

1 **TITLE 20 ENVIRONMENTAL PROTECTION**
2 **CHAPTER 11 ALBUQUERQUE-BERNALILLO COUNTY AIR QUALITY CONTROL BOARD**
3 **PART 82 RULEMAKING PROCEDURES- -AIR QUALITY CONTROL BOARD**
4

5 **20.11.82.1 ISSUING AGENCY:** Albuquerque-Bernalillo County Air Quality Control Board, c/o
6 Environmental Health Department. P.O. Box 1293, Albuquerque, New Mexico 87103. Telephone: (505)
7 768-2601.
8 [20.11.82.1 NMAC –N, 8/11/08]
9

10 **20.11.82.2 SCOPE:** 20.11.82 NMAC governs the procedures in all rulemaking hearings before the
11 board, except to the extent that 20.11.82 NMAC is inconsistent with specific procedures in governing law.
12 In cases in which 20.11.82 NMAC is inconsistent with any rulemaking procedures specified in governing
13 law, the procedures in governing law shall apply, rather than the procedures in 20.11.82 NMAC. A
14 rulemaking hearing includes a hearing regarding a proposal to adopt, amend or repeal a board rule,
15 regulation or standard.
16 [20.11.82.2 NMAC - N, 8/11/08]
17

18 **20.11.82.3 STATUTORY AUTHORITY:** 20.11.82 NMAC is adopted pursuant to the authority
19 provided in the New Mexico Air Quality Control Act, NMSA 1978 Sections 74-2-4, 74-2-5; the Joint Air
20 Quality Control Board Ordinance, Bernalillo County Ordinance No. 94-5, Sections 4 and 5; and the Joint
21 Air Quality Control Board Ordinance, Revised Ordinances of Albuquerque 1994, Sections 9-5-1-4 and 9-5-
22 1-5.
23 [20.11.82.3 NMAC - N, 8/11/08]
24

25 **20.11.82.4 DURATION:** Permanent.
26 [20.11.82.4 NMAC - N, 8/11/08]
27

28 **20.11.82.5 EFFECTIVE DATE:** August 11, 2008, unless a later date is cited at the end of a
29 section.
30 [20.11.82.5 NMAC - N, 8/11/08]
31

32 **20.11.82.6 OBJECTIVE:** The purposes of 20.11.82 NMAC are to:
33 **A.** standardize the procedures used in rulemaking proceedings before the board;
34 **B.** encourage participation in the hearings conducted by the board for the promulgation of
35 regulations;
36 **C.** make possible the effective presentation of the evidence and points of view of parties and
37 members of the general public; and
38 **D.** assure that board hearings are conducted in a fair and equitable manner.
39 [20.11.82.6 NMAC - N, 8/11/08]
40

41 **20.11.82.7 DEFINITIONS:** As used in 20.11.82 NMAC:
42 **A.** “**Act**” means the Air Quality Control Act, Chapter 74, Article 2 NMSA 1978, and its
43 later amendments and successor provisions.
44 **B.** “**Board**” means Albuquerque-Bernalillo county air quality control board or its successor
45 board pursuant to the act.
46 **C.** “**Days**” means consecutive days except as otherwise specifically provided.
47 **D.** “**Department**” means the city of Albuquerque environmental health department or its
48 successor agency.
49 **E.** “**Document**” means any paper, exhibit, pleading, motion, response, memorandum,
50 decision, order or other written or tangible item that is filed in a proceeding pursuant to 20.11.82 NMAC,
51 or brought to or before the board for its consideration, but does not include a cover letter accompanying a
52 document transmitted for filing.
53 **F.** “**Ex parte contact**” means oral or other communication with a board member or a board
54 hearing officer regarding the merits of a pending rulemaking procedure if:
55 (1) the communication is made by a person who is not a board member, hearing clerk or
56 hearing officer;

1 (2) the person communicating knows or has reason to know a petition has been filed
2 pursuant to 20.11.82 NMAC;

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

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

8 **G. "Exhibit"** means any document or tangible item submitted for inclusion in the hearing
9 record.

10 **H. "General public"** means any person attending a rulemaking hearing who has not
11 submitted a notice of intent to present technical testimony.

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

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

17 **K. "Hearing officer"** means the person who is designated by the board to conduct a hearing
18 pursuant to 20.11.82 NMAC.

19 **L. "Hearing record"** means:

20 (1) the transcript of proceedings; and

21 (2) the record proper.

