties
35 required or delegated by the director pursuant to the act and 20.11.80 NMAC. The hearing officer shall conduct a
36 fair and impartial proceeding, assure that the facts are fully elicited and avoid delay. The hearing officer shall have
37 authority to take all measures necessary to maintain order and the efficient, fair and impartial adjudication of issues
38 arising in proceedings governed by 20.11.80 NMAC, including, but not limited to:

- 39 (i) conducting hearings authorized by 20.11.80 NMAC;
- 40 (ii) ruling upon motions, procedural requests and offers of proof, and issuing all
41 necessary orders;
- 42 (iii) administering oaths and affirmations, examining witnesses and admitting or
43 excluding evidence;
- 44 (iv) requiring parties to attend conferences for the settlement or simplification of issues,
45 or for expediting proceedings;
- 46 (v) imposing sanctions, subject to review and approval by the director, on parties who
47 cause undue delay or fail to cooperate in the proceeding; and
- 48 (vi) filing with the hearing clerk all original documents received by the hearing officer.

49 (3) **Director and hearing officer; disqualification or withdrawal:**

50 (a) The director may not perform functions authorized by 20.11.80 NMAC regarding any
51 matter in which the director:

- 52 (i) has a personal bias or prejudice concerning a party, has personal knowledge of
53 disputed facts concerning the proceeding, is related to a party within the third degree of relationship or has a
54 financial interest in the proceeding;
- 55 (ii) has performed prosecutorial or investigative functions in connection with the matter
56 at issue in the proceeding; or

1 (iii) is an officer, director or trustee of a party to the proceeding.

2 (b) The director shall not be disqualified solely because the director has been briefed on the
3 matter before a compliance order is issued.

4 (c) A party may request the withdrawal or disqualification of the director or the hearing officer
5 by filing a motion that includes a reason for disqualification listed in either Subparagraph (a) of Paragraph (3) of
6 Subsection C of 20.11.80.12 NMAC or Subparagraph (a) of Paragraph (2) of Subsection C of 20.11.80.12 NMAC,
7 as applicable. The motion shall be filed within 10 days after the later of the date the compliance order has been
8 docketed or the hearing officer has been designated, or, if a new director or new hearing officer is appointed, within
9 10 days after the new director takes office or the new hearing officer is appointed, as applicable.

10 (d) A motion seeking withdrawal or disqualification of the director or the hearing officer shall
11 be ruled upon by the director. If the director withdraws or is disqualified, the duties of the director shall be assumed
12 by an associate director, deputy director or other person who would not be subject to disqualification and does not
13 directly oversee the air program.

14 **D. Recording of hearings:** All hearings on the merits shall be recorded by a court reporter unless
15 otherwise directed by the director or hearing officer. The recording made by the court reporter will be the sole
16 official recording of the hearing. The hearing clerk shall make the transcription part of the record proper, which is a
17 public record except as otherwise provided by law.

18 **E. Computation and extension of time:**

19 (1) **Computation of time:** In computing any period of time prescribed or allowed by 20.11.80
20 NMAC, except as otherwise specifically provided, the day of the event from which the designated period begins to
21 run shall not be included. The last day of the computed period shall be included, unless it is a Saturday, Sunday or
22 legal city of Albuquerque holiday, in which event, the time shall be extended until 5:00 p.m. on the next day that is
23 not a Saturday, Sunday or legal city of Albuquerque holiday. Whenever a party must act within a prescribed period
24 after service upon that party and service is by mail, three days shall be added to the prescribed period. The three-day
25 extension does not apply to a deadline established by the act.

26 (2) **Extensions of time:** When a motion is filed, the hearing officer or director, as appropriate for the
27 stage of the proceeding at the time the motion is filed, may grant an extension of time for filing a document or may
28 grant continuance of a hearing. No extension shall be granted regarding a deadline established by the act.

29 **F. Ex parte contact.** Between the time a compliance order has been issued and the time the director
30 issues a final order or the request for hearing has been withdrawn, no person shall have ex parte contact with the
31 director or the hearing officer regarding the merits of a pending compliance order or motion filed pursuant to
32 20.11.80 NMAC. The ex parte restriction established in the immediately-preceding sentence does not apply to the
33 director, the hearing officer or the hearing clerk.

