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

20.11.80.1 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.
[20.11.80.1 NMAC – N, __/__/11]

20.11.80.2 SCOPE:

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

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

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

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

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

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

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

C. Exempt: 20.11.80 NMAC does not apply to sources within Bernalillo county that are located on Indian lands over which the board lacks jurisdiction, or to administrative enforcement actions that involve air care inspection stations, fleet air care stations, air care inspectors or the decentralized or centralized motor vehicle inspection program, which are governed by 20.11.100 NMAC and 20.11.101 NMAC respectively.
[20.11.80.2 NMAC – N, __/__/11]

20.11.80.3 STATUTORY AUTHORITY: 20.11.80 NMAC is adopted pursuant to the authority of the Air Quality Control Act, Chapter 74, Article 2 NMSA 1978, specifically Sections 74-2-5, 74-2-5.1 and 74-2-12 NMSA 1978.
[20.11.80.3 NMAC – N, __/__/11]

20.11.80.4 DURATION: Permanent.
[20.11.80.4 NMAC – N, __/__/11]

20.11.80.5 EFFECTIVE DATE: [Date:] _____, 2011, unless a later date is cited at the end of a section.
[20.11.80.5 NMAC – N, __/__/11]

20.11.80.6 OBJECTIVE: To govern the adjudicatory proceedings of the department and the director regarding administrative enforcement, provide due process for all parties and give an orderly structure to the proceedings.
[20.11.80.6 NMAC – N, __/__/11]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

P. "Respondent" means the person to whom the air program manager has issued a compliance order.

[20.11.80.7 NMAC – N, __/__/11]

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

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

[20.11.80.9 NMAC – N, __/__/11]

20.11.80.10 SEVERABILITY: If for any reason any section, subsection, sentence, phrase, clause or wording of 20.11.80 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 of remaining portions of 20.11.80 NMAC.

[20.11.80.10 NMAC – N, __/__/10]

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

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

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

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

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

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

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

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

(i) an employee of or staff for the air program;

(ii) an employee of or staff for the department unless employed by the department as a hearing officer;

(iii) a person who has a personal bias or prejudice concerning a party, has personal knowledge of disputed facts concerning the proceeding, is related to a party within the third degree of relationship or has a financial interest in the proceeding;

(iv) a person who has performed prosecutorial or investigative functions in connection with the matter at issue in the proceeding; or

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

(b) **Hearing officer functions:** The hearing officer shall exercise all powers and duties required or delegated by the director pursuant to the act and 20.11.80 NMAC. 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 to maintain order and the efficient, fair and impartial adjudication of issues arising in proceedings governed by 20.11.80 NMAC, including, but not limited to:

(i) conducting hearings authorized by 20.11.80 NMAC;

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

(iii) administering oaths and affirmations, examining witnesses and admitting or excluding evidence;

(iv) requiring parties to attend conferences for the settlement or simplification of issues, or for expediting proceedings;

(v) imposing sanctions, subject to review and approval by the director, on parties who cause undue delay or fail to cooperate in the proceeding; and

(vi) filing with the hearing clerk all original documents received by the hearing officer.

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

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

(i) has a personal bias or prejudice concerning a party, has personal knowledge of disputed facts concerning the proceeding, is related to a party within the third degree of relationship or has a financial interest in the proceeding;

(ii) has performed prosecutorial or investigative functions in connection with the matter at issue in the proceeding; or

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

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

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

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

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

E. Computation and extension of time:

(1) **Computation of time:** In computing any period of time prescribed or allowed by 20.11.80 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 5:00 p.m. on 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 that party and service is by mail, three days shall be added to the prescribed period. The three-day extension does not apply to a deadline established by the act.

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

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

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

(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; and

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

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

(3) **Form of documents:**

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

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

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

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

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

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

J. Samples - Caption; Certificate of Service:

CITY OF ALBUQUERQUE
ENVIRONMENTAL HEALTH DEPARTMENT

CITY OF ALBUQUERQUE
ENVIRONMENTAL HEALTH DEPARTMENT
AIR QUALITY DIVISION
Complainant,

v.

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

[NAME OF RESPONDENT],
Respondent.

