TITLE 20 ENVIRONMENTAL PROTECTION
CHAPTER 11 ALBUQUERQUE-BERNALILLO COUNTY AIR QUALITY CONTROL BOARD
PART 82 RULEMAKING PROCEDURES -- AIR QUALITY CONTROL BOARD

20.11.82.1 ISSUING AGENCY: Albuquerque-Bernalillo County Air Quality Control Board, c/o Environmental Health Department. P.O. Box 1293, Albuquerque, New Mexico 87103. Telephone: (505) 768-2601.
[20.11.82.1 NMAC - N, 8/11/08]

20.11.82.2 SCOPE: 20.11.82 NMAC governs the procedures in all rulemaking hearings before the board, except to the extent that 20.11.82 NMAC is inconsistent with specific procedures in governing law. In cases in which 20.11.82 NMAC is inconsistent with any rulemaking procedures specified in governing law, the procedures in governing law shall apply, rather than the procedures in 20.11.82 NMAC. A rulemaking hearing includes a hearing regarding a proposal to adopt, amend or repeal a board rule, regulation or standard.
[20.11.82.2 NMAC - N, 8/11/08]

20.11.82.3 STATUTORY AUTHORITY: 20.11.82 NMAC is adopted pursuant to the authority provided in the New Mexico Air Quality Control Act, NMSA 1978 Sections 74-2-4, 74-2-5; the Joint Air Quality Control Board Ordinance, Bernalillo County Ordinance No. 94-5, Sections 4 and 5; and the Joint Air Quality Control Board Ordinance, Revised Ordinances of Albuquerque 1994, Sections 9-5-1-4 and 9-5-1-5.
[20.11.82.3 NMAC - N, 8/11/08]

20.11.82.4 DURATION: Permanent.
[20.11.82.4 NMAC - N, 8/11/08]

20.11.82.5 EFFECTIVE DATE: August 11, 2008, unless a later date is cited at the end of a section.
[20.11.82.5 NMAC - N, 8/11/08]

20.11.82.6 OBJECTIVE: The purposes of 20.11.82 NMAC are to:
A. standardize the procedures used in rulemaking proceedings before the board;
B. encourage participation in the hearings conducted by the board for the promulgation of regulations;
C. make possible the effective presentation of the evidence and points of view of parties and members of the general public; and
D. assure that board hearings are conducted in a fair and equitable manner.
[20.11.82.6 NMAC - N, 8/11/08]

20.11.82.7 DEFINITIONS: As used in 20.11.82 NMAC:
A. **"Act"** means the Air Quality Control Act, Chapter 74, Article 2 NMSA 1978, and its later amendments and successor provisions.
B. **"Board"** means the Albuquerque-Bernalillo county air quality control board or its successor board pursuant to the act.
C. **"Days"** means consecutive days except as otherwise specifically provided.
D. **"Department"** means the city of Albuquerque environmental health department or its successor agency.
E. **"Document"** means [~~any paper, exhibit, pleading, motion, response, memorandum, decision, order or other written or tangible item that is filed in a proceeding pursuant to 20.11.82 NMAC, or brought to or before the board for its consideration, but does not include a cover letter accompanying a document transmitted for filing~~] a pleading or exhibit and any other document including electronically stored information, writings, drawings, graphs, charts, photographs, sound recordings, images and any other data or data compilations that are stored in any medium from which information can be obtained either directly or, if necessary, after translation, into a reasonably usable form.
F. **"Environmental justice"** means the fair treatment of all residents (in the City of Albuquerque and Bernalillo County), including communities of color and low income communities, and their meaningful involvement in the development, implementation and enforcement of environmental laws, regulations and policies regardless of race, color, ethnicity, religion, income or education level.