34 **G. Document - filing, service, form and examination:**

35 (1) **Filing of documents:**

36 (a) except as otherwise provided, the original of all documents served in the proceeding shall
37 be filed with the hearing clerk; and

38 (b) the party that files a document shall serve a copy of the document on all other parties. All
39 documents shall be filed at least 15 days before the hearing at which the hearing officer or director will consider the
40 matter unless otherwise ordered by the hearing officer. A certificate of service like the certificate of service shown
41 in Subsection J of 20.11.80.12 NMAC shall accompany each filed document.

42 (2) **Service of Documents:** Except as otherwise provided or ordered by the hearing officer, all
43 documents shall be served personally, mailed by express or first class mail, or, if the person being served has agreed
44 in writing, sent by facsimile or by electronic transmission. Service by mail is complete when the document is
45 mailed. Service by facsimile or electronic transmission is accomplished when transmission of the document is
46 complete. If the person being served is represented by an attorney, service shall be made on the attorney. Delivery
47 receipts shall be kept as proofs of service and shall be produced immediately upon the request of the hearing officer,
48 the director or another party.

49 (3) **Form of documents:**

50 (a) If feasible, all documents in paper form shall be prepared on 8 1/2 inch x 11 inch white
51 paper, printed double-sided. Where appropriate, the first page of every document shall include the caption or
52 heading required by Subsection J of 20.11.80.12 NMAC. The contents, except quotations and footnotes, shall be
53 double spaced.

54 (b) The original of each document, except exhibits, shall be signed by the party or the party's
55 attorney or other representative, and shall include the address, e-mail address if any, and telephone number of the
56 person who signed. The signature constitutes a certification that the signer has read the document; that, to the best

1 of the signer's knowledge, information and belief, there are good grounds to support the document; and that, except
2 for motions for extension of time, the document is not interposed or submitted for purposes of delay.

3 (c) A notice or service that is required by 20.11.80 NMAC shall be deemed adequate if made to
4 the most recent address provided by the person upon whom service is made.

5 **H. Filing and service of documents issued by director or hearing officer:** Every document issued by
6 the director and the hearing officer shall be filed with the hearing clerk. The hearing clerk shall promptly serve
7 copies of the document upon all parties.

8 **I. Examination of documents filed:** Pursuant to the New Mexico Inspection of Public Records Act at
9 Chapter 14, Article 2 NMSA 1978 and all applicable city of Albuquerque ordinances and administrative
10 instructions, during normal business hours and subject to the provisions of law restricting public disclosure of
11 confidential information, any person may inspect and copy any document filed in any proceeding pursuant to
12 20.11.80 NMAC. The documents shall be made available by the hearing clerk, as authorized.

13 **J. Samples - Caption; Certificate of Service:**

14 CITY OF ALBUQUERQUE
15 ENVIRONMENTAL HEALTH DEPARTMENT

16
17 CITY OF ALBUQUERQUE
18 ENVIRONMENTAL HEALTH DEPARTMENT
19 AIR QUALITY DIVISION
20 Complainant,

21 v.

Administrative Compliance Order No. [year] - [indiv. order #]
[Note: Confirm the compliance order number with the
hearing clerk before filing.]

26 [NAME OF RESPONDENT],
27 Respondent.

28
29 [TITLE OF DOCUMENT: COMPLIANCE ORDER, MOTION FOR ..., etc.]

30
31 By: _____
32 [Signature]

33
34 _____
35 [Print or type name]

36 Title: _____

37 Address: _____

38 Telephone Number: _____

39 E-mail: _____
40

41 **CERTIFICATE OF SERVICE**

42 I hereby certify that a copy of the foregoing [insert: name of document] was [mailed by first class
43 mail/express mail/hand delivered/ sent by facsimile/ sent by electronic transmission] to [insert: names of persons
44 upon whom service was made: attorney/party] on this ____ day of [month], 20 ____.