22 **M. "Non-technical testimony"** means testimony that is not scientific, engineering,
23 economic or other specialized testimony. A person who provides only non-technical testimony or a non-
24 technical exhibit is not required to file an NOI or entry of appearance pursuant to 20.11.82.20 NMAC or
25 20.11.82.21 NMAC.

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

28 **O. "Party"** means the petitioner, any person filing a notice of intent to present technical
29 testimony, and any person filing an entry of appearance.

30 **P. "Person"** means an individual or any entity, including federal, state and local
31 governmental entities, however organized.

32 **Q. "Petitioner"** means the person who petitioned the board for the regulatory change that is
33 the subject of the hearing.

34 **R. "Record proper" or "record"** means all documents related to the hearing, including
35 documents received or generated by the board before the beginning, or after the conclusion of the hearing,
36 including, but not limited to:

37 (1) the petition for hearing and any response thereto;

38 (2) the minutes (or an appropriate extract of the minutes) of the meeting at which the
39 petition for hearing was considered, and of any meeting thereafter at which the proposed regulatory change
40 was discussed;

41 (3) the notice of hearing;

42 (4) proof of publication;

43 (5) notices of intent to present technical testimony;

44 (6) statements for the public record;

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

46 (8) post-hearing submissions, if allowed;

47 (9) the stenographic transcription or audio tape of the hearing and the stenographic
48 transcription or audio tapes or appropriate extract of the audio tapes of the meeting at which the board
49 deliberated on the adoption of the proposed regulatory change; and

50 (10) the board's decision and the reasons therefore.

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

54 **T. "Regulatory change"** means the adoption, amendment or repeal of a regulation.

55 **U. "Service"** means personally delivering a copy of a document, exhibit or pleading to a
56 party required by 20.11.82 NMAC to be served; mailing it to that person; or, if that person has agreed in

1 writing, sending it by facsimile or electronic transmission. If a person is represented by an attorney, service
2 shall be made on the attorney. Service by mail is complete upon mailing the document unless service is
3 made by mail to a party who must act within a prescribed period after being served, in which case three
4 days shall be added to the prescribed period. The three-day extension does not apply to any deadline
5 imposed by the act. Service by facsimile or electronic transmission is accomplished when the transmission
6 of the document is complete. The person who receives the facsimile or electronic transmission shall
7 promptly provide written confirmation of receipt if requested by the hearing officer, the board or a party.

8 **V. "Technical testimony"** means scientific, engineering, economic or other specialized
9 testimony, but does not include legal argument, general comments, or statements of policy or position
10 concerning matters at issue in the hearing.

11 **W. "Transcript of proceedings"** means the verbatim record, audio tape or stenographic
12 transcription of the proceedings, testimony and argument in the matter, together with all exhibits offered at
13 the hearing, whether or not admitted into evidence, and includes the record of any motion hearings or pre-
14 hearing conferences.

15 [20.11.82.7 NMAC - N, 8/11/08]

16
17 **20.11.82.8 VARIANCES:** The variance procedures provided by 20.11.7 NMAC shall not apply to
18 20.11.82 NMAC.

19 [20.11.82.8 NMAC - N, 8/11/08]

20
21 **20.11.82.9 SEVERABILITY:** If for any reason any section, subsection, sentence, phrase, clause,
22 wording or application of 20.11.82 NMAC is held to be unconstitutional or otherwise invalid by any court
23 or the United States environmental protection agency, the decision shall not affect the validity or
24 application of remaining portions of 20.11.82 NMAC.

25 [20.11.82.9 NMAC - N, 8/11/08]

26
27 **20.11.82.10 DOCUMENTS:** Documents incorporated and cited in 20.11.82 NMAC may be viewed
28 at the Albuquerque environmental health department, 400 Marquette NW, Room 3023, Albuquerque, NM
29 87102.

30 [20.11.82.10 NMAC - N, 8/11/08]

31
32 **20.11.82.11 POWERS AND DUTIES OF BOARD AND HEARING OFFICER:**

33 **A. Board:** The board shall exercise all powers and duties authorized by 20.11.82 NMAC
34 and not otherwise delegated to the hearing officer or the hearing clerk.