G. **"Exhibit"** means any document or tangible item submitted for inclusion in the [~~hearing~~] record proper.

H. **[~~"Ex parte contact"~~** ~~means oral or other communication with a board member or a board hearing officer regarding the merits of a pending rulemaking procedure 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 has been filed pursuant to 20.11.82 NMAC;~~

~~(3) the communication is made without all other parties being present or receiving the same communication that was received by the board member or the 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 pending rulemaking proceeding.~~] Reserved

I. **"General public"** means any person attending a rulemaking hearing who has not [~~submitted~~] filed a notice of intent to present technical testimony (NOI) or filed an entry of appearance pursuant to 20.11.82.20 NMAC or 20.11.82.21 NMAC.

J. **"Governing law"** means the statute, including any applicable case law, which authorizes and governs the decision regarding the proposed regulatory change.

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 designated by the board to conduct a hearing pursuant to 20.11.82 NMAC.

M. **[~~"Hearing record"~~** ~~means:~~

~~(1) the transcript of proceedings; and~~

~~(2) the record proper.~~] Reserved

~~[**N.** **"Party"** means the petitioner, any person filing a notice of intent to present technical testimony, and any person filing an entry of appearance pursuant to 20.11.82.20 NMAC or 20.11.82.21 NMAC.]~~

N. **"NOI"** means a notice of intent to present technical testimony which is described in 20.11.82.20 NMAC.

O. **"Non-technical testimony"** means testimony that is not scientific, engineering, economic or other specialized testimony. A person who provides only non-technical testimony or a non-technical exhibit is not required to file an NOI or entry of appearance pursuant to 20.11.82.20 NMAC or 20.11.82.21 NMAC.

P. **"Participant"** means any person who participates in a rulemaking proceeding before the board.

Q. **"Party"** means:

(1) the petitioner;

(2) any person who filed an NOI pursuant to 20.11.82.20 NMAC; or

(3) any person who filed an entry of appearance pursuant to 20.11.82.21 NMAC. {20.11.82.7.N NMAC}

[~~Q.~~]R. **"Person"** means an individual or any entity, including federal, state and local governmental entities, however organized.

[~~R.~~]S. **"Petitioner"** means the person who petitioned the board for the regulatory change that is the subject of the hearing.

[~~S.~~]T. **"Record proper"** or **"record"** means all documents related to the hearing, including documents received or generated by the board before 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 meeting thereafter at which the proposed regulatory change was discussed;

(3) the notice of hearing;

(4) proof of publication;

(5) [~~notices of intent to present technical testimony~~] NOI(s);

(6) statements for the public record;

(7) the hearing officer's report, if any;

(8) post-hearing submissions, if allowed;

(9) the stenographic transcription or audio [~~tape~~] recording of the hearing and the stenographic transcription or audio [~~tapes~~] recording or appropriate extract of the audio [~~tapes~~] recording of the meeting at which the board deliberated on the adoption of the proposed regulatory change; and {20.1.1.7.N NMAC}

(10) the board's decision and the reasons [~~therefore~~] therefor.

[~~T.~~]U. **"Regulation"** means a rule, regulation or standard promulgated by the board that affects one or more persons, in addition to the board and the department, except for any order or decision issued in connection with the disposition of any case involving a particular matter as applied to a specific set of facts.

[~~U.~~]V. **"Regulatory change"** means the adoption, amendment or repeal of a regulation.

[~~V.~~]W. **"Service"** means [~~personally~~] delivering a copy of a document, [~~exhibit or pleading~~] including a pleading or exhibit, to a party as required by [~~20.11.82 NMAC~~] Subsection C of 20.11.82.16. [~~to be served; mailing it to that person; or, if that person has agreed in writing, sending it by facsimile or electronic transmission. 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 the prescribed period. The three-day extension does not apply to any deadline imposed by the act. Service by facsimile or electronic transmission is accomplished when the transmission of the document is complete. The person who receives the facsimile or electronic transmission shall promptly provide written confirmation of receipt if requested by the hearing officer, the board or a party.~~]

[~~W.~~]X. **"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.