45 [List names of persons served:]
46
47

48 By _____
49 [Signature of person certifying service]

50
51 [Print or type name]

52 [20.11.80.12 NMAC – N, __/__/11]
53

54 **20.11.80.13 PREHEARING PROCEDURES:**

55 **A. Initiation of process:**

1 (1) **Filing a request for hearing:** As required by the act at Subsection C of Section 74-2-12 NMSA
2 1978, no later than 30 days after a compliance order is served on a respondent, the respondent shall submit a written
3 request for a hearing to the director. If a timely request for hearing is not submitted, the compliance order shall be
4 final. The process governed by 20.11.80 NMAC shall be initiated by the respondent filing a timely request for
5 hearing and serving the request on the department director, the air program manager or his or her designee and every
6 other party.

7 (2) **Request for hearing:** The request for hearing shall include an answer to the compliance order.
8 The answer shall:

9 (a) in separately-numbered paragraphs that sequentially reference the numbered paragraphs in
10 the compliance order, clearly and directly admit or deny each of the factual assertions contained in the compliance
11 order; however, if the respondent has no knowledge of a particular factual assertion and so states, the assertion may
12 be denied on the basis of a lack of knowledge; every allegation in the compliance order that is not specifically
13 denied shall be deemed admitted by the respondent;

14 (b) indicate every affirmative defense upon which the respondent intends to rely; every
15 affirmative defense that is not asserted in the request for hearing shall be deemed waived, except a defense asserting
16 lack of subject matter jurisdiction;

17 (c) be signed under oath or affirmation that the information contained in the answer is to the
18 best of the signer's knowledge and belief true and correct; and

19 (d) have a copy of the compliance order attached.

20 **B. Notice of docketing; notice of hearing officer assignment:**

21 (1) **Notice:** As soon as practical after the hearing clerk receives a request for hearing, the hearing
22 clerk shall issue a notice of docketing that includes the caption or heading required by Subsection J of 20.11.80.12
23 NMAC, the docket number of the case, the date upon which the request for hearing was received by the hearing
24 clerk and the name of the hearing officer if one has been designated. If a hearing officer has not been designated,
25 the hearing clerk shall notify the parties of the name and address of the hearing officer as soon as one is assigned.
26 The hearing clerk shall include a copy of 20.11.80 NMAC with the notice of docketing that is sent to the respondent.

27 (2) **Untimeliness:** The hearing clerk shall docket every request for hearing that is delivered to the
28 hearing clerk without regard to whether it appears to be timely. Any party may move to dismiss an untimely request
29 for hearing.

30 **C. Scheduling the hearing:**

31 (1) In consultation with the hearing officer, but no later than 30 days before the date of the hearing,
32 the hearing clerk shall issue and serve upon the parties a notice of hearing setting forth the date, time and location of
33 the hearing.

34 (2) After consideration of prejudice to the parties, the hearing officer shall not grant a request to
35 postpone a hearing unless all parties consent or the hearing officer determines good cause has been shown.

36 (3) **Location of the hearing; attendance by the public:** The hearing shall be held in a public facility
37 within Bernalillo county with seating available for members of the public, who can attend and listen, but who shall
38 not testify unless identified as a witness by a party as required by Subsection B of 20.11.80.14 NMAC.

39 **D. Motions:**

40 (1) **General:** Except for motions made orally during a hearing, all motions shall be in writing,
41 specify the grounds for the motion, state the relief sought and state whether the motion is opposed or unopposed.
42 Each motion that is not made orally during a hearing shall be filed no fewer than 30 days before the hearing at which
43 the hearing officer or director will consider the matter unless a different deadline is established by the hearing
44 officer; shall be accompanied by an affidavit, certificate or other evidence relied upon; and shall be served as
45 required by Paragraph (2) of Subsection G of 20.11.80.12 NMAC.

46 (2) **Unopposed motions:** An unopposed motion shall state that concurrence of all other parties was
47 obtained. The moving party shall submit a proposed order approved by all parties for the hearing officer's review
48 with the motion.

