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This rule was filed as 20 NMAC 1.5

TITLE 20 ENVIRONMENTAL PROTECTION
CHAPTER 1 ENVIRONMENTAL PROTECTION GENERAL
PART 5 ADJUDICATORY PROCEDURES – ENVIRONMENT DEPARTMENT

20.1.5.1 ISSUING AGENCY: Environment Department.
[11/30/95; 20.1.5.1 NMAC – Rn, 20 NMAC 1.5.I.100, Recompiled 11/27/01]

20.1.5.2 SCOPE: Except as otherwise specifically provided by statute or by any other rule or regulation of the Board or the Department, this Part governs administrative appeals of compliance orders, administrative orders, field citations or compliance determinations issued or administered by the Department. This Part further governs administrative hearings for permit suspensions and revocations. In any Department proceeding conducted under the Uniform Licensing Act, NMSA 1978, Sections 61-1-1 et seq. (ULA), the procedures in the ULA shall govern the proceeding. In the absence of a specific provision in the ULA governing an action, the Department may look to this Part for guidance.
[11/15/90, 11/30/95; 20.1.5.2 NMAC – Rn, 20 NMAC 1.5.I.101, Recompiled 11/27/01]

20.1.5.3 STATUTORY AUTHORITY: This Part is adopted under the authority of NMSA 1978, 9-7A-6, 74-2-12, 74-4-10, 74-6B-8, 74-6B-13, 74-9-28.A(2), 74-9-29, 74-9-36, 74-11-10 and 74-11-11, as amended.
[11/15/09, 11/30/95; 20.1.5.3 NMAC – Rn, 20 NMAC 1.5.I.102, Recompiled 11/27/01]

20.1.5.4 DURATION: Permanent.
[11/30/95; 20.1.5.4 NMAC – Rn, 20 NMAC 1.5.I.103, Recompiled 11/27/01]

20.1.5.5 EFFECTIVE DATE: November 1, 1995.
[11/30/95; 20.1.5.5 NMAC – Rn, 20 NMAC 1.5.I.104, Recompiled 11/27/01]

20.1.5.6 OBJECTIVE: The objective of this Part is to establish regulations that govern adjudicatory proceedings of the Environment Department. This Part is to ensure due process for all the parties and give an orderly structure to the proceedings.
[11/30/95; 20.1.5.6 NMAC – Rn, 20 NMAC 1.5.I.105, Recompiled 11/27/01]

20.1.5.7 DEFINITIONS:
A. GENERAL. As used in this Part:
(1) "Act" means, as the context requires:
(a) the Department of Environment Act, NMSA 1978, Chapter 9, Article 7A, and its subsequent amendments and successor provisions;
(b) the Air Quality Control Act, NMSA 1978, Chapter 74, Article 2, and its subsequent amendments and successor provisions;
(c) the Hazardous Waste Act, NMSA 1978, Chapter 74, Article 4, and its subsequent amendments and successor provisions;
(d) the Solid Waste Act, NMSA 1978, Chapter 74, Article 9, and its subsequent amendments and successor provisions;
(e) the Ground Water Protection Act, NMSA 1978, Chapter 74, Article 6B, and its subsequent amendments and successor provisions;
(f) the Tire Recycling Act, NMSA 1978, Chapter 74, Article 11, and its subsequent amendments and successor provisions; or
(g) any other statute enacted or amended by the Legislature and including authority for issuance of compliance orders or field citations by the Division or the Secretary or any other adjudicatory proceedings as consistent with law;
(2) "Board" means the Environmental Improvement Board;
(3) "Complainant" means the Division that issues Compliance Orders, or the party requesting a hearing on a Compliance Determination;

(4) "Compliance Determination" means a decision by the Division listed in the Corrective Action Fund Payment and Reimbursement, 20 NMAC 5.17; [20.5.17 NMAC]

(5) "Compliance Order" means a written administrative order or any field citation issued by the Division;

(6) "Department" means the New Mexico Environment Department or it successor agency under the Act;