[~~X.~~]Y. **"Transcript of proceedings"** means the verbatim record, audio [~~tape~~] recording or stenographic transcription of the proceedings, testimony and argument in the matter, together with all exhibits offered at the hearing, whether or not admitted into evidence, and includes the record of any motion hearings or pre-hearing conferences. {20.1.1.7.S NMAC}

[20.11.82.7 NMAC - N, 8/11/08]

20.11.82.8 **VARIANCES:** The variance procedures provided by 20.11.7 NMAC shall not apply to 20.11.82 NMAC.

[20.11.82.8 NMAC - N, 8/11/08]

20.11.82.9 **SEVERABILITY:** If for any reason any section, subsection, sentence, phrase, clause, wording or application of 20.11.82 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 or application of remaining portions of 20.11.82 NMAC.

[20.11.82.9 NMAC - N, 8/11/08]

20.11.82.10 **DOCUMENTS:** Documents incorporated and cited in 20.11.82 NMAC may be viewed at the Albuquerque environmental health department, 400 Marquette NW, [~~Room~~] Suite 3023, Albuquerque, NM 87102.

[20.11.82.10 NMAC - N, 8/11/08]

20.11.82.11 **POWERS AND DUTIES OF BOARD AND HEARING OFFICER:**

A. **Board:** The board shall exercise all powers and duties authorized by 20.11.82 NMAC and not otherwise delegated to the hearing officer or the hearing clerk. The board shall designate a hearing officer for each hearing. The board may direct the hearing officer to file a report of the hearing as provided by 20.11.82.31 NMAC.

B. **Hearing officer:** [~~The board shall designate a hearing officer for each hearing.~~**]** The hearing officer shall exercise all powers and duties delegated or otherwise authorized by 20.11.82 NMAC. The hearing officer may be a member of the board. 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 20.11.82 NMAC, including:

(1) conducting hearings pursuant to 20.11.82 NMAC;

(2) taking, admitting or excluding evidence, examining witnesses and allowing post-hearing submissions;

(3) making orders as may be necessary to preserve decorum and to protect the orderly hearing process;

(4) if requested by the board, preparing [~~and filing~~] a report of the hearing, with recommendations for board action;

(5) requesting parties to file original documents with the hearing clerk;

(6) establishing the deadlines for filing documents with the hearing clerk; [~~and~~]

(7) requesting the prevailing party to submit a proposed statement of reasons in support of the board's decision; and

(8) filing with the hearing clerk all original documents issued by the hearing officer. {after 20.1.1.307.F. NMAC}

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.

[20.11.82.11 NMAC - N, 8/11/08]

20.11.82.12 LIBERAL CONSTRUCTION: 20.11.82 NMAC shall be liberally construed to carry out its objectives.

[20.11.82.12 NMAC - N, 8/11/08]

20.11.82.13 GENERAL PROVISIONS - COMPUTATION OF TIME:

A. Computation of time: In computing any period of time prescribed or allowed by 20.11.82 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 holiday, in which event the time shall be extended until the end of the next day that is not a Saturday, Sunday or legal city of Albuquerque holiday. Whenever a party must act within a prescribed period after service upon a party, and service is by mail, three days shall be added to the prescribed period. The three-day extension does not apply to any deadline imposed by the act.

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

[20.11.82.13 NMAC - N, 8/11/08]

20.11.82.14 GENERAL PROVISIONS - RECUSAL:

A. No board member shall participate in any action in which his [~~or her~~] impartiality or fairness may reasonably be questioned. [~~and~~] The member shall recuse himself [~~or herself~~] in any such action by giving notice to the board and the general public by announcing the recusal on the record. In making a decision to recuse [~~him or herself~~] himself, the board member may rely upon any relevant authority.

B. A board member or a hearing officer shall not perform any function authorized by 20.11.82 NMAC regarding any matter in which a board member or a hearing officer:

(1) has a personal bias or prejudice concerning a party;

(2) is related to a party within the third degree of relationship;

(3) is an officer, director or trustee of a party or interested participant in the proceeding; or

(4) has a financial interest in the proceeding or has any other conflict of interest.