35 **B. Hearing officer:** The board shall designate a hearing officer for each hearing. The
36 hearing officer shall exercise all powers and duties delegated or otherwise authorized by 20.11.82 NMAC.
37 The hearing officer may be a member of the board. The hearing officer shall conduct a fair and impartial
38 proceeding, assure that the facts are fully elicited and avoid delay. The hearing officer shall have authority
39 to take all measures necessary for the maintenance of order and for the efficient, fair and impartial
40 consideration of issues arising in proceedings governed by 20.11.82 NMAC, including:

41 (1) conducting hearings pursuant to 20.11.82 NMAC;
42 (2) taking, admitting or excluding evidence, examining witnesses and allowing post-hearing
43 submissions;

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

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

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

49 (6) establishing the deadlines for filing documents with the hearing clerk; and

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

52 [20.11.82.11 NMAC - N, 8/11/08]

53
54 **20.11.82.12 LIBERAL CONSTRUCTION:** 20.11.82 NMAC shall be liberally construed to carry
55 out its objectives.

56 [20.11.82.12 NMAC - N, 8/11/08]

1
2 **20.11.82.13 GENERAL PROVISIONS - COMPUTATION OF TIME:**

3 **A. Computation of time:** In computing any period of time prescribed or allowed by
4 20.11.82 NMAC, except as otherwise specifically provided, the day of the event from which the designated
5 period begins to run shall not be included. The last day of the computed period shall be included, unless it
6 is a Saturday, Sunday, or legal city of Albuquerque holiday, in which event the time shall be extended until
7 the end of the next day that is not a Saturday, Sunday or legal city of Albuquerque holiday. Whenever a
8 party must act within a prescribed period after service upon a party, and service is by mail, three days shall
9 be added to the prescribed period. The three-day extension does not apply to any deadline imposed by the
10 act.

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

14 [20.11.82.13 NMAC - N, 8/11/08]
15

16 **20.11.82.14 GENERAL PROVISIONS - RECUSAL:** No board member shall participate in any
17 action in which his or her impartiality or fairness may reasonably be questioned, and the member shall
18 recuse himself or herself in any such action by giving notice to the board and the general public by
19 announcing the recusal on the record. In making a decision to recuse him or herself, the board member
20 may rely upon any relevant authority.

21 [20.11.82.14 NMAC - N, 8/11/08]
22

23 **20.11.82.15 GENERAL PROVISIONS - EX PARTE COMMUNICATION:** At no time after a
24 proceeding is initiated by filing a petition pursuant to 20.11.82.18 NMAC and before the conclusion of a
25 proceeding initiated pursuant to 20.11.82 NMAC shall the department, or any other party, interested
26 participant or their representatives communicate ex parte, orally or in writing, with any board member or
27 the hearing officer, regarding the merits of the proceeding.

28 [20.11.82.15 NMAC - N, 8/11/08]
29

30 **20.11.82.16 DOCUMENT REQUIREMENTS - FILING AND SERVICE OF DOCUMENTS:**

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

33 **B.** Any person filing any document shall:

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

36 (2) deliver a copy to the board attorney;

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

39 (4) file with the hearing clerk at least 15 days before any meeting at which the board will
40 consider the document. If the document is a motion seeking an order from the hearing officer in a
41 rulemaking hearing, the motion shall also be served at the same time on the hearing officer and the board
42 attorney. Motions and responses shall be filed only by parties to a hearing and shall comply with
43 20.11.82.16 NMAC.

44 **C.** Whenever 20.11.82 NMAC requires service of a document, service on all other parties
45 shall be made by delivering a copy to the person to be served by mailing it, or, if that person has agreed in
46 writing, by sending it by facsimile or by electronic transmission to that person. An agreement to be served
47 by facsimile or electronic transmission may be evidenced by placing the person's facsimile number or
48 email address on a document filed pursuant to 20.11.82 NMAC. Service shall also be made upon the
49 board's attorney. If a person is represented by an attorney, service of the document shall be made on the
50 attorney. Service by mail is complete upon mailing the document unless service is made by mail to a party
51 who must act within a prescribed period after being served, in which case three days shall be added to the
52 prescribed period. The three-day extension does not apply to any deadline imposed by the act. Service by
53 facsimile or electronic transmission is accomplished when the transmission of the document is completed.
54 The person who received the facsimile or electronic transmission shall promptly provide written
55 confirmation of receipt if requested by the hearing officer, the board or a party.

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

8 **E.** All documents filed pursuant to 20.11.82 NMAC shall be made available for inspection
9 upon request as provided by the Inspection of Public Records Act, NMSA 1978, Sections 14-2-1 through
10 14-2-12.