(7) "Division" means the appropriate Division within the Environment Department;

(8) "document" means, except as otherwise used in Subpart III, any pleading, motion, response, memorandum, decision, order, or other written material filed or served in a proceeding under this Part, but does not include a cover letter accompanying a document transmitted for filing;

(9) "final order" means an order issued by the Secretary that is dispositive of the matter;

(10) "Hearing Clerk" means the person designated by the Secretary to maintain the official record of the proceeding;

(11) "Hearing Officer" means the person appointed by the Secretary to conduct a proceeding under this Part;

(12) "Notice of Contemplated Action" means a notice issued by the Secretary under NMSA 1978, Section 61-1-4 of the ULA;

(13) "party" means the Complainant, the Division, Respondent, any person who is entitled and who timely requests to be heard under the ULA, or any person who is permitted to intervene in the hearing pursuant to SCRA 1986, 1-024;

(14) "Petition" means a Petition for revocation or suspension of a permit;

(15) "Petitioner" means the Department when the Petition is for revocation or suspension of a permit;

(16) "Record Proper" means all documents filed by or with the Hearing Clerk during the proceeding and includes the written transcript or tape of the hearing and all exhibits offered into evidence at the hearing, whether or not admitted;

(17) "Regulations" means any rule promulgated and adopted pursuant to the Act;

(18) "Request for Hearing" means a written appeal for review of a decision or Compliance Order issued by Division;

(19) "Respondent" means any person to whom a Compliance Order has been issued; or the Division in the case of a Compliance Determination under the Ground Water Protection Act; and

(20) "Secretary" means the Secretary of Environment, or any person who assumes the role of Secretary for purposes of this Part in the event of the Secretary's disqualification.

B. Terms Used in Act or Regulations: Terms defined in the Act or Regulations and not defined in this Part are used consistent with the meanings given in the Act or Regulations.

[11/15/95, 11/30/95; 20.1.5.7 NMAC – Rn, 20 NMAC 1.5.I.111, Recompiled 11/27/01]

20.1.5.8 to 20.1.5.99 RESERVED]

20.1.5.100 GENERAL [PROVISIONS]:

A. Applicability of Rules of Civil Procedure: In the absence of a specific provision in this Part governing an action, the New Mexico Rules of Civil Procedure, SCRA 1986, 1-001 to 1-102 and the New Mexico Rules of Evidence, SCRA 1986, 11-101 to 11-1102 may apply as necessary in the discretion of the Secretary or Hearing Officer. The reference to the Rules of Civil Procedure or the Rules of Evidence shall not be construed to extend or otherwise modify the authority and jurisdiction of the Secretary under any statute.

B. Liberal Construction: This Part shall be liberally construed to carry out its purpose.

C. Severability: If any Part or application of this Part is held invalid, the remainder of the Part, or its application to other persons or situations, shall not be affected.

D. Replacement of Prior Rules: This Part replaces the Rules Governing Appeals From Compliance Orders Under the Hazardous Waste Act and the Solid Waste Act, HED 90-10 (EID), filed October 16, 1990. Any reference in this Title to these Rules shall be construed as a reference to this Part.

E. Savings Clause: Replacement of the Rules Governing Appeals From Compliance Orders Under the Hazardous Waste Act and the Solid Waste Act, HED 90-10 (EID), filed October 16, 1990, does not affect pending litigation, nor any Compliance Orders or Compliance Determinations issued prior to the effective date of this Part.

F. Powers and Duties of the Secretary, Hearing Officer:

(1) Secretary: The Secretary shall exercise all powers and duties as prescribed under the Act and this Part, and not otherwise delegated to a staff member, the Hearing Officer, or the Hearing Clerk.

(2) Hearing Officer: The Secretary may appoint one or more Hearing Officers to perform the functions described in Paragraph 2 of this Subsection [Subparagraph (b) of this Subsection].