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

By: _____
[Signature]

_____
[Print or type name]

Title: _____

Address: _____
Telephone Number: _____
E-mail: _____

CERTIFICATE OF SERVICE

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

By _____
[Signature of person certifying service]

_____
[Print or type name]

[20.11.80.12 NMAC – N, __/__/11]

20.11.80.13 PREHEARING PROCEDURES:

A. Initiation of process:

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

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

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

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

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

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

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

(1) **Notice:** As soon as practical after the hearing clerk receives a request for hearing, the hearing clerk shall issue a notice of docketing that includes the caption or heading required by Subsection J of 20.11.80.12 NMAC, the 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 hearing clerk shall notify the parties of the name and address of the hearing officer as soon as one is assigned. The hearing clerk shall include a copy of 20.11.80 NMAC with the notice of docketing that is sent to the respondent.

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

C. Scheduling the hearing:

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

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

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

D. Motions:

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

(3) **Opposed motions:** Every opposed motion shall state either that concurrence 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. The moving party shall submit a proposed order for the hearing officer's review with the motion.

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

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

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

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

(8) The hearing officer may refer a motion to the director with the hearing officer's recommendation if the motion would result in a final determination of the merits or an essential element of the compliance order. [20.11.80.13 NMAC – N, __/__/11]

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

A. Scope of discovery:

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

(a) the discovery will not unreasonably delay the proceeding;

(b) the information to be obtained is not unreasonably cumulative or duplicative, or not otherwise reasonably obtainable elsewhere;

(c) the discovery is not unreasonably burdensome; and

(d) there is a substantial reason to believe that the information sought will be admissible at the hearing or will be likely to lead to the discovery of admissible evidence.

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

(a) serve the discovery request directly upon the party from whom discovery is sought; and

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

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

(a) serve the response, including any objections, upon the party making the discovery request; and

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

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

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

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

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

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

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

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

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

B. Witness information; exhibits: Unless otherwise ordered by the hearing officer, within 15 days after receipt of the notice of hearing on the merits or within no fewer than 45 days before the hearing on the merits, whichever is closer to the hearing date, each party shall provide to every other party:

(1) regarding each person who is expected to be called as an expert witness: {Based on 20.11.81.14.H.(2) NMAC}

(a) the name and address of the person expected to be called as an expert witness;

(b) a complete statement of all opinions the expert witness will express and the basis and reasons for the opinions;

(c) the data or other information considered by the expert witness in forming the opinions of the expert witness;

(d) an estimate of the length of the direct testimony of the expert witness;

(e) a list of exhibits, if any, to be offered into evidence at the hearing on the merits through testimony of the expert witness, and, regarding each exhibit, the name of each expert witness who is expected to testify regarding the exhibit; and

(f) a copy of each exhibit to be offered into evidence at the hearing on the merits through the testimony of the expert witness.

(2) regarding each person who is expected to be called by a party, but not as an expert witness:

(a) the name and address of the witness;

(b) a description of the general subject matter of the anticipated testimony of the witness;

(c) an estimate of the length of the direct testimony of the witness;

(d) a list of exhibits, if any, to be offered into evidence at the hearing on the merits through testimony of the witness; and

(e) a copy of each exhibit to be offered into evidence at the hearing on the merits through testimony of the witness; and

C. Production of documents:

(1) **Definition:** As used in Subsection C of 20.11.80.14 NMAC, "document" includes the following: any designated documents or electronically stored information, including 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, including translation by a responding party, into a reasonably usable form.

(2) **Request:** If the criteria in Paragraph (1) of Subsection A of 20.11.80.14 NMAC are met, any party may inspect and make copies of any designated documents in the possession or control of a party after serving a written request on the 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 party who has received the request for production shall specify a reasonable time, place and manner for inspecting and copying. Reasonable time means no more than 20 days after service of the request unless a different deadline is established by the hearing officer.

D. Subpoenas: {From Subsection H of Section 74-2-12 NMSA 1978 and NM Rules of Civil Procedure Rule 1-045 NMRA}

(1) A party that wishes to have a subpoena issued shall obtain a subpoena form from the hearing clerk. The subpoena form shall be completed by the requesting party and shall:

(a) include the caption or heading and the information required by Subsection J of 20.11.80.12 NMAC; and

(b) command each person to whom it is directed to attend and give testimony or to produce and permit inspection, copying, testing or sampling of designated documents, electronically stored information or other tangible things in the possession, custody or control of that person, or to permit inspection of premises, at a time and place specified in the subpoena.

(2) All subpoenas shall be issued by hearing clerk, who shall sign and date the subpoena.