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

14 **G.** 20.11.82.20 NMAC and 20.11.82.27 NMAC also provide requirements regarding hearing
15 exhibits.

16 [20.11.82.16 NMAC - N, 8/11/08]

17
18 **20.11.82.17 EXAMINATION OF DOCUMENTS FILED:**

19 **A. Examination allowed:** Subject to the provisions of law restricting the public disclosure
20 of confidential information, during normal business hours any person may inspect and request a copy of
21 any document filed in any rulemaking proceeding before the board. The documents shall be made
22 available by the hearing clerk as required by the Inspection of Public Records Act, NMSA 1978, Sections
23 14-2-1 through 14-2-12, and may be viewed at the Albuquerque environmental health department, 400
24 Marquette NW, Room 3023, Albuquerque, NM 87102.

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

27 [20.11.82.17 NMAC - N, 8/11/08]

28
29 **20.11.82.18 PREHEARING PROCEDURES - PETITION FOR REGULATORY CHANGE:**

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

32 **B.** The petition shall be in writing and shall include a statement of the reasons for the
33 proposed regulatory change. The petition shall cite the relevant statutes that authorize the board to adopt
34 the proposed regulatory change, and shall estimate the time that will be needed to conduct the rulemaking
35 hearing, if at all possible. A copy of the entire rule, including any proposed regulatory change, indicating
36 any language proposed to be added or deleted, shall be attached to the petition. The entire rule and its
37 proposed changes shall be submitted to the board in legislative-edit format, with strike-outs and underlines
38 as appropriate, and shall include individual line numbers. The hearing clerk shall return to the petitioner
39 any document that does not meet the requirements of 20.11.82.18 NMAC, along with a copy of 20.11.82
40 NMAC and a check-list of required items. The petitioner will be asked to resubmit the petition as required
41 by 20.11.82.18 NMAC.

42 **C.** At a public meeting occurring no later than 60 days after receipt of the petition, the board
43 shall determine whether or not to hold a public hearing on the proposal. Any person may respond to the
44 petition either in writing before the public meeting or in person at the public meeting.

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

51 [20.11.82.18 NMAC - N, 8/11/08]

52
53 **20.11.82.19 NOTICE OF HEARINGS:**

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

- 1 (1) a single publication in the newspaper with the largest general circulation in Bernalillo
2 county;
3 (2) publication in the New Mexico Register;
4 (3) if technically feasible at the time, publication by electronic media; and
5 (4) other means of providing notice as the board may direct or are required by law.

6 **B.** The board shall make reasonable efforts to give notice to persons who have made a
7 written request to the board for advance notice of regulatory change hearings. Requests for notice shall be
8 addressed to hearing clerk and shall designate the areas of board activity that are of interest.

9 **C.** Public notice of the hearing shall state:

- 10 (1) the subject, including a description of the proposed regulatory change, date, time and
11 place of the hearing;
12 (2) the statutes, regulations and procedural rules governing the conduct of the hearing;
13 (3) the manner in which persons may present their views or evidence to the board;
14 (4) the location where persons may obtain copies of the proposed regulatory change; and
15 (5) if applicable, that the board may make a decision on the proposed regulatory change at
16 the conclusion of the hearing or at a separate board meeting.

17 [20.11.82.19 NMAC - N, 8/11/08]

18
19 **20.11.82.20 TECHNICAL TESTIMONY; NOTICE OF INTENT (NOI):**

20 **A.** No later than 15 days before the hearing, any person, including the petitioner, who
21 intends to present technical testimony at the hearing shall file a notice of intent to present technical
22 testimony. The notice shall:

- 23 (1) identify the person for whom the witness or witnesses will testify;
24 (2) identify each technical witness the person intends to present and state the qualifications
25 of that witness, including a description of their educational and work background;
26 (3) summarize or include a copy of the direct testimony of each technical witness and state
27 the anticipated duration of the testimony of that witness;
28 (4) include the text of any recommended modifications to the proposed regulatory change;
29 and

30 (5) list and describe, or attach, all exhibits anticipated to be offered by that person at the
31 hearing, including any proposed statement of reasons for adoption of rules.

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

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

37 [20.11.82.20 NMAC - N, 8/11/08]

38
39 **20.11.82.21 ENTRY OF APPEARANCE:** Any person who is or may be affected by the proposed
40 regulatory change may file an entry of appearance and shall be a party. The entry of appearance shall be
41 filed no later than 15 days before the date of the hearing on the petition.

