

AReview of Part 81

With Reference to the
American Cement Permit Appeal
Bill Grantham, January 13, 2010

Prehearing Procedures

- Petition (*20.11.81.14.A*)
 - Filed November 2, 2009; Amended November 17
- Department Response (Answer) (*20.11.81.14.D*)
 - Filed November 17, December 1, 2009
- Scheduling Order (*20.11.81.14.F(2)*)
 - 2nd Amended Order filed Jan. 7, 2010 (revised time for public comment)
 - Specified 60 day-hearing timelines applicable

Prehearing Procedures

- Public Notice (*20.11.81.14.G*)
 - 15 days before hearing (February 5, 2010) – newspaper and mailing
- Statements of Intent to present technical evidence (*20.11.81.14.H*)
 - Due February 5, 2010
- Entries of Appearance (*20.11.81.14.I*)
 - Due 10 days before hearing = February 12
- Discovery
 - Discouraged under Part 81
 - No requests to date

Motions

- Deadline for Pretrial Motions January 22, 2010, per Amended Scheduling Order
- Responses due 15 days after motion, i.e. no later than February 8, 2010. (20.11.81.12.H (4))
- H.O. may decide all motions without a hearing on the motion, except:
 - Any motion that would dispose of case must be referred to the Board.
 - Any other motion may be referred to the Board.(20.11.81.12.H (6) – (7))

Hearing Procedures

- Hearing Officer Conducts (*20.11.81.16.B*)
 - Provide reasonable opportunity for all parties and interested persons to be heard, without unreasonable length or record burdened by unnecessary repetition
- Evidence (*20.11.81.16.D*)
 - Presented by parties through testimony
 - Admitted if relevant, provided it's not unduly repetitious, unreliable, or not probative
- **Board Members may cross exam any witness, as may parties, H.O., interested participants (per entry of appearance) (*20.11.81.14.G (2)*)**

Burden of Persuasion

- **20.11.81.16.C NMAC**

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

Post-Hearing Procedures

- Transcript -- typically available 2-3 weeks.
- Proposed Findings of Fact & Concl. of Law – H.O. may leave record open for. (20.11.81.18.B)
 - Typically, deadline for filing based off of transcript availability, e.g. 30 days after.
- Recommended Decision (H.O. Report) (20.11.81.18.C)
 - If directed by board, in time specified
 - H.O.'s findings and conclusions
 - Reasons for recommended decision
 - Proposed final order

Post-Hearing Procedures

- Board Deliberation and Decision (*20.11.81.18.D*)
 - May deliberate in closed session; must make final decision in an open meeting.
 - Board must direct a member, H.O., or a party to prepare a final order.
 - (If a recommended decision by the H.O. was directed, it will include a proposed final order, but the Board need not adopt it)

Post-Hearing Procedures

- Judicial Review (*20.11.81.18.E*)
 - Per NMSA 1978 § 74-2-9, appeal is to the New Mexico Court of Appeals
- Standard of Review
 - Board's decision will be overturned if it is
 - arbitrary, capricious, or an abuse of discretion
 - not supported by substantial evidence in the record, or
 - otherwise not in accordance with law

Ex Parte Contact

- **20.11.12.E. NMAC**

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.

Summary – Role of Board

- Members may attend hearing and cross-examine witnesses, but are not required to.
- Board will rule on an dispositive motions and any other motions referred by the H.O.
- Board must decide whether to direct the H.O. to issue a recommended decision
- Board will make final decision on findings of fact and conclusions of law, and issue a final order.