[20.11.82.14 NMAC - N, 8/11/08]

20.11.82.15 GENERAL PROVISIONS - EX PARTE COMMUNICATION: At no time after a proceeding is initiated by filing a petition pursuant to 20.11.82.18 NMAC and before the conclusion of a proceeding initiated pursuant to 20.11.82 NMAC shall [~~the department, or any other party, interested participant or their representatives communicate ex parte, orally or in writing, with any board member or the hearing officer, regarding the merits of the proceeding~~] any person have ex parte contact with a board member or the hearing officer regarding the merits of a petition or motion filed pursuant to 20.11.82 NMAC.

[20.11.82.15 NMAC - N, 8/11/08]

20.11.82.16 DOCUMENT REQUIREMENTS - FILING AND SERVICE OF DOCUMENTS:

A. The filing of any document as required by 20.11.82 NMAC shall be accomplished by delivering the document to the hearing clerk.

B. Any person filing any document shall:

(1) provide the hearing clerk with the original and [~~nine~~] 15 copies of the document [~~, unless the document is an exhibit, in which case 20.11.82.27 NMAC shall apply~~];

(2) deliver a copy to the board attorney;

(3) [serve a copy thereof on the petitioner, if the document is a notice of intent to present technical testimony filed by any person other than the petitioner] serve a copy on all other parties; and

(4) file with the hearing clerk at least 15 days before any hearing or meeting at which the board will consider the document. If the document is a motion seeking an order from the hearing officer in a rulemaking hearing, the motion shall also be served at the same time on the hearing officer and the board attorney. Motions and responses shall be filed only by parties to a hearing and shall comply with 20.11.82.16 NMAC and 20.11.82.25 NMAC.

(5) If the document is a motion for a stay, 20.11.82.35 NMAC shall apply.

C. Whenever 20.11.82 NMAC requires service of a document, service on all other parties shall be made by delivering a copy to the person to be served by [mailing it,] hand delivery, mail or, if that person has agreed in writing, by sending it by facsimile or by electronic transmission to that person. An agreement to be served by facsimile or electronic transmission may be evidenced by placing the person's facsimile number or email address on a document filed pursuant to 20.11.82 NMAC. Service shall also be made upon the board's attorney. 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 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 the prescribed period. The three-day extension does not apply to any deadline imposed by the act. Service by facsimile or electronic transmission is accomplished when the transmission of the document is completed. The person who received the facsimile or electronic transmission shall promptly provide written confirmation of receipt if requested by the hearing officer, the board or a party.

D. The petitioner and any person who has filed a timely [notice of intent to present technical testimony] NOI pursuant to 20.11.82.20 NMAC may inspect all documents that have been filed in a proceeding in which he [or she] is involved as a participant. The inspection shall be permitted as provided by the Inspection of Public Records Act, NMSA 1978, Sections 14-2-1 through 14-2-12. Whenever any document is filed in a proceeding subject to 20.11.82 NMAC, the hearing clerk shall notify by email the petitioner and all persons who have filed a timely [notice of intent to present technical testimony] NOI. A person who does not provide an email address shall instead be notified by mail.

E. **[**All documents filed pursuant to 20.11.82 NMAC shall be made available for inspection upon request as provided by the Inspection of Public Records Act, NMSA 1978, Sections 14-2-1 through 14-2-12. {20.11.82.17.A NMAC}

F. **]**The hearing clerk shall provide copies of all documents to each board member at least five days before a hearing or meeting at which the board will consider the documents. [With regard to documents filed in conjunction with any rulemaking hearing,] The hearing officer may make an exception to this requirement.

[G.] F. 20.11.82.20 NMAC and 20.11.82.[27]28 NMAC also provide requirements regarding hearing exhibits.

[20.11.82.16 NMAC - N, 8/11/08]

20.11.82.17 EXAMINATION OF DOCUMENTS FILED:

A. Examination allowed: [Subject to the provisions of law restricting the public disclosure of confidential information, during normal business hours] Any person may inspect and request a copy of any document filed in any rulemaking proceeding before the board, during normal business hours, subject to the provisions of law restricting the public disclosure of confidential information. The documents shall be made available by the hearing clerk as required by the Inspection of Public Records Act, NMSA 1978, Sections 14-2-1 through 14-2-12, and may be viewed at the Albuquerque environmental health department, 400 Marquette NW, [Room] Suite 3023, Albuquerque, NM 87102.