42 [20.11.82.21 NMAC - N, 8/11/08]

43
44 **20.11.82.22 PARTICIPATION BY GENERAL PUBLIC:**

45 **A.** Any member of the general public may testify at the hearing. Notification before the
46 hearing is not required in order to present non-technical testimony at the hearing. A person providing non-
47 technical testimony also may offer non-technical exhibits in connection with the testimony provided, if the
48 exhibit is not unduly repetitious of the testimony provided. The board requests but does not require
49 members of the general public to provide the hearing clerk with an original and nine copies of every non-
50 technical exhibit before or at the hearing.

51 **B.** A member of the general public who wishes to submit a non-technical written statement
52 for the record instead of providing oral testimony at the hearing shall file the written statement before the
53 hearing or submit it at the hearing.

54 [20.11.82.22 NMAC - N, 8/11/08]

55

1 **20.11.82.23 LOCATION OF HEARING:** Unless otherwise provided by governing law, the board
2 shall hold rulemaking hearings and meetings in public facilities within Bernalillo County with public
3 seating available.

4 [20.11.82.23 NMAC - N, 8/11/08]

5
6 **20.11.82.24 PARTICIPATION AT A BOARD MEETING BY CONFERENCE TELEPHONE
7 OR OTHER SIMILAR DEVICE:**

8 A member of the board may participate in a meeting of the board by means of a conference telephone or
9 other similar communications equipment when a medical or emergency situation exists that makes it
10 extremely difficult or impossible for the member to attend the meeting in person, provided that each
11 member participating by conference telephone or other device can be identified when speaking, all
12 participants are able to hear each other at the same time, and members of the public attending the meeting
13 are able to hear any member of the board who speaks at the meeting. A request to be present and vote by
14 telephone or other similar device shall be made by the member to the chair or acting chair of the board by
15 the member. A board member who wishes to participate in a meeting in this manner must receive
16 permission from the chair or acting chair of the board sufficiently in advance of the meeting so the hearing
17 clerk can arrange for an adequate telephone hookup. The chair or acting chair shall determine whether a
18 qualifying medical or emergency situation exists. A board member's participation by such means shall
19 constitute presence in person at the meeting. This provision shall not be used to allow a member to
20 constitute a quorum of the board, and may only be used for the purposes of:

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

25 [20.11.82.24 MAC - N, 8/11/08]

26
27 **20.11.82.25 HEARING PROCEDURES - CONDUCT OF HEARINGS:**

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

29 B. The hearing officer shall conduct the hearing in a manner that provides a reasonable
30 opportunity for all persons to be heard without making the hearing unreasonably lengthy or cumbersome,
31 or burdening the record with unnecessary repetition. The hearing shall proceed as follows.

32 (1) The hearing shall begin with an opening statement from the hearing officer. The
33 statement shall identify the nature and subject matter of the hearing and explain the procedures to be
34 followed.

35 (2) The hearing officer may allow a brief opening statement by any person who wishes to
36 make one.

37 (3) Unless otherwise ordered, the petitioner shall present its case first.

38 (4) The hearing officer shall establish an order for the testimony of other participants. The
39 order may be based upon notices of intent to present technical testimony, sign-in sheets and the availability
40 of witnesses who cannot be present for the entire hearing.

41 (5) If the hearing continues for more than one day, the hearing officer shall provide an
42 opportunity each day for testimony from members of the general public. Members of the general public
43 who wish to present testimony should indicate their intent to testify on a sign-in sheet.

44 (6) The hearing officer may allow a brief closing argument by any person who wishes to
45 make one.

46 (7) At the close of the hearing, the hearing officer shall determine whether to keep the record
47 open for written submittals in accordance 20.11.82.29 NMAC. If the record is kept open, the hearing
48 officer shall determine and announce the subject or subjects regarding which submittals will be allowed and
49 the deadline for filing the submittals.

50 [20.11.82.25 NMAC - N, 8/11/08]

51
52 **20.11.82.26 TESTIMONY AND CROSS-EXAMINATION:**

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

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

4 **C.** Any person who testifies at the hearing is subject to cross-examination on the subject
5 matter of his or her direct testimony and matters affecting his or her credibility. Any person attending the
6 hearing is entitled to conduct cross-examination as may be required for a full and true disclosure of matters
7 at issue in the hearing. The hearing officer may limit cross-examination to avoid harassment, intimidation,
8 needless expenditure of time or undue repetition.