(a) Qualifications: If an independent Hearing Officer is required by the Act, then the Hearing Officer may be an independent contractor or a State employee who is employed in the capacity as a Hearing Officer. The Hearing Officer shall not be anyone who has performed prosecutorial or investigative functions in connection with the matter at issue in the proceeding.

(b) Functions: The Hearing Officer shall exercise all powers and duties prescribed or delegated by the Secretary under the Act or this Part. The Hearing Officer shall conduct a fair and impartial proceeding, assure that the facts are fully elicited, and avoid delay. The Hearing Officer shall have authority to take all measures necessary for the maintenance of order and for the efficient, fair and impartial adjudication of issues arising in proceedings governed by this Part, which includes, but is not limited to authority to:

(i) conduct hearings under this Part;

(ii) rule upon motions, procedural requests, offers of proof, and issue all necessary orders;

(iii) issue subpoenas, as authorized by the Act, for the attendance and testimony of witnesses and the production of documentary evidence as provided for in Subpart III [20.1.5.300 NMAC];

(iv) administer oaths and affirmations, examine witnesses and admit or exclude evidence;

(v) require parties to attend conferences for the settlement or simplification of the issues, or the expedition of the proceedings; and

(vi) impose sanctions, subject to review by the Secretary, on parties who cause undue delay or fail to cooperate in the proceeding.

(3) Secretary or Hearing Officer; Disqualification or Withdrawal:

(a) Neither the Secretary nor any Hearing Officer may perform functions provided for in this Part regarding any matter in which the Secretary or the Hearing Officer:

(i) has a personal bias or prejudice concerning a party or personal knowledge of facts or information concerning the proceeding;

(ii) has a financial interest in the proceeding;

(iii) is related to a party; or

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

(b) The Secretary shall not be disqualified solely because of having been briefed on the matter prior to issuance of the Compliance Order or having authorized further investigation of the matter prior to issuance of the Compliance Order.

(c) Any party, by motion and for cause listed in Section 112.C.1, [Subparagraph (a) of Paragraph (3) of this Subsection] may request the disqualification of the Secretary or the Hearing Officer within ten (10) days after the matter has been docketed or the Hearing Officer designated, or if a new Secretary is appointed, within ten (10) days after the Secretary takes office.

(d) Any motion seeking disqualification of the Hearing Officer or the Secretary shall be ruled upon by the Secretary. Upon disqualification of the Secretary, the Deputy Secretary shall assume the duties of the Secretary. In the event that the Deputy Secretary is also subject to disqualification, a division director other than the Complainant shall assume the duties of the Secretary.

G. Computation and Extension of Time:

(1) Computation of Time: In computing any period of time prescribed or allowed by this Part, 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 state holiday, then the time is extended until the next day which is not a Saturday, Sunday, or legal state holiday. Whenever a party must act within a prescribed period after service upon him and service is by mail, three (3) days is added to the prescribed period. The three days extension does not apply to any deadline mandated otherwise under the Act.

(2) Extensions of Time : The Secretary or Hearing Officer may grant an extension of time to file a document or continuance of a hearing upon timely motion of a party to the proceeding, for good cause shown, and after consideration of prejudice to other parties and undue delay to the proceedings.

H. Ex Parte Discussions: At no time shall any party to a proceeding under this Part discuss ex parte with the Secretary or the Hearing Officer the merits of the proceeding.

I. Filing, Service, and Form of Documents:

(1) Filing of Documents:

(a) Except as otherwise provided, the original of all documents served in the proceeding shall be filed with the Hearing Clerk.

(b) Except as otherwise provided, a party filing documents shall serve copies thereof upon all other parties. A certificate of service, as shown in Section 118, [Subsection L. of this Section] shall accompany each filed document.

(2) Service of Documents: Except as otherwise provided, all documents may be served personally, by express mail, by telefax or by first class mail.

(3) Form of Documents:

(a) Unless otherwise ordered by the Hearing Officer, all documents, except exhibits, shall be on 8 1/2 x 11-inch white paper, and where appropriate, the first page of every document shall contain a heading and caption as illustrated in Section 118 [Subsection L. of this Section]. Any field citation may be on a pre-printed, multi-copy form.