(3) Pursuant to the authority that has been delegated by the director to the hearing clerk, the hearing clerk shall issue a subpoena, signed but otherwise in blank, to the party requesting the subpoena. The hearing clerk shall not issue a subpoena if the hearing officer issues a protective order as provided by Paragraph (6) of Subsection A of 20.11.80.14 NMAC.

(4) The requesting party shall complete the subpoena form before serving the subpoena. The subpoena shall be served as required by Paragraph (2) of Subsection G of 20.11.80.12 NMAC.

(5) The party that served the subpoena shall file an original proof of service with the record and shall serve a copy on all other parties.

(6) Duties in responding to subpoena.

(a) A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business and shall organize and label them to correspond with the categories in the demand.

(b) If a subpoena does not specify the form or forms for producing electronically stored information, a person responding to a subpoena must produce the information in a form or forms in which the person ordinarily maintains it or in a form or forms that are reasonably usable.

(c) A person responding to a subpoena is not required to produce the same electronically stored information in more than one form.

(d) A person responding to a subpoena is not required to provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or to quash, the person from whom discovery is sought must show that the information sought is not reasonably accessible because of undue burden or cost. If that showing is made, the hearing officer may order discovery from such sources if the requesting party shows good cause, after taking into consideration the provisions of Paragraph (1) of Subsection A of 20.11.80.14 NMAC regarding scope of discovery and the requirements of Subsection B of 20.11.80.14 NMAC regarding witness information and exhibits.

(e) A party receiving documents under subpoena shall make them available for copying by other parties.

E. {Based on EIB 20.1.5.300.E NMAC} Request for admissions: If the criteria in Paragraph (1) of Subsection A of 20.11.80.14 NMAC are met, no fewer than 30 days before the hearing on the merits, 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, unless otherwise ordered by the hearing officer. 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 in the request for admissions shall be deemed admitted unless, within 20 days after service of the request for admission, or a longer or shorter period as the hearing officer may establish, the party to whom the request is directed serves upon the requesting party a sworn written response specifically denying the matter.
[20.11.80.14 NMAC – N, __/__/11]

20.11.80.15 HEARING PROCEDURES:

A. Evidence:

(1) **General:** The hearing officer shall admit all 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 could be excluded in the courts under Rule 11-408 NMRA is not admissible.

(2) **Examination of witnesses:** Witnesses shall be examined orally, under oath or affirmation, except as otherwise provided in 20.11.80 NMAC, and may be examined by the hearing officer. In addition to the hearing officer, only 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 direct testimony of the witness.

(3) **Exhibits:** All exhibits in evidence shall be marked with a designation identifying the party by whom the exhibit is offered and shall be numbered serially in the sequence in which the exhibits are expected to be offered. Large charts and diagrams, models and other bulky exhibits are discouraged. Exhibits should be limited to 8 ½ x 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.

B. Objections and offers of proof:

(1) **Objection:** An 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 the grounds for the objection. The ruling by the hearing officer regarding an objection and the reasons given by the hearing officer for the ruling 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 the 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. If the director decides the ruling of the hearing officer that excluded the evidence was both erroneous and prejudicial, the hearing may be reopened to allow the taking of the excluded evidence.

C. Burden of persuasion:

(1) **Compliance order:** The complainant has the burden of going forward with the evidence and proving by a preponderance of the evidence that the facts relied upon to show the violation occurred and that the proposed civil penalty is appropriate. After the complainant has established a prima facie case, the respondent shall have the burden of going forward with adverse evidence or a defense to the allegations.

(2) **Preponderance of evidence:** Each matter of controversy shall be determined by the hearing officer upon a preponderance of the evidence.

[20.11.80.15 NMAC – N, __/__/11]

20.11.80.16 POST-HEARING PROCEDURES.

A. Filing the transcript: Unless otherwise ordered by the director or hearing officer, the hearing shall be transcribed verbatim. The hearing clerk shall promptly notify all parties of the availability of the transcript. Any person who wants a copy of the transcript may order a copy from the reporter.

B. Proposed findings and conclusions: Within 30 days after the transcript is filed, or by the deadline established by the hearing officer, any party may submit to the hearing officer proposed findings of fact and conclusions of law or discretion and a closing argument. All such submissions shall be in writing, filed, served on all parties and contain adequate references to the record and authorities relied upon. No new evidence shall be presented unless specifically allowed by the hearing officer.