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

[20.11.82.17 NMAC - N, 8/11/08]

20.11.82.18 PREHEARING PROCEDURES - PETITION FOR REGULATORY CHANGE:

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

B. The petition shall be in writing and shall include the name of the regulation and a statement of the reasons for the proposed regulatory change. The petition shall cite the relevant statutes that authorize the board to adopt the proposed regulatory change, and shall estimate the time that will be needed to conduct the rulemaking hearing, if at all possible. A copy of the entire rule, including any proposed regulatory change, indicating any language proposed to be added or deleted, shall be attached to the petition. The entire rule and its proposed changes

shall be submitted to the board in legislative-edit format, with strike-outs and underlines as appropriate, and shall include individual line numbers. The hearing clerk shall return to the petitioner any document that does not meet the requirements of 20.11.82.18 NMAC, along with a copy of 20.11.82 NMAC and a check-list of required items. The petitioner will be asked to resubmit the petition as required by 20.11.82.18 NMAC.

C. At a public meeting occurring no later than 60 days after receipt of the petition, the board shall determine whether or not to hold a public hearing on the [~~proposal~~] proposed regulatory change. Any person may respond to the petition either in writing before the public meeting or in person at the public meeting.

D. If the board decides by a vote of a majority of board members present to hold a public hearing on the petition, the board may issue orders specifying procedures for conduct of the hearing, in addition to the requirements established in 20.11.82 NMAC, as may be necessary and appropriate to fully inform the board of the matters at issue in the hearing or control the conduct of the hearing. The orders may include requirements for giving additional public notice, holding pre-hearing conferences, filing direct testimony in writing before the hearing, or limiting testimony or cross-examination.

[20.11.82.18 NMAC - N, 8/11/08]

20.11.82.19 NOTICE OF HEARINGS:

A. Unless otherwise allowed by governing law and specified by the board, the board, through the hearing clerk, shall give public notice of the hearing at least 30 days before the hearing unless the board requires a longer public notice period. Public notice shall include at a minimum:

(1) a single publication in the newspaper with the largest general circulation in Bernalillo county;

(2) publication in the New Mexico Register;

(3) if technically feasible at the time, publication by electronic media; and

(4) other means of providing notice as the board may direct or are required by law.

B. The board shall make reasonable efforts to give notice to persons who have made a written request to the board for advance notice of regulatory change hearings. Requests for notice shall be addressed to the hearing clerk, [~~and~~] shall designate the areas of board activity that are of interest, and provide a legible address to which notice can be sent.

C. Public notice of the hearing shall state:

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

(2) the statutes, regulations and procedural rules governing the conduct of the hearing;

(3) the manner in which persons may present their views or evidence to the board;

(4) the location where persons may obtain copies of the proposed regulatory change; and

(5) if applicable, that the board may make a decision on the proposed regulatory change at the conclusion of the hearing or at a separate board meeting.

[20.11.82.19 NMAC - N, 8/11/08]

20.11.82.20 TECHNICAL TESTIMONY; NOTICE OF INTENT (NOI):

A. No later than 15 days before the hearing, any person, including the petitioner, who intends to present technical testimony at the hearing shall file [~~a notice of intent to present technical testimony~~] an NOI. The [~~notice~~] NOI shall:

(1) identify the person for whom the witness or witnesses 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) [~~summarize or~~] include a copy of the direct testimony of each technical witness and state the anticipated duration of the testimony of that witness; {20.1.1.302.A.(4) NMAC}

(4) include the text of any recommended modifications to the proposed regulatory change; [~~and~~]

(5) list and [~~describe, or~~] attach an original and 15 copies of all exhibits anticipated to be offered by that person at the hearing, including any proposed statement of reasons for adoption of rules; and

(6) be served on the petitioner, if the document is an NOI filed by any person other than the petitioner. {20.1.1.200.B.(2) NMAC}

B. The person filing an NOI shall serve the notice pursuant to 20.11.82.16 NMAC.

C. The hearing officer may enforce the provisions of 20.11.82.20 NMAC by taking whatever action the hearing officer deems appropriate, including exclusion of the technical testimony of any witness for whom [~~a notice of intent~~] an NOI was not timely filed. If the testimony is admitted, the hearing officer may keep the record open after the hearing to allow responses to the testimony.