(b) The original of each document, except exhibits, shall be signed by the party or the party's counsel or other representative, and shall include address and telephone number. The signature constitutes a certificate that the signer has read the document; that to the best of the signer's knowledge, information, and belief, there is good ground to support it; and that, except for motions for extension of time, it is not interposed for delay.

(c) Any notice or service required under this Part shall be deemed adequate if made to the most recent address provided by the person upon whom service is made.

J. Filing and Service of Documents Issued by Secretary or Hearing Officer: All documents issued by the Hearing Officer shall be filed with the Hearing Clerk. The Hearing Clerk shall promptly serve copies of the document upon all parties.

K. Examination of Documents Filed:

(1) Examination Allowed: Subject to the provisions of law restricting the public disclosure of confidential information, any person may, during normal business hours, inspect and copy any document filed in any proceeding. Such documents shall be made available by the Hearing Clerk, as appropriate.

(2) Cost of Duplication: Unless waived by the Department, the cost of duplicating documents filed in any proceeding shall be borne by the person seeking copies of such documents.

L. Sample Document:

STATE OF NEW MEXICO
SECRETARY OF ENVIRONMENT

NAME OF COMPLAINANT,
Complainant,
v. No.

NAME OF RESPONDENT,
Respondent.

TITLE OF DOCUMENT

Signature_____
NAME
ADDRESS & TELEPHONE NUMBER

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing [name of document] was [hand-delivered/express mailed/faxed/mailed first class] on the following [party/counsel] of record [date]:

[names and addresses of persons upon whom service is made.]

Signature_____
Name of signer

[11/15/90, 11/30/95; 20.1.5.100 NMAC – Rn, 20 NMAC 1.5.I.106 through 110, and 20 NMAC 1.5.I.112 through 118, Recompiled 11/27/01]

20.1.5.101 to 20.1.5.199 [RESERVED]

20.1.5.200 PREHEARING PROCEDURES:

A. Initiation of Process:

(1) Filing of Request: The appeal process governed by this Part shall be initiated by the filing of a Request for Hearing and served on the Department and any other party.

(2) Request for Hearing: The Request for Hearing shall include an Answer. The Answer shall:

(a) clearly and directly admit or deny each of the factual assertions contained in the Compliance Order/Determination; but where the Respondent/Complainant has no knowledge of a particular factual assertion and so states, the assertion may be denied on that basis. Any allegation of the Compliance Order/Determination not specifically denied shall be deemed admitted;

(b) indicate any affirmative defenses upon which the Respondent/Complainant intends to rely. Any affirmative defense not asserted in the Request for Hearing, except a defense asserting lack of subject matter jurisdiction, shall be deemed waived;

(c) be signed under oath or affirmation that the information contained therein is to the best of the signer's knowledge believed to be true and correct; and

(d) have a copy of the Compliance Order/Determination attached.

B. Notice of Docketing; Notice of Hearing Officer Assignment:

(1) Notice of Docketing; Notice of Hearing Officer Assignment: The Hearing Clerk shall, as soon as practicable after receipt of a Request for Hearing, issue a Notice of Docketing containing the caption and docket number of the case, the date upon which the Request for Hearing was received by the Hearing Clerk, and the name of the Hearing Officer, if one has been designated. If a Hearing Officer has not been designated, the parties shall be notified of the name and address of the Hearing Officer as soon as one is assigned. A copy of this Part shall be included with a Notice of Docketing sent to the Respondent/Complainant.

(2) Untimeliness: The Hearing Clerk shall docket any Request for Hearing, without regard to whether it appears to be timely; but any party may move to dismiss an untimely Request for Hearing.

C. Scheduling the Hearing:

(1) Compliance Determinations: The hearing for Compliance Determinations shall be scheduled to begin no later than ninety (90) days after the date the Request for Hearing was received, unless a stipulated or unopposed motion is filed requesting that the ninety day deadline be waived. The motion to waive must be filed prior to the expiration of the ninety day deadline.