9 [20.11.82.26 NMAC - N, 8/11/08]

10
11 **20.11.82.27 TECHNICAL EXHIBITS**

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

13 **B.** Any person offering a technical exhibit shall provide the hearing clerk with an original
14 and 15 copies for the board, the hearing officer, the board attorney, and persons attending the hearing.

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

18 **D.** Large charts and diagrams, models and other bulky exhibits are discouraged. If visual
19 aids are used, legible copies shall be submitted for inclusion in the record.

20 [20.11.82.27 NMAC - N, 8/11/08]

21
22 **20.11.82.28 TRANSCRIPT OF PROCEEDINGS:** The hearing clerk shall arrange for a court
23 reporter to make a verbatim transcription of the hearing unless the board requires another method of
24 recording. The petitioner shall pay the cost of the court reporter and the original transcription. The
25 petitioner shall also pay the cost of a copy of a transcription for each board member, the hearing officer and
26 the board attorney if required by the hearing officer or the board.

27 [20.11.82.28 NMAC - N, 8/11/08]

28
29 **20.11.82.29 POST-HEARING SUBMISSIONS:** The hearing officer may allow the record to
30 remain open for a reasonable period of time following the conclusion of the hearing for written submission
31 of additional evidence, comments and arguments, and proposed statements of reasons. The hearing
32 officer's determination shall be announced at the conclusion of the hearing. In considering whether the
33 record will remain open, the hearing officer shall consider the reasons why the material was not presented
34 during the hearing, the significance of the material to be submitted and the necessity for a prompt decision.

35 [20.11.82.29 NMAC - N, 8/11/08]

36
37 **20.11.82.30 HEARING OFFICER'S REPORT:** If the board directs, the hearing officer shall file a
38 report of the hearing. The report shall identify the issues addressed at the hearing, explain the testimony
39 and make a recommendation for board action, and shall be filed with the hearing clerk within the time
40 specified by the board. The hearing clerk shall promptly notify each participant that the hearing officer's
41 report has been filed and shall provide a copy of the report upon request as required by 20.11.82.17

42 NMAC.
43 [20.11.82.30 NMAC - N, 8/11/08]

44
45 **20.11.82.31 DELIBERATION AND DECISION:**

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

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

50 (2) the public interest, including the social and economic value of the sources and subjects
51 of air contaminants; and

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

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

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

9 **D.** The board shall reach its decision on the proposed regulatory change within 60 days after
10 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
11 available.

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

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

18 **G.** The board's written decision is the official version of the board's action, and the reasons
19 for that action. Other written or oral statements by board members are not recognized as part of the board's
20 official decision or reasons.

21 [20.11.82.31 NMAC - N, 8/11/08]
22

23 **20.11.82.32 NOTICE OF BOARD ACTION:** The hearing clerk shall provide notice of the board's
24 action to each of the participants and to all other persons who have made a legible written request to the
25 board for notification of the action taken.

26 [20.11.82.32 NMAC - N, 8/11/08]
27

28 **20.11.82.33 APPEALS AND STAYS - APPEAL OF REGULATIONS:**

29 **A.** Appeal of any regulatory change by the board shall be taken in accordance with NMSA
30 74-2-9.

31 **B.** The appellant shall serve a copy of the notice of appeal on the board and on each
32 participant.

33 **C.** The appellant shall be responsible for preparation of a sufficient number of copies of the
34 hearing record at the expense of appellant.

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

37 [20.11.82.33 NMAC - N, 8/11/08]
38

39 **20.11.82.34 STAY OF BOARD REGULATIONS:**

40 **A.** Any person who is or may be affected by a regulatory change adopted by the board may
41 file a motion with the board seeking a stay of that rule or regulatory change. The motion shall include the
42 reason for, and the legal authority supporting the granting of a stay. The movant shall file the motion at
43 least 15 days before the meeting at which the board will consider the motion. The movant shall serve the
44 motion for a stay as provided by 20.11.82.16 NMAC, and shall also serve all participants in the rulemaking
45 proceeding.

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

49 **C.** In determining whether good cause exists for granting a stay, the board shall consider:

- 50 (1) the likelihood that the movant will prevail on the merits of the appeal;
- 51 (2) whether the moving party will suffer irreparable harm if a stay is not granted;
- 52 (3) whether substantial harm will result to other interested persons; and
- 53 (4) whether harm to the public interest will result.

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

56 [20.11.82.34 NMAC - N, 8/11/08]

1
2 **HISTORY OF 20.11.82 NMAC:**