49 (3) **Opposed motions:** Every opposed motion shall state either that concurrence was sought and
50 denied or why concurrence was not sought. A memorandum brief in support of an opposed motion may be filed
51 with the motion. The moving party shall submit a proposed order for the hearing officer's review with the motion.

52 (4) **Response to motions:** Unless a different deadline is established by the hearing officer, every
53 party upon whom an opposed motion is served shall have 15 days after service of the motion to file a response. A
54 non-moving party who fails to file a timely response shall be deemed to have waived any objection to the granting
55 of the motion.

(5) **Reply to response:** Unless a different deadline is established by the hearing officer, the moving party may submit a reply to a response within 10 days after service of the response, but is not required to submit a reply.

(6) **Decision regarding motions:** All motions shall be decided by the hearing officer without a hearing, unless the hearing officer decides to hold a hearing or unless a party requests a hearing and the hearing officer consents to a motion hearing.

(7) **Procedural motions:** The hearing officer may rule upon a procedural motion before the expiration of the time for response. A response regarding the procedural motion received after the decision is made shall be treated as a request for reconsideration of the ruling.

(8) The hearing officer may refer a motion to the director with the hearing officer's recommendation if the motion would result in a final determination of the merits or an essential element of the compliance order.

[20.11.80.13 NMAC – N, __/__/11]

20.11.80.14 DISCOVERY: Formal discovery is not a right in an administrative enforcement procedure and, therefore, is discouraged. If a party wishes to conduct discovery in addition to the methods of discovery provided in 20.11.80.14 NMAC, additional discovery shall only be allowed by order of the hearing officer.

A. Scope of discovery:

(1) {Based on EIB 20.1.5.300.A NMAC} **Criteria:** Discovery of information that is not privileged or exempt may be permitted if:

- (a) the discovery will not unreasonably delay the proceeding;
- (b) the information to be obtained is not unreasonably cumulative or duplicative, or not otherwise reasonably obtainable elsewhere;
- (c) the discovery is not unreasonably burdensome; and
- (d) there is a substantial reason to believe that the information sought will be admissible at the hearing or will be likely to lead to the discovery of admissible evidence.

(2) **Request:** Unless otherwise directed by the hearing officer, a party requesting discovery shall:

- (a) serve the discovery request directly upon the party from whom discovery is sought; and
- (b) file a notice with the hearing clerk. The notice shall include the caption or heading required by Subsection J of 20.11.80.12 NMAC and state the date of service of the discovery request, the type of discovery sought and the party from whom discovery is sought.

(3) **Response to discovery request:** A party responding to a discovery request shall:

- (a) serve the response, including any objections, upon the party making the discovery request; and
- (b) file a notice with the hearing clerk. The notice shall include the caption or heading required by Subsection J of 20.11.80.12 NMAC and state the date of service of the response, the type of discovery request being responded to and the party upon whom the response was served.

(4) **Continuing obligation to supplement responses:** Every party from whom discovery is sought has a continuing obligation, subject to any objections interposed that are not overruled by the hearing officer, to supplement responses with relevant information obtained after service of the initial response and any previous supplemental responses. Unless otherwise ordered by the hearing officer, supplemental responses shall be served as soon as practical, but no later than five days after the information became available. If the information becomes available fewer than five days before the hearing or during the hearing, the information shall be brought to the attention of the hearing officer for direction and ruling on use of the information.

(5) **Privilege:** A list of privileged or exempt documents, identified by titles, author, date and privilege or protection claimed, shall be provided in response to discovery.

(6) **Protective order:** Upon motion and for good cause show, the hearing officer may protect the discovery from disclosure. If the motion is granted, the moving party shall not present the protected discovery at the hearing.

(7) **Motion to compel; sanctions:** A party may move for an order compelling discovery if the party from whom discovery was requested has failed to respond in an adequate or timely manner. The hearing officer may order the response and may impose such sanctions as may be appropriate, including the following:

- (a) refusal to allow the testimony of a witness not identified as required by Subsection B of 20.11.80.14 NMAC;

- (b) denial of admission of a document that has not been provided as required by Subsection B of 20.11.80.14 NMAC or has not been produced for inspection and copying as required by Subsection C of 20.11.80.14 NMAC;