(2) Tire Recycling Act Compliance Order: Within five days of receipt of a Request for Hearing, a public hearing shall be scheduled to begin at least fifteen days and not more than twenty days after the date the notice of hearing is mailed to the Respondent.

(3) Notice of Hearing: The Hearing Clerk shall in consultation with the Hearing Officer, but no later than thirty (30) days prior to the hearing date, issue and serve upon the parties a Notice of Hearing setting forth the date, time, and location of the hearing.

(4) Postponement of Hearing: No request for postponement of a hearing shall be granted except upon consent of all parties or for good cause shown.

(5) Location of the Hearing: Unless otherwise ordered by the Secretary, the hearing shall be in Santa Fe.

D. Motions:

(1) General: All motions, except those made orally during a hearing, shall be in writing, specify the grounds for the motion, state the relief sought and state whether it is opposed or unopposed. Each motion may be accompanied by an affidavit, certificate, or other evidence relied upon and shall be served as provided by Section 115 [Subsection I. of 20.1.5.100 NMAC].

(2) Unopposed Motions: An unopposed motion shall state that concurrence of all other parties was obtained. The moving party shall submit a proposed order approved by all parties for the Hearing Officer's review.

(3) Opposed Motions: Any opposed motion shall state either that concurrence was sought and denied, or why concurrence was not sought. A memorandum brief in support of such motion may be filed with the motion.

(4) Response to Motions: Any party upon whom an opposed motion is served shall have fifteen (15) days after service of the motion to file a response. A non-moving party failing to file a timely response shall be deemed to have waived any objection to the granting of the motion.

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

(6) Decision: All motions shall be decided by the Hearing Officer without a hearing, unless otherwise ordered by the Hearing Officer sua sponte or upon written request of any party.

[11/15/90, 11/30/95; 20.1.5.200 NMAC – Rn, 20 NMAC 1.5.II 200 through 203, Recompiled 11/27/01]

20.1.5.201 to 20.1.5.299 [RESERVED]

20.1.5.300 DISCOVERY:

A. Scope of Discovery:

(1) Grounds: For a ULA Hearing, discovery shall be governed by the provisions of the ULA. Discovery of information not privileged may be permitted if it meets the following:

(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;

(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 serve the discovery request directly upon the party from whom discovery is sought and shall file a notice with the Hearing Clerk, indicating 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 serve the response, including any objections, upon the party making the discovery request and shall file a notice with the Hearing Clerk, indicating 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: Any party from whom discovery is sought has a continuing obligation, subject to any objections interposed and not overruled by the Hearing Officer, to supplement responses with relevant information obtained after serving of the initial response and any previous supplemental responses. Unless otherwise ordered by the Hearing Officer, supplemental responses shall be served as soon as practicable, but no later than five (5) days from when the information became available. If the information becomes available less than five days before the hearing or during the hearing, it 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 documents, identified by titles, author, date, and privilege or protection claimed shall be provided in response to discovery.

(6) Protective Order: The Hearing Officer may, upon motion and for good cause shown, protect the discovery from disclosure. If such motion is granted, the moving party may not present the protected discovery at the hearing.

(7) Motion to Compel, Sanctions: A party may move for an order compelling discovery where the party from whom discovery was requested has failed to adequately or timely respond. The Hearing Officer may order the response and may impose such sanctions as may be appropriate, including but not limited to the following:

(a) refusal to allow the testimony of a witness not identified as required by Section 301 [Subsection B. of this Section];

(b) denial of admission of a document not disclosed as required by Section 302; [Subsection C. of this Section]

(c) drawing of adverse inferences against the non-responsive party; and

(d) in an extreme case, dismissal or default judgment against the non-responding party.