[20.11.82.20 NMAC - N, 8/11/08]

20.11.82.21 ENTRY OF APPEARANCE: Any person who is or may be affected by the proposed regulatory change may file an entry of appearance and shall be a party. The entry of appearance shall be filed no later than 15 days before the date of the hearing on the petition. In the event of multiple entries of appearance by those affiliated with one interest group, the hearing officer may consolidate the entries, or divide the service list to avoid a waste of public resources. {20.1.1.303 NMAC}
[20.11.82.21 NMAC - N, 8/11/08]

20.11.82.22 NON-TECHNICAL TESTIMONY; PARTICIPATION BY GENERAL PUBLIC:

A. Any member of the general public may [~~testify~~] provide non-technical testimony at the hearing. Notification before the hearing is not required in order to present non-technical testimony at the hearing. A person providing non-technical testimony [~~also~~] may also offer non-technical exhibits in connection with the testimony provided, if the exhibit is not [~~unduly repetitious of the testimony provided~~] an undue repetition of previous non-technical testimony. [~~The board requests, but does not require members of the general public to provide the hearing clerk with an original and nine copies of every non-technical exhibit before or at the hearing~~.] Members of the general public are requested to deliver an original and 15 copies of each non-technical exhibit offered, to the hearing clerk, either before or at the hearing.

B. A member of the general public who wishes to submit a non-technical written statement for the record instead of providing oral testimony at the hearing shall file the written statement before the hearing or submit it at the hearing, and is requested to provide an original and 15 copies of the statement to the hearing clerk.

C. A member of the general public who wishes to provide technical testimony or offer technical exhibits shall comply with requirements of 20.11.82.20 NMAC.

[20.11.82.22 NMAC - N, 8/11/08]

20.11.82.23 LOCATION OF HEARING: Unless otherwise provided by governing law, the board shall hold rulemaking hearings and meetings in public facilities within Bernalillo county with public seating available.
[20.11.82.23 NMAC - N, 8/11/08]

20.11.82.24 PARTICIPATION AT A BOARD MEETING 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 shall 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~~] make adequate arrangements. The chair or acting chair shall determine whether a qualifying medical or emergency situation exists. The chair or acting chair who approves the request shall direct the hearing clerk to make arrangements. A board member's participation by such means shall constitute presence in person at the meeting. This provision shall not be used to allow a member to constitute a quorum of the board, and may only be used for the purposes of:

A. choosing a hearing officer;
B. authorizing the hearing clerk to secure a hearing officer for a hearing or hearings;
C. scheduling or rescheduling a meeting or hearing; and
D. voting on the limited issues listed in Subsections A, B and C of 20.11.82.24 NMAC.

[20.11.82.24 NMAC - N, 8/11/08]

20.11.82.25 MOTIONS:

A. General: All motions, except those made orally during a hearing, shall be in writing, specify the grounds for the motion, and state the relief sought. Each written motion shall be accompanied by an affidavit, certificate or other evidence relied upon, and shall be filed and served as required by 20.11.82.16 NMAC.

B. Unopposed motions: All unopposed motions 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.

C. Opposed motions: All opposed motions 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.

D. Response to motions: a party upon whom an opposed motion is served shall have 15 days 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.

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

F. Decision regarding motions: Motions may be decided by the hearing officer, in the hearing officer's sole discretion, without a hearing. Within five days 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. A procedural motion may be ruled upon before the expiration of the time for response. Any response regarding a procedural motion received after the decision is made shall be treated as a request for reconsideration of the ruling. However, the hearing officer shall refer all motions that would effectively dispose of the petition to the board for a decision. {20.11.81.12.H NMAC}.