C. Recommended decision:

(1) **Content:** Unless otherwise ordered by the director, the hearing officer shall issue a recommended decision within 30 days after the deadline established by Subsection B of 20.11.80.16 NMAC for filing proposed findings and conclusions has passed. The recommended decision shall contain:

(a) the hearing officer's findings of fact and conclusions regarding all material issues of law or discretion and the reasons for the findings and conclusions;

(b) if applicable, a review of the penalty to determine if the division acted within its discretion in setting the amount or nature of the penalty; if the hearing officer decides to recommend a civil penalty that is different in amount or nature from the penalty in the compliance order, the hearing officer shall set forth the hearing officer's recommended decision regarding the penalty and the reason for the change; and

(c) a proposed final order.

(2) **Comment on recommended decision:** Within 15 days after service of the recommended decision, any party may file comments regarding the recommended decision and may include argument for, against or for modification of the recommended decision.

(3) **Oral argument before the director:** Upon the request of a party or on the director's own initiative, the director may allow oral argument regarding the recommended decision. If oral argument is allowed, the director shall specify the time and place for the oral argument, after giving due consideration to the convenience of the parties and the need to expeditiously resolve the proceeding.

D. Final order of director: As soon a practical, but no later than 30 days after the later of the deadline for filing comments on the recommended decision of the hearing officer or the conclusion of oral argument if oral argument is allowed, the director shall issue a written final order in the matter.

(1) **Decision:** The director may adopt, modify or set aside the hearing officer's recommended decision, and shall set forth the reasons for the action taken.

(2) **Penalty:** The director may change the amount and nature of the civil penalty, if any, that the hearing officer recommends assessing and shall set forth the reasons for the change.

E. Payment of civil penalty: Within 60 days after the respondent receives the final order, the respondent shall pay the full amount of any monetary civil penalty that is assessed in the final order unless otherwise ordered by the director. Payment shall be made by delivering to the division a cashier's check or certified check in the amount of the penalty assessed in the final order, payable to the general fund as specified in the final order. The respondent shall attach a copy of the final order to the penalty payment.

F. Judicial review: Judicial review of the director's final order shall be by appeal to the court of appeals of the state of New Mexico as provided by the act Subsection A of Section 74-2-9 NMSA 1978.

G. Preparation of record proper: The preparation of the record proper for an appeal to the court of appeals of the state of New Mexico or for any other reason shall be the responsibility of the hearing clerk. Appellant shall make satisfactory arrangements with the hearing clerk, including arrangements regarding copying or transcript costs, before the hearing clerk begins to prepare the record proper.

[20.11.80.16 NMAC – N, __/__/11]

20.11.80.17 ALTERNATE RESOLUTION:

A. Summary procedures:

(1) **Use of summary procedures:** Under the following limited circumstances, the director may dispose of a request for hearing after an expedited hearing as a result of:

(a) a motion by a party to dismiss the request for hearing because of jurisdictional defects, such as filing an untimely request for hearing; 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 in the manner set forth in Paragraph (1) of Subsection C of 20.11.80.13 NMAC. Following the expedited hearing, the hearing officer shall submit a recommended decision to the director. The director shall either follow Subsection D of 20.11.80.16 NMAC and issue a final order or remand the matter to the hearing officer with directions to proceed with a full hearing as otherwise required by 20.11.80 NMAC.

B. Settlement:

(1) **Policy:** The director encourages settlement of a proceeding at any time if the settlement is consistent with the provisions and objectives of the act and the regulations. Settlement conferences shall not affect any party's obligation to respond in a timely manner to any matter governed by 20.11.80 NMAC, including the respondent's obligation to file a timely request for hearing under Subsection A of 20.11.80.13 NMAC.

(2) **Stipulated final order:** The director 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 and consent to the relief specified, including the assessment of the civil penalty, if any is included in the stipulated final order. If the director disapproves the stipulated final order, the matter shall proceed as if there had been no stipulated final order or settlement.

(3) **Withdrawal:** The respondent may withdraw the request for hearing at any time before the director issues a final order. A notice of withdrawal shall be filed with the hearing clerk and served on all parties. Any party may file written objections to the notice of withdrawal within 10 days after receipt. If an objection is filed, the director shall rule on the notice of withdrawal.

[20.11.80.17 NMAC – N, __/__/11]

HISTORY OF 20.11.80 NMAC

Pre-NMAC History: None

History of Repealed Material: [Reserved]

NMAC History [Reserved]