B. Identity of Witness: Except as provided in Subsection B of this Section [Paragraph (2) of Subsection A. of this Section] or allowed by the Hearing Officer, each party shall, within fifteen (15) days after receipt of notice of the scheduling of the hearing or within forty-five (45) days before the hearing, whichever is closer to the hearing date, provide the name and address of each person expected to be called as a witness and a description of the general subject matter of the anticipated testimony of each witness.

C. Production of Documents:

(1) Definition: As used in this Subpart, "document" includes writings, memos, correspondence, financial information, drawings, graphs, charts, photographs, video tapes and other data compilations from which information can be obtained, and if necessary, translated by the party through detection devices into reasonably usable form. In addition, each copy of a document that is not identical in all respects to every other copy shall be considered a separate document.

(2) Request: Provided the grounds in Section 300.A [Paragraph (1) of Subsection A. of this Section] are met, any party, upon written request to another party, may inspect and make copies of any designated documents in the possession or control of the other party. The request shall set forth the items to be inspected either by individual item or by category and describe each item and category with reasonable particularity. The request shall specify a reasonable time, place and manner of making the inspection and copies. Reasonable time means not less than twenty (20) days after service of the request in the case of a Compliance Order and not less than ten (10) days after service of the request in the case of a Compliance Determination.

D. Subpoenas: As allowed by the Act, the Hearing Clerk shall, upon written request by any party, issue a subpoena requiring the attendance and testimony of any witness and the production of any evidence in the possession or under the control of the witness at the hearing or at deposition authorized by the Hearing Officer under Section 304 [Subsection E. of this Section]. A subpoena may be issued with the name and address of the witness blank, to be completed by the requesting party.

E. Request for Admissions: Provided the grounds in Section 300.A [Paragraph (1) of Subsection A. of this Section] are met, any party may serve upon any other party a written request for the admission of any statement or opinion of fact or the application of law to fact, including the genuineness of any document. If the request includes a request for admission of the genuineness of a document, the document shall be attached to the request unless it has been or is otherwise furnished or made available for inspection and copying. Each statement shall be deemed admitted unless, within twenty (20) days after service of the Request, or such longer or shorter period as the Hearing Officer may prescribe, the party to whom the request is directed serves upon the requesting party a sworn written response specifically denying such matter.

F. Depositions and Interrogatories:

(1) Motion: Requests for Depositions and Interrogatories must be made by motion to the Hearing Officer and may be permitted only upon determination by the Hearing Officer that the Grounds listed in Section 300.A [Paragraph (1) of Subsection A. of this Section] are met.

(2) Order: Upon determining that a motion for depositions or interrogatories should be granted, the Hearing Officer shall issue an order for the taking of such discovery together with any conditions and terms of the discovery.

[11/15/90, 11/30/95; 20.1.5.300 NMAC – Rn, 20 NMAC 1.5.III.300 through 305, Recompiled 11/27/01]

20.1.5.301 to 20.1.5.399 [RESERVED]

20.1.5.400 HEARING PROCEDURES:

A. Evidence:

(1) General: The Hearing Officer shall admit all relevant evidence, unless the Hearing Officer determines that the evidence is irrelevant, immaterial, unduly repetitious or otherwise unreliable or of little probative value. Evidence relating to settlement that would be excluded in the courts under SCRA 1986, 11-408 is not admissible.

(2) Examination of Witnesses: Witnesses shall be examined orally, under oath or affirmation, except as otherwise provided in this Part or by the Hearing Officer. Parties shall have the right to cross-examine a witness. The Hearing Officer may limit cross-examination that is unduly repetitious, harassing or beyond the scope of the witness' direct testimony.

(3) Exhibits: All exhibits offered in evidence shall be marked with a designation identifying the person by whom the exhibit is offered, and numbered serially in the sequence in which offered. Large charts and diagrams, models, and other bulky exhibits are discouraged. Exhibits should be limited to 8 1/2 by 11 inches or be capable of being folded to that size, unless otherwise necessary for adequate presentation of evidence.

(4) Official Notice: Official notice may be taken of any matter that may be judicially noticed in the New Mexico courts. In a ULA Hearing, parties shall be given adequate opportunity to show that such facts are erroneously noticed.

B. Objections and Offers of Proof:

(1) Objection: Any objection concerning the conduct of the hearing may be stated orally or in writing during the hearing. The party raising the objection must supply a short statement of its grounds. The ruling by the Hearing Officer on any objection and the reasons given for it shall be part of the record.

(2) Offer of Proof: Whenever evidence is excluded from the record, the party offering the evidence may make an offer of proof, which shall be included in the record. The offer of proof for excluded oral testimony shall consist of a brief statement describing the nature of the evidence excluded and what such evidence would have proved. The offer of proof for excluded documents or exhibits shall consist of the insertion in the record of the documents or exhibits excluded. Where the Secretary decides that the ruling of the Hearing Officer in excluding the evidence was both erroneous and prejudicial, the hearing may be reopened to permit the taking of such evidence.

C. Burden of Persuasion:

(1) Compliance Order: The Complainant has the burden of going forward with the evidence and of proving by a preponderance of the evidence the facts relied upon to show the violation occurred and that the proposed civil penalty is appropriate. Following the establishment of a prima facie case, the Respondent shall have the burden of going forward with any adverse evidence or defense to the allegations.

(2) Compliance Determination: The Complainant has the burden of proving cost eligibility and substantial compliance with the Act and Corrective Action Fund Payment and Reimbursement Regulations.

(3) Preponderance of Evidence: Each matter of controversy shall be determined by the Hearing Officer upon a preponderance of the evidence.

[11/15/90, 11/30/95; 20.1.5.400 NMAC – Rn, 20 NMAC 1.5.IV.400 through 402, Recompiled 11/27/01]

20.1.5.401 to 20.1.5.499 [RESERVED]

20.1.5.500 POST-HEARING PROCEDURES:

A. Filing the Transcript: Unless otherwise ordered by the Secretary or Hearing Officer, The hearing shall be transcribed verbatim. The Hearing Clerk shall promptly notify all parties and interested participants of the availability of the transcript. Any person desiring a copy of the transcript must order a copy from the reporter.

B. Proposed Findings and Conclusions: Unless otherwise ordered by the Hearing Officer, within thirty (30) days after the filing of the transcript, or within such time as may be fixed by the Hearing Officer, any party may submit proposed findings of fact and conclusions of law and closing argument. All such submissions shall be in writing, served on all parties and contain adequate references to the record and authorities relied on. No new evidence shall be presented unless specifically allowed by the Hearing Officer.

C. Recommended Decision:

(1) Content: Unless otherwise ordered by the Secretary, the Hearing Officer shall issue a recommended decision within thirty (30) days after the period for filing of proposed findings and conclusions under Section 501 [Subsection B. of this Section] has expired. The recommended decision shall contain the following:

(a) the Hearing Officer's findings of fact; conclusions regarding all material issues of law or discretion, as well as reasons therefor;

(b) if applicable, a review of the penalty amount to determine if the agency acted within its discretion in setting the penalty amount. If the Hearing Officer decides to recommend a civil penalty different in amount or nature from the penalty recommended to be assessed in the Compliance Order, the Hearing Officer shall set forth in the recommended decision the specific reasons for the change; and

(c) a proposed final order.

(2) Comment on Recommended Decision: Any party may file, within fifteen (15) days after service of the recommended decision, comments regarding the recommended decision, including argument for, against or modification of the recommended decision.

(3) Argument Before the Secretary: The Secretary may, upon request of a party or sua sponte, allow oral argument on the recommended decision. If oral argument is allowed, the Secretary shall specify the time and place for such oral argument, after giving due consideration to the convenience of the parties and the need for expeditious resolution of the proceeding.

D. Final Order by Secretary: As soon as practicable, but not later than thirty (30) days, after expiration of the time for filing of comments on the recommended decision or conclusion of oral argument, if allowed, the Secretary shall issue a final written order in the matter.

(1) Decision: The Secretary may adopt, modify, or set aside the Hearing Officer's recommended decision, and shall set forth in the final order the reasons for the action taken. In a ULA Hearing, if the Secretary takes any action specified in the ULA against the licensee, the final order shall specify that the licensee shall bear all costs of the proceeding.

(2) Penalty: The Secretary may change the amount and nature of the civil penalty, if any, assessed from the amount recommended by the Hearing Officer and shall set forth reasons for the change. The final order shall also specify the fund to which any civil penalty assessed shall be paid.

E. Payment of Civil Penalty: The Respondent shall pay the full amount of the civil penalty, if any, assessed in the final order within ninety (90) days after receipt of the final order unless otherwise ordered by the Secretary. Payment shall be made by forwarding to the Hearing Clerk a cashier's check or certified check in the amount of the penalty assessed in the final order, payable to the fund specified in the final order.

F. Judicial Review: Judicial review of the Secretary's final order shall be as provided by law. The filing of an appeal does not stay any action, compliance, corrective action or payment of penalty required by the final order, unless otherwise ordered by the Secretary or the Court.

G. Preparation of Record Proper: The preparation of the Record Proper for an appeal or for any other reason shall be the responsibility of the Hearing Clerk. Appellant shall make satisfactory arrangements, including copying or transcript costs, with the Hearing Clerk.

[11/15/90, 11/30/95; 20.1.5.500 NMAC – Rn, 20 NMAC 1.5.V.500 through 506, Recompiled 11/27/01]

20.1.5.501 to 20.1.5.599 [RESERVED]

20.1.5.600 ALTERNATE RESOLUTION:

A. Summary Procedures:

(1) Use of Summary Procedures: Under the following limited circumstances, the Secretary may dispose of a Request for Hearing after an expedited hearing for:

(a) a motion by a party to dismiss the Request for Hearing for jurisdictional defects (i.e. an untimely Request, lack of final action); or

(b) a request by a party to decide the merits of the Request for Hearing on legal arguments presented in writing and oral argument.

(2) Expedited Hearing: If the Hearing Officer determines that a request for an expedited hearing has a likelihood of success and could fairly expedite the resolution of the proceeding, then notice for a hearing shall be given as set forth in this Part. The Hearing Officer shall then submit a recommended decision to the Secretary. The Secretary shall either follow Section 503 [Subsection D. of 20.1.5.500 NMAC] for final orders or remand to the Hearing Officer to proceed with a full hearing under this Part.

B. Settlement:

(1) Settlement Policy: The Secretary encourages settlement of a proceeding at any time if the settlement is consistent with the provisions and objectives of the Act and Regulations. Settlement conferences shall not affect any party's obligation to timely respond to any matter governed by this Part, including the Respondent's obligation to file a timely Request for Hearing under Section 200 [20.1.5.200 NMAC].

(2) Stipulated Final Order: The Secretary may approve a Stipulated Final Order signed by all the parties. The Stipulated Final Order shall include all the terms and conditions agreed to by the parties, and shall state that, for the purpose of this proceeding, the parties admit the jurisdictional allegations of the Compliance Order/Determination and consent to the relief specified, including the assessment of the stated civil penalty, if any. If the Secretary disapproves the Stipulated Final Order, the matter shall proceed as if there had been no Stipulated Final Order or settlement.

(3) Withdrawal: The Respondent/Complainant may withdraw the Request for Hearing or the Compliance Order at any time prior to a decision by the Secretary. A Notice of Withdrawal shall be filed with the Hearing Clerk and served on all other parties. The parties may file written objections to the Notice within ten (10) days after receipt. If any objection is filed, the Secretary shall rule on the Notice.

[11/15/90, 11/30/95; 20.1.5.600 NMAC – Rn, 20 NMAC 1.5.VI.601, Recompiled 11/27/01]

20.1.5.601 to 20.1.5.699 [RESERVED]

HISTORY OF 20.1.5 NMAC: [RESERVED]

History of Repealed Material: [RESERVED]