[20.11.82.25 NMAC - N, 8/11/08]

20.11.82.~~25~~26 HEARING PROCEDURES - CONDUCT OF HEARINGS:

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

B. The hearing officer shall conduct the hearing in a manner that provides 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~~] a statement from the hearing officer. The statement shall identify the nature and subject matter of the hearing and explain the procedures to be followed.

(2) The hearing officer may allow a brief opening statement by any [~~person~~] party who wishes to make one. {20.1.1.400.B.(2) NMAC}

(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~~] NOI(s), 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 to testify on a sign-in sheet.

(6) The hearing officer may allow a brief closing argument by any [~~person~~] party who wishes to make one.

(7) At the close of the hearing, the hearing officer shall determine whether to keep the record open for written submittals in accordance 20.11.82.[~~29~~]30 NMAC. If the record is kept open, the hearing officer shall determine and announce the subject or subjects regarding which submittals will be allowed and the deadline for filing the submittals.

(8) Any board action to adopt, amend or repeal a board regulation requires the concurrence of four board members. {City Ordinance 9-5-1-3(B)(6)}

[20.11.82.25 NMAC - N, 8/11/08]

20.11.82.[~~26~~]27 TESTIMONY AND CROSS-EXAMINATION:

A. All testimony shall be taken under oath or affirmation, which may be accomplished as a group or individually.

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

C. Any person who testifies at the hearing is subject to cross-examination on the subject matter of his [~~or her~~] direct testimony and matters affecting his [~~or her~~] credibility. Any person attending the hearing is entitled to conduct cross-examination as may be required for a full and true disclosure of matters at issue in the hearing. The

hearing officer may limit cross-examination to avoid harassment, intimidation, needless expenditure of time or undue repetition.
[20.11.82.26 NMAC - N, 8/11/08]

20.11.82.[~~27~~]28 TECHNICAL EXHIBITS:

A. The deadlines for filing technical exhibits are established by 20.11.82.20 NMAC.

B. Any [~~person~~] party offering a technical exhibit shall provide the hearing clerk with an original and 15 copies for the board, the hearing officer, the board attorney, and persons attending the hearing.

C. All exhibits offered at the hearing shall be marked with a designation identifying the person offering the exhibit and shall be numbered sequentially. If a person offers multiple exhibits, the person shall identify each exhibit with an index tab or by other appropriate means.

D. Large charts and diagrams, models and other bulky exhibits are discouraged. If visual aids are used, legible copies shall be submitted for inclusion in the record.
[20.11.82.27 NMAC - N, 8/11/08]

20.11.82.[~~28~~]29 TRANSCRIPT OF PROCEEDINGS: The hearing clerk shall arrange for a court reporter to make a verbatim transcription of the hearing unless the board requires another method of recording. The petitioner shall pay the cost of the court reporter and the original transcription. The petitioner shall also pay the cost of a copy of a transcription for each board member, the hearing officer and the board attorney if required by the hearing officer or the board.
[20.11.82.28 NMAC - N, 8/11/08]

20.11.82.[~~29~~]30 POST-HEARING SUBMISSIONS: The hearing officer may allow the record to remain open for a reasonable period of time following the conclusion of the hearing for written submission of additional evidence, comments and arguments, and proposed statements of reasons. The hearing officer's determination regarding post-hearing submissions shall be announced at the conclusion of the hearing. In considering whether the record will remain open, the hearing officer shall consider the reasons why the material was not presented during the hearing, the significance of the material to be submitted and the necessity for a prompt decision.
[20.11.82.29 NMAC - N, 8/11/08]

20.11.82.[~~30~~]31 HEARING OFFICER'S REPORT: If the board 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 board action~~] identify the parties' final proposals and the evidence supporting those proposals, including discussion or recommendations as requested by the board, and shall be filed with the hearing clerk within the time specified by the board. The hearing clerk shall promptly notify each [~~participant~~] party that the hearing officer's report has been filed and shall provide each party with a copy of the report [~~upon request~~] and notice of any deadline set for comments on the report [~~as required by 20.11.82.17 NMAC~~]. {20.1.1.405 NMAC}
[20.11.82.30 NMAC - N, 8/11/08]

20.11.82.[~~31~~]32 DELIBERATION AND DECISION:

A. As provided in the act at NMSA 74-2-5.E, in making its regulations, the board shall give weight it deems appropriate to all facts and circumstances, including:

(1) character and degree of injury to or interference with health, welfare, visibility and property;

(2) the public interest, including the social and economic value of the sources and subjects of air contaminants, with due consideration for environmental justice principles; and

(3) technical practicability and economic reasonableness of reducing or eliminating air contaminants from the sources involved and previous experience with equipment and methods available to control the air contaminants involved.

B. If a quorum of the board attended the hearing, and if the hearing notice indicated that a decision might be made at the conclusion of the hearing or meeting, the board may immediately deliberate and make a decision on the proposed regulatory change at the end of the hearing or at a board meeting after the hearing.

C. If the board does not reach a decision at the conclusion of the hearing or meeting, then, following receipt of the transcript, the hearing clerk shall promptly furnish a copy of the transcript to each board member who did not attend the hearing and, if necessary, to other board members, the board attorney and the hearing officer. Exhibits that were provided to persons at the time of the hearing need not be supplied again.

D. The board shall reach its decision on the proposed regulatory change within 60 days after the later of the close of the record or the date the hearing officer's report is filed, if a quorum of the board is available.

E. During the course of its deliberations, if the board determines that additional testimony or documentary evidence is necessary for a proper decision on the proposed regulatory change, then, consistent with the requirements of due process, the board may reopen the hearing for necessary additional evidence only. The board or hearing officer may require additional notice as appropriate.

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

G. The board's written decision is the official version of the board's action and the reasons for that action. Other written or oral statements by board members are not [~~recognized as~~] a part of the board's official decision or reasons.

[20.11.82.31 NMAC - N, 8/11/08]

20.11.82.[~~32~~]33 NOTICE OF BOARD ACTION: The hearing clerk shall provide notice of the board's action to each of the [~~participants~~] parties who have provided a legible address and to all other persons who have made a [~~legible~~] written request to the board for notification of the action taken, and have provided a legible address. {20.1.1.407 NMAC}

[20.11.82.32 NMAC - N, 8/11/08]

20.11.82.[~~33~~]34 [~~APPEALS AND STAYS –~~]APPEAL OF BOARD REGULATIONS:

A. Appeal of any regulatory change by the board shall be taken in accordance with NMSA 74-2-9.

B. The appellant shall serve a copy of the notice of appeal on the board and on each [~~participant~~] party.

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

D. Unless otherwise provided by NMSA 74-2-9, the filing of an appeal shall not act as a stay of the regulatory change being appealed.

[20.11.82.33 NMAC - N, 8/11/08]

20.11.82.[~~34~~]35 STAY OF BOARD REGULATIONS:

A. Any person who is or may be affected by a regulatory change adopted by the board may file a motion with the board seeking a stay of that rule or regulatory change. The motion shall include the reason for, and the legal authority supporting the granting of a stay. The movant shall serve the motion for a stay as provided by 20.11.82.16 NMAC. The movant shall file the motion at least 15 days before the next regularly scheduled board meeting [~~at which the board will consider the motion. The movant shall serve the motion for a stay as provided by 20.11.82.16 NMAC, and shall also serve all participants in the rulemaking proceeding.~~] At the beginning of the next regularly scheduled board meeting, the board shall appoint a hearing officer. The hearing officer shall preside at the motion hearing, which shall occur before the meeting at which the board makes a final decision regarding the motion.

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

C. In determining whether good cause exists for granting a stay, the board 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~~] another participant; and
(4) whether harm to the public interest will result.

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

[20.11.82.34 NMAC - N, 8/11/08]

HISTORY OF 20.11.82 NMAC: