

**TITLE 20 ENVIRONMENTAL PROTECTION**  
**CHAPTER 1 ENVIRONMENTAL PROTECTION GENERAL**  
**PART 3 ADJUDICATORY PROCEDURES - WATER QUALITY CONTROL COMMISSION**

**20.1.3.1 ISSUING AGENCY:** Water Quality Control Commission (“Commission”).  
[20.1.3.1 NMAC - Rp, 20 NMAC 1.3.I.100, 10/15/2010]

**20.1.3.2 SCOPE:**

A. This part governs the following adjudicatory proceedings of the water quality control commission:

- (1) permit reviews, which include proceedings for the appeal from permitting actions pursuant to the Water Quality Act, NMSA 1978 Section 74-6-5(O);
- (2) abatement plan hearings which include proceedings for the appeal of certain abatement plan actions pursuant to commission regulation 20.6.2.4114 NMAC;
- (3) variance hearings, which include proceedings for: (a) the consideration of variance requests pursuant to the Water Quality Act, NMSA 1978 Section 74-6-4(G), and (b) the consideration of alternative abatement standards pursuant to commission regulation, Subsection F of 20.6.2.4103 NMAC;
- (4) compliance order hearings, which include proceedings for the appeal from compliance orders pursuant to the Water Quality Act, NMSA 1978 Section 74-6-10, and the Utility Operators Certification Act, NMSA 1978 Section 61-33-10; and
- (5) any other adjudicatory proceedings under the jurisdiction of the commission to which the commission applies this part.

B. Uniform Licensing Act proceedings: In any commission adjudicatory proceeding conducted under the Uniform Licensing Act, NMSA 1978 Sections 61-1-1 NMSA 1978 et seq. (“ULA”), including the suspension or revocation of a certification under the Utility Operators Certification Act, NMSA 1978 Section 61-33-7, the procedures in the ULA shall govern the proceeding. However, the commission may, in the absence of a specific provision in the ULA governing an action, look to this part for guidance.  
[20.1.3.2 NMAC - Rp, 20 NMAC 1.3.I.101, 10/15/2010]

**20.1.3.3 STATUTORY AUTHORITY:** This part is adopted under the authority of the Water Quality Act, NMSA 1978 Sections 74-6-4, 74-6-5 and 74-6-10, as amended, and the Utility Operators Certification Act, NMSA 1978 Section 61-33-10, as amended.  
[20.1.3.3 NMAC - Rp, 20 NMAC 1.3.I.102, 10/15/2010]

**20.1.3.4 DURATION:** Permanent.  
[20.1.3.4 NMAC - Rp, 20 NMAC 1.3.I.103, 10/15/2010]

**20.1.3.5 EFFECTIVE DATE:** 10/15/2010, unless a later date is cited at the end of a section.  
[20.1.3.5 NMAC - Rp, 20 NMAC 1.3.I.104, 10/15/2010]

**20.1.3.6 OBJECTIVE:** The objective of this part is to establish procedures that govern the adjudicatory proceedings of the water quality control commission.  
[20.1.3.6 NMAC - Rp, 20 NMAC 1.3.I.105, 10/15/2010]

**20.1.3.7 DEFINITIONS:**

A. General: As used in this part:

- (1) “abatement plan action” means those actions that may be appealed to the commission pursuant to 20.6.2.4114 NMAC;
- (2) “abatement plan hearing” means a proceeding before the commission initiated by the timely filing of an abatement plan petition filed pursuant to 20.6.2.4114 NMAC;
- (3) “act” means, as the context requires:
  - (a) the Water Quality Act, NMSA 1978 Chapter 74, Article 6 and its subsequent amendments and successor provisions;
  - (b) the Utility Operators Certification Act, NMSA 1978 Chapter 61, Article 33 and its subsequent amendments and successor provisions; and
  - (c) any other statute enacted or amended by the legislature that includes authority for adjudicatory proceedings before the commission when the commission applies this part to such proceedings;

- (4) “applicant” means the person who is the holder of, or the applicant for, the permit or abatement plan that is the subject of the action to which a permit review petition or abatement appeal petition applies;
- (5) “commission” means the water quality control commission or its successor agency under the act;
- (6) “compliance order” means a written administrative order issued by the department pursuant to NMSA 1978 Sections 61-33-10 or 74-6-10;
- (7) “compliance order hearing” means a proceeding before the commission initiated by the timely filing of a request for compliance order hearing;
- (8) “department” means the applicable constituent agency, that, pursuant to its authority under the act, either (a) performed the permitting action or abatement plan action which is the subject of a petition; (b) is charged with implementing the regulations at the site where the variance is sought; or (c) issued the compliance order;
- (9) “hearing” means the evidentiary hearing conducted before the commission or a hearing officer on an abatement plan petition, a variance petition or a request for compliance order hearing unless the context requires otherwise;
- (10) “hearing clerk” means the person designated to maintain the official record of the proceeding and unless otherwise ordered is the commission administrator;
- (11) “hearing officer” means the person designated under this part or appointed by the commission to conduct a proceeding under this part ;
- (12) “party” means:
- (a) for the purposes of a permit review, the petitioner, the applicant if different from the petitioner, the department, and, upon motion to the commission, any person who permitted to intervene in the review pursuant to NMRA 1-024;
  - (b) for purposes of an abatement plan hearing, the petitioner, the applicant if different from the petitioner, the department, any person who participated in the abatement plan action before the department and who files an entry of appearance, and any constituent agency;
  - (c) for purposes of a variance hearing, the petitioner, the department, any person who has an interest in the proceeding and files an entry of appearance, and any other constituent agency; and
  - (d) for purposes of a compliance order hearing, the respondent and the department;
- (13) “permit review” means a record review proceeding before the commission initiated by the timely filing of a record review petition filed pursuant to NMSA 1978 Section 74-6-5(O);
- (14) “permitting action” means those actions that may be appealed to the commission pursuant to the Water Quality Act, NMSA 1978 Section 74-6-5(O), including the certification of a federal water quality permit;
- (15) “petition” means a written petition (a) for review of a permitting action filed under NMSA 1978 Section 74-6-5(O); (b) for hearing on an abatement plan action filed under 20.6.2.4114 NMAC; or (c) for hearing on a variance filed under NMSA 1978 Section 74-6-4(G) or 20.6.2.1210 NMAC;
- (16) “petitioner” means any person who files a timely petition and who is entitled to be a party pursuant to Subparagraphs (a), (b), and (c) of Paragraph (12) of this subsection;
- (17) “record proper” means all documents filed by or with the hearing clerk during the proceeding and includes:
- (a) the verbatim record of the hearing and all exhibits offered into evidence at the hearing, whether or not admitted;
  - (b) for a permit review, the administrative record of the department; and
  - (c) minutes, or an appropriate extract of minutes, of any commission meeting where the commission deliberated or acted on any procedural or substantive issue in the proceeding;
- (18) “regulations” means any rules or standards promulgated by the commission to implement the act;
- (19) “request for compliance order hearing” means a written request for hearing on a compliance order filed by a respondent pursuant to NMSA 1978 Section 61-33-10(E) or 74-6-10(G);
- (20) “respondent” means any person to whom a compliance order has been issued;
- (21) “technical evidence” means scientific, engineering, economic or other specialized testimony, but does not include legal argument, general comments, or statements of policy or position concerning matters at issue in the hearing; and
- (22) “variance hearing” means a proceeding before the commission initiated by the timely filing of a variance petition filed pursuant to NMSA 1978 Section 74-6-4(G), Subsection F of 20.6.2.4103 NMAC or 20.6.2.1210 NMAC.

B. Terms defined 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.  
[20.1.3.7 NMAC - Rp, 20 NMAC 1.3.I.108, 10/15/2010]

**20.1.3.8 APPLICABILITY OF RULES OF CIVIL PROCEDURE:** In the absence of a specific provision in this part governing an action, the commission may look to 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 for guidance. Any reference to the Rules of Civil Procedure and the Rules of Evidence shall not be construed to extend or otherwise modify the authority and jurisdiction of the commission under the act.  
[20.1.3.8 NMAC - Rp, 20 NMAC 1.3.I.106, 10/15/2010]

**20.1.3.9 CONSTRUCTION; SEVERABILITY SAVINGS CLAUSE:** This part shall be liberally construed to carry out its purpose. If any part or application of this part is held invalid, the remainder of this part, or its application to other persons or situations, shall not be affected.  
[20.1.3.9 NMAC - Rp, 20 NMAC 1.3.I.107, 10/15/2010]

**20.1.3.10 POWERS AND DUTIES OF THE COMMISSION AND HEARING OFFICER:**

A. Commission: The commission shall exercise all powers and duties as prescribed under the act, the regulations and this part, and not otherwise delegated to a staff member, the hearing officer or the hearing clerk.

(1) The commission may issue procedural orders that, based on the nature of the proceeding, either impose additional procedural duties, such as expanded public notice, or simplify the procedures provided in this part, such as foregoing post-hearing submittals or holding the hearing before the full commission. In no event may the commission eliminate any procedural requirements of the act.

(2) The appointment of a hearing officer does not preclude the commissioners from attending or participating in the proceeding.

B. Hearing officer: With respect to abatement plan hearings, variance hearings, and compliance order hearings, the commission may appoint one or more hearing officers to perform the functions described in Paragraph (2) of this subsection. With respect to permit reviews, the commission may appoint a hearing officer to review the record and the arguments of the parties and to recommend a decision to the commission. From the date the petition or request for compliance order hearing is received by the commission, the chair of the commission shall serve as hearing officer until such time as another hearing officer is appointed.

(1) Qualifications: Hearing officer may be an independent contractor or a commissioner, shall be knowledgeable of the laws of the state and of administrative hearing procedures, and shall not be:

(a) an employee of the department, except for the commissioners themselves or their designees, or unless employed by the department as a hearing officer;

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

(c) a person who has performed prosecutorial or investigative functions in connection with the compliance order or permitting action at issue in the hearing.

(2) Functions: The hearing officer shall exercise all powers and duties prescribed or delegated by the commission 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 including, but not limited to:

(a) conduct permit reviews or hearings under this part;

(b) rule upon motions and procedural requests that do not seek final resolution of the proceeding and issue all necessary orders;

(c) issue subpoenas, as authorized by the act, for the attendance and testimony of witnesses and the production of documentary evidence as provided for in this part;

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

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

(f) impose sanctions, subject to review by the commission, on parties who cause undue delay and fail to cooperate in the proceeding.

C. Notice of hearing officer assignment: If a hearing officer other than a commissioner is assigned, the hearing clerk shall notify the parties of the name and address of the hearing officer. The hearing clerk shall also, at that time, forward to the hearing officer copies of all documents filed to date.  
[20.1.3.10 NMAC - Rp, 20 NMAC 1.3.I.109, 10/15/2010]

**20.1.3.11 EX PARTE DISCUSSIONS:** At no time after the initiation and before the conclusion of a proceeding under this part shall any person discuss ex parte the merits of the proceeding with any commissioner or the hearing officer. This prohibition does not preclude any constituent agency commissioner from conferring with commission counsel, the commission administrator, or agency employees who are not, and have not been, involved in the matter before the commission.  
[20.1.3.11 NMAC - Rp, 20 NMAC 1.3.I.110, 10/15/2010]

**20.1.3.12 COMPUTATION AND EXTENSION OF TIME:**

A. 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, in which event the time is extended until the end of 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 days is added to the prescribed period. The three day extension does not apply to any deadline under the act.

B. Extension of time: The commission or hearing officer may grant an extension of time for the filing of any document upon timely motion of a party to the proceeding, for good cause shown, and after consideration of prejudice to other parties.  
[20.1.3.12 NMAC - Rp, 20 NMAC 1.3.I.111, 10/15/2010]

**20.1.3.13 DOCUMENTS: FILING, SERVICE, FORM AND EXAMINATION:**

A. As used in this section, "document" means any pleading, motion, response, memorandum, decision, order or other written material filed in a proceeding under this part, but does not include a cover letter accompanying a document transmitted for filing.

B. Filing of documents:

(1) Except as otherwise provided, the originals of all documents served in the proceeding shall be filed with the hearing clerk.

(2) Except as otherwise provided, a party filing documents shall serve copies thereof upon all other parties. A certificate of service, as shown in appendix A, shall accompany each filed document.

C. Service of documents: Except as otherwise provided, all documents may be served personally, by telefax, by e-mail or by express or first-class mail.

D. Form of documents: Unless otherwise ordered by the hearing officer, all documents, except exhibits, shall be prepared on 8 1/2 x 11-inch white paper, printed single-sided, if possible, and where appropriate, the first page of every document shall contain a heading and caption as illustrated in appendix A.

E. Documents issued by commission or hearing officer: All documents issued by the commission or hearing officer shall be filed with the hearing clerk. The hearing clerk shall promptly serve copies of the documents upon all parties.

F. 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 or tapes filed in any proceeding shall be borne by the person seeking copies of such documents or tapes.  
[20.1.3.13 NMAC - Rp, 20 NMAC 1.3.I.112, 10/15/2010]

**20.1.3.14 NOTICE OF DOCKETING:**

A. Docketing notice: The hearing clerk shall, as soon as practicable after initiation of a proceeding under this part, issue and serve upon the parties and each commissioner a notice of docketing, containing the caption and docket number of the case, and the date upon which the petition or request for compliance order hearing was received by the hearing clerk. A copy of this part shall be included with a notice of docketing sent to a petitioner, applicant or respondent.

B. Untimeliness: The hearing clerk shall docket any petition or request for compliance order hearing, without regard to whether it appears to be timely; but the commission or any party may move to dismiss an untimely petition or request for compliance order hearing.  
[20.1.3.14 NMAC - Rp, 20 NMAC 1.3.I.113, 10/15/2010]

**20.1.3.15 MOTIONS:**

A. 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 shall be accompanied by an affidavit, certificate or other evidence relied upon and shall be served as provided by 20.1.3.13 NMAC.

B. Unopposed motions: An unopposed motion shall state that the 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.

C. 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.

D. Response to motions: Any 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 failing to file a timely response shall be deemed to have waived any objection to the granting of the motion.

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

F. Decision: All motions shall be decided by the hearing officer without a hearing, unless otherwise ordered by the hearing officer. The hearing officer shall refer any motion that would effectively dispose of the matter and may refer any other motion to the commission for a decision. A procedural motion may be ruled upon prior to the expiration of the time for response; any response received thereafter shall be treated as a request for reconsideration of the ruling.

[20.1.3.15 NMAC - Rp, 20 NMAC 1.3.I.114, 10/15/2010]

**20.1.3.16 PERMIT REVIEW:**

A. Initiation and conduct of permit review: A permit review shall be initiated by the filing of a permit review petition under Paragraph (1) of Subsection A of 20.1.3.16 NMAC.

(1) Timing and contents: A permit review petition shall:

(a) be filed with the commission within 30 days from the date notice is received of the permitting action;

(b) identify the petitioner, and state that the petitioner has standing under NMSA 1978 Section 74-6-5(O) or 20.6.2.3112 NMAC to file the petition;

(c) identify the permitting action to be reviewed;

(d) specify the portions of the permitting action to which petitioner objects;

(e) include a statement of the issues to be raised and the relief sought;

(f) have a copy of the permitting action attached;

(g) be signed under oath or affirmation and attest to the truth of the information contained therein; and

(h) be filed with the commission and a copy served on the department, the applicant or permittee, if the petitioner is not the applicant or permittee, and on any person who submitted evidence, data, views or arguments in the proceeding before the constituent agency.

(2) Filing of administrative record by the department: The department shall within 15 days after receipt of the petition:

(a) file with the commission the administrative record of the permitting action which is the subject of the petition, including the transcript or audio recording of any public hearing held on the application or draft permit and the action taken; the department shall serve only the index to the record on other parties; the parties may stipulate that only specific portions of the record be filed with the commission; and

(b) deliver to the hearing clerk a list of all persons who have expressed in writing an interest in the facility or the permitting action that is the subject of the petition or who registered with the hearing clerk as a participant at a public hearing on the permitting action.

(3) Remand to the department. A party may request the commission to remand the matter to the department. A request for remand must be filed simultaneously with the permit review petition. If a party shows to the satisfaction of the commission that there was no reasonable opportunity to submit comment or evidence on an

issue being challenged, the commission shall order that additional comment or evidence be taken by the department. Based on the additional evidence, the department may revise the decision and shall promptly file with the commission the additional evidence received and the action taken.

(4) Briefing by the parties.

(a) Within 25 days of the department filing the administrative record or 25 days of the department filing additional evidence received and the action taken after a remand, whichever is applicable, the petitioner and any parties in support of the petitioner shall file opening briefs which shall contain a summary of the proceedings before the department and an argument with respect to each issue presented by the petitioner. The opening brief may include proposed findings of fact and conclusions of law. All statements of fact shall contain citations to the administrative record before the department. The opening brief shall not exceed 30 pages.

(b) Within 25 days of the petitioner filing an opening brief, the department and any parties in support of the department shall file answer briefs. The answer brief shall conform to the requirements of the opening brief, except that a summary of proceedings shall not be included unless deemed necessary by the party filing an answer brief.

(c) Within 10 days of the department filing an answer brief, the petitioner and any parties in support of the petitioner may file reply briefs.

(5) The failure to file a timely permit review petition shall be grounds for dismissal of the appeal.

B. Scheduling the permit review:

(1) Review date: The permit review shall be scheduled to begin no later than 90 days after the date a permit review petition is received or 90 days after the date the department files the additional evidence received and action taken after a remand, whichever is applicable, unless a stipulated or unopposed motion is filed requesting that the 90 day deadline be waived. The motion must be filed prior to the expiration of the 90 day deadline.

(2) Scheduling order: Unless the 90 day deadline has been waived, the hearing officer shall, no later than 30 days prior to the deadline, issue an order setting the date, time and location of the review by the commission, which the hearing clerk shall send to the parties by certified mail. The order shall provide information on whether the commission will hear oral argument from the parties. The order may include other procedural matters. The parties may, jointly or singly, submit to the hearing officer, prior to the issuance of the scheduling order, requests regarding the date and location of the review and other procedural matters, including the assignment of a non-commissioner hearing officer. The hearing officer may consult with the commission on procedural matters at a commission meeting.

C. Public notice of permit review.

(1) Content: The hearing clerk shall, upon direction from the commission or hearing officer, prepare a notice of review setting forth the permit for which the review is sought, the date, time, and location of the permit review, the name and address of the petitioner and where the permit and petition may be viewed.

(2) Distribution: The hearing clerk shall:

(a) no later than 30 days prior to the review date, send copies, with requests for publication, to at least one newspaper of general circulation in the state, and to at least one additional newspaper published or distributed at least weekly in the county where the facility is located; and

(b) mail a copy to each party and to each person who has expressed in writing to the department or the commission an interest in the facility or permitting action that is the subject of the petition.

(3) Certification: After the notice of permit review has been distributed in accordance with this section, the hearing clerk shall file an affidavit certifying how and when notice was given with a copy of the notice of permit review and any affidavits of publication attached.

D. Location of permit review: Unless otherwise ordered by the commission or hearing officer, the review shall be in Santa Fe.

E. Postponement of permit review: No request for postponement of a review or hearing shall be granted except upon consent of all parties or for good cause shown.

F. Conduct of permit review.

(1) Argument before the commission: The commission may, upon request of a party or its own initiative, allow oral argument prior to its deliberations. If oral argument is allowed, the commission 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. No new evidence will be admitted during oral argument.

(2) The hearing clerk shall audio record any oral argument before the commission. Any party may, at its own expense, have the oral argument stenographically recorded by a certified court reporter. Any party may, at its own expense, have the audio recording or stenographic recording transcribed by a certified court reporter.

(3) Decision: The commission shall consider and weigh only the evidence contained in the record before the department and the recommended decision of the hearing officer, if any, and shall not be bound by the factual findings or legal conclusions of the department. The commission shall sustain, modify or reverse the action of the department based on a review of the evidence, the arguments of the parties and recommendations of the hearing officer. The commission shall set forth in the final order the reasons for its actions.

G. Judicial review: Judicial review of the final order shall be as provided by law. The filing of an appeal does not stay the final order, unless otherwise ordered by the commission or a court.

H. Preparation of record proper: The hearing clerk shall prepare the record proper for any appeal, which shall include a transcript of any oral argument before the commission. The appellant shall make satisfactory arrangements for payment of preparation of the record proper with the hearing clerk, including copying costs and transcription costs. If any oral argument was stenographically recorded by a certified court reporter, the appellant shall have a transcription made at its own expense. If any oral argument was not stenographically recorded by a certified court reporter, the appellant shall have the hearing clerk's audio recording of the oral argument transcribed by a certified court reporter certifying the accuracy of the transcription.

[20.1.3.16 NMAC - N, 10/15/2010]

#### **20.1.3.17 ABATEMENT PLAN HEARING:**

A. Initiation of abatement plan hearing: An appeal hearing shall be initiated by the filing of an abatement plan petition under Paragraph (1) of Subsection A of 20.1.3.17 NMAC.

(1) Timing and contents: an abatement plan petition shall:

(a) be filed with the commission within 30 days from the date notice is received of the abatement plan action;

(b) identify the petitioner, and state that the petitioner has standing under 20.6.2.4114 NMAC to file the petition;

(c) identify the abatement plan action being appealed, specify the portions of the abatement plan action to which petitioner objects and generally state the objections;

(d) have a copy of the abatement plan action attached;

(e) be signed under oath or affirmation and attest to the truth of the information contained therein; and

(f) be filed with the commission and a copy served on the department.

(2) Response of the department: If an abatement plan petition is filed under Paragraph (1) of Subsection A of 20.1.3.17 NMAC, the department shall within 30 days after receipt of the petition:

(a) file with the commission the administrative record of the abatement plan action which is the subject of the petition, including the transcript or audio recording of any public hearing held. The department shall serve only the index to the record on other parties. The parties may stipulate that only the relevant portions of the record be filed with the commission;

(b) deliver to the hearing clerk a list of all persons who have expressed in writing an interest in the facility or the abatement plan action that is the subject of the petition or who participated in a public hearing on the abatement plan action; and

(c) file an answer to the petition clearly and directly responding to each of the objections in the petition;

(d) the failure to file a timely abatement plan petition shall be grounds for dismissal of the appeal.

B. Scheduling the hearing.

(1) Hearing date: The hearing shall be scheduled to begin no later than 90 days after the date an abatement plan petition is received unless a stipulated or unopposed motion is filed requesting that the 90 day deadline be waived. The motion must be filed prior to the expiration of the ninety day deadline.

(2) Scheduling order: Unless the 90 day hearing deadline has been waived, the hearing officer shall, no later than 45 days prior to the hearing deadline, issue an order setting the date, time and location of the hearing. The order may include other procedural matters. The parties may, jointly or singly, submit to the hearing officer, prior to the issuance of the scheduling order, requests regarding the date and location of the hearing and other procedural matters, such as the assignment of a non-commissioner hearing officer. The hearing officer may consult with the commission on procedural matters at a commission meeting.

C. Public notice of hearing.

(1) Content: The hearing clerk shall, upon direction from the commission or hearing officer, prepare a notice of hearing setting forth the date, time, and location of the hearing, a brief description of the petition, and information on the requirements for entry of appearance and the statement of intent to present evidence.

(2) Distribution: The hearing clerk shall:

(a) no later than 30 days prior to the hearing date, send copies, with requests for publication, to at least one newspaper of general circulation in the state, and to at least one additional newspaper published or distributed at least weekly in the county where the facility is located;

(b) mail a copy to each interested participant who has previously filed an entry of appearance, and to each person who has expressed in writing to the department or the commission an interest in the facility or abatement plan action that is the subject of the petition; and

(c) immediately upon receipt of an entry of appearance that is received after the initial mailing, mail a copy to such interested participant.

(3) Certification: After the notice of hearing has been distributed in accordance with this section, the hearing clerk shall file an affidavit certifying how and when notice was given with a copy of the notice of hearing and any affidavits of publication attached.

D. Transcription of hearing: The petitioner shall, at its own expense, have the hearing stenographically recorded and transcribed by a certified court reporter unless, after a showing of substantial financial hardship, the hearing officer orders the department to hire a certified court reporter. The petitioner shall, no later than 30 days prior to the hearing date, file with the hearing clerk a certification that the petitioner has hired a certified court reporter and will deliver 16 copies of the hearing transcript to the hearing clerk or a request that the department hire a certified court reporter.

E. Statement of intent to present technical evidence.

(1) Requirement to file: Any person who wishes to present technical evidence at the hearing shall, no later than 10 days prior to the hearing, file a statement of intent.

(2) Content: The statement of intent to present technical evidence shall include:

(a) the name of the person filing the statement;

(b) indication of whether the person filing the statement supports or opposes the petition at issue;

(c) the name of each witness;

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

(e) a list of exhibits, if any, to be offered into evidence at the hearing; and

(f) a summary or outline of the anticipated direct testimony of each witness.

F. Participation by the general public: Any person who has not timely filed either an entry of appearance or a statement of intent to present evidence may present a general non-technical statement as follows:

(1) Any member of the general public may testify at the hearing. Any testimony provided will be subject to cross-examination. No prior notification is required to present general non-technical statements in support of or in opposition to the petition. Any such member may also offer exhibits in connection with his testimony, so long as the exhibit is non-technical in nature and not unduly repetitious of the testimony.

(2) A member of the general public who wishes to submit a written statement for the record, in lieu of providing oral testimony at the hearing, shall file the written statement prior to or at the hearing.

G. Discovery:

(1) Grounds for discovery: Discovery shall only be permitted upon a determination by the hearing officer that:

(a) the type of discovery sought will not unreasonably delay the proceeding, and is neither unreasonably burdensome nor unreasonably expensive; and

(b) the information to be obtained is relevant and is not otherwise reasonably obtainable, may be lost, or may become unavailable.

(2) Order for discovery: Upon motion for discovery by a party and determination by the hearing officer that such motion should be granted, the hearing officer shall issue an order for the taking of such discovery together with the conditions and terms thereof.

H. Hearing: Burden of persuasion: at the hearing, the petitioner has the burden of going forward with the evidence and of proving by a preponderance of the evidence the facts relied upon to justify the relief sought in the petition. Following the establishment of a prima facie case by the petitioner, any person opposed to the relief sought in the petition has the burden of going forward with any adverse evidence and showing why the relief should not be granted.

[20.1.3.17 NMAC - Rp, 20 NMAC 1.3.II.200-207, 10/15/2010]



**20.1.3.18 VARIANCE HEARING:**

A. Initiation of variance hearing:

(1) Variance hearing shall be initiated by the filing of a variance petition. A copy of the petition shall be served on the department.

(2) Contents: A variance petition shall comply with Subsection A of 20.6.2.1210 NMAC or Subsection F of 20.6.2.4103 NMAC, as applicable.

(3) Response of the department: The department shall review each variance petition and, within 60 days after receipt of the petition, file a recommendation with the commission to grant, grant with conditions, or deny the variance request. The recommendation shall include reasons and a copy shall be served on the petitioner by certified mail and on any other party.

B. Hearing requirement: If the department recommends granting the variance request, or any part of the variance request, with or without conditions, the commission shall hold a hearing on those requests recommended for approval. If the department recommends denial of all or part of the variance request, the commission shall only hold a hearing on the variances recommended for denial if the petitioner files a request for hearing within 15 days after receipt of the department's recommendation. If a timely request for hearing is not filed, the recommended denial shall become a final action of the commission and shall not be subject to review.

C. Scheduling the hearing:

(1) Timing of hearing: If a hearing on a variance petition is required, the hearing shall be held within 90 days after the later of the filing of a department recommendation to grant a variance or the filing of a request for hearing by the petitioner, as applicable. The 90 day deadline may be waived upon the filing of a stipulated or unopposed motion prior to the expiration of the deadline.

(2) Scheduling order and public notice: If a hearing on a variance petition is required, a scheduling order shall be issued as provided in Subsection B of 20.1.3.16 NMAC, and public notice shall be given as provided in Subsection C of 20.1.3.16 NMAC.

D. Participation by the general public: Any person who has not timely filed either an entry of appearance or a statement of intent to present evidence may present a general non-technical statement as follows:

(1) Any member of the general public may testify at the hearing. Any testimony provided will be subject to cross-examination. No prior notification is required to present general non-technical statements in support of or in opposition to the petition. Any such member may also offer exhibits in connection with his testimony, so long as the exhibit is non-technical in nature and not unduly repetitious of the testimony.

(2) A member of the general public who wishes to submit a written statement for the record, in lieu of providing oral testimony at the hearing, shall file the written statement prior to or at the hearing.

E. Transcription of hearing: The petitioner shall, at its own expense, have the hearing stenographically recorded and transcribed by a certified court reporter unless, after a showing of substantial financial hardship, the hearing officer orders the department to hire a certified court reporter. The petitioner shall, no later than 30 days prior to the hearing date, file with the hearing clerk a certification that the petitioner has hired a certified court reporter and will deliver 16 copies of the hearing transcript to the hearing clerk or a request that the department hire a certified court reporter.

F. Additional procedures: Procedures for statements of intent to present technical evidence, for discovery and for the burden of persuasion in variance hearings shall follow the procedures for abatement plan hearings, Subsection E to Subsection H of 20.1.3.17 NMAC.

[20.1.3.18 NMAC - Rp, 20 NMAC 1.3.III 300-303, 10/15/2010]

**20.1.3.19 COMPLIANCE ORDER HEARING:**

A. Initiation of compliance order hearing:

(1) Filing of request: A compliance order hearing shall be initiated by the filing of a request for compliance order hearing within 30 days after the compliance order is served. The respondent shall file the original of the request for compliance order hearing with the commission and serve a copy on the department.

(2) Request for compliance order hearing: The request for compliance order hearing shall also serve as an answer to the compliance order and shall:

(a) clearly and directly admit or deny each of the factual assertions contained in the compliance order; but where the respondent 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 not specifically denied shall be deemed admitted;

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

(c) be signed by a person authorized to do so; and

(d) attach a copy of the compliance order.

B. Scheduling the hearing:

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

(2) Scheduling order and public notice: A scheduling order shall be issued as provided in Subsection B of 20.1.3.17 NMAC, and public notice shall be given as provided in Subsection C of 20.1.3.17 NMAC.

C. Transcription of hearing: The respondent shall, at its own expense, have the hearing stenographically recorded and transcribed by a certified court reporter unless, after a showing of substantial financial hardship, the hearing officer orders the department to hire a certified court reporter. The respondent shall, no later than 30 days prior to the hearing date, file with the hearing clerk a certification that the respondent has hired a certified court reporter and will deliver 16 copies of the hearing transcript to the hearing clerk or request that the department hire a certified court reporter.

D. General rules regarding discovery:

(1) Discovery request: Except as otherwise provided by the commission, 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.

(2) 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.

(3) 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 commission or hearing officer, supplemental responses shall be served as soon as practicable but not later than five days from when the information became available. If the new information becomes available less than five days prior to the hearing or during the hearing, it shall be brought to the attention of the hearing officer for direction and ruling on the use of the information.

(4) Protective order: The hearing officer may, upon motion and for good cause shown, issue any order which justice requires to protect a party or person from annoyance, embarrassment, oppression or undue burden or expense, including that discovery be limited or that a trade secret or other confidential information not be disclosed.

(5) Failure to make discovery; sanctions: Upon motion by a party showing that another party from whom discovery was requested has failed to respond within the required time, the hearing officer may order the response and may impose such sanctions as may be appropriate, including:

(a) refusal to allow the testimony of a witness not identified as required by Subsection E of 20.1.3.20 NMAC;

(b) denial of admission of a document not disclosed as required by Subsection F of 20.1.3.20 NMAC;

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

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

E. Identity of witnesses: Except as allowed by the hearing officer, each party shall, 15 days before the hearing, 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, and a list of exhibits, if any, to be offered into evidence at the hearing.

F. Production of documents:

(1) Definition: As used in this section, "document" includes writings, drawings, graphs, charts, photographs, videotapes and other data compilations from which information can be obtained, and if necessary, translated by a 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: Any party, upon written request to another party, is entitled to inspect and make copies of any relevant documents in the possession or control of the other party. The request shall specify a reasonable time (not less than 20 days after service of the request), place and manner of making the inspection and copies. The party responding to the request shall also provide a list of privileged documents, identified by title, author and date.

G. Subpoenas: As allowed by the act, the hearing clerk shall, upon request by any party and without the necessity for notice to other parties, prepare 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 a deposition authorized by the hearing officer under Subsection I of 20.1.3.19 NMAC, and forward the subpoena to the hearing officer for issuance. A subpoena may be issued with the name and address of the witness blank, to be completed by the requesting party.

H. Request for admissions: 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 otherwise furnished. Each statement shall be deemed admitted unless, within 20 days after service of the request, or such other time prescribed by the hearing officer, the party to whom the Request is directed serves upon the requesting party a sworn written response specifically denying such matter.

I. Other discovery:

(1) Additional discovery not favored: Discovery not specifically provided for under this part, including interrogatories and depositions, is discouraged. Requests for additional discovery may be made by motion to the hearing officer setting forth:

- (a) the circumstances and necessity warranting the taking of the discovery;
- (b) the nature of the information expected to be discovered; and
- (c) the proposed time and place where the discovery will be taken.

(2) Findings for additional discovery: Discovery may be permitted upon determination by the hearing officer that:

- (a) such discovery will not unreasonably delay the proceeding;
- (b) the information to be obtained is not otherwise reasonably obtainable, may be lost, or may become unavailable because of physical illness or infirmity; and
- (c) 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.

(3) Order for additional discovery: Upon determining that a motion for additional discovery should be granted, the hearing officer shall issue an order for the taking of such discovery together with any conditions and terms of the additional discovery.

J. Hearing burden of persuasion: At compliance order hearing, the department has the burden of going forward with the evidence and of proving by a preponderance of the evidence that the violation occurred, and that the proposed civil penalty, revocation, or suspension, as the case may be, 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.

[20.1.3.19 NMAC - Rp, 20 NMAC 1.3.IV.400-409, 10/15/2010]

### **20.1.3.20 GENERAL HEARING PROCEDURES FOR ABATEMENT PLAN, VARIANCE AND COMPLIANCE ORDER HEARINGS:**

A. Hearing:

(1) Location of the hearing: Unless otherwise ordered by the commission or hearing officer, the hearing shall be in Santa Fe.

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

B. Conduct of hearing:

(1) The hearing officer shall conduct the hearing so as to provide a reasonable opportunity for all interested persons to be heard without making the hearing unreasonably lengthy or cumbersome or burdening the record with unnecessary repetition.

(2) The hearing officer shall establish the order of testimony except that the party with the burden of persuasion shall present its case first. The hearing officer may allow brief opening or closing statements.

C. Evidence:

(1) General: The hearing officer shall admit any relevant evidence, unless the hearing officer determines that the evidence is 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. The commission, hearing officer, and 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 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.

(5) Preponderance of evidence: Each matter of controversy shall be determined upon a preponderance of the evidence.

D. 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 commission 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. [20.1.3.20 NMAC - Rp, 20 NMAC 1.3.V.500-503, 10/15/2010]

**20.1.3.21 POST-HEARING PROCEDURES FOR ABATEMENT PLAN, VARIANCE AND COMPLIANCE ORDER HEARINGS:**

A. Filing the transcript: If post-hearing submittals are allowed, the hearing clerk shall, promptly following receipt of the transcript, transmit a copy to the hearing officer, and notify all parties of its availability. Any person, other than the commission, desiring a copy of a transcript may order a copy from the court reporter.

B. Proposed findings and conclusions: Unless otherwise ordered by the commission, within 30 days after conclusion of the hearing, 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, shall be served upon all parties, and shall 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) Filing and contents: Unless otherwise ordered by the commission, the hearing officer shall issue a recommended decision within 30 days after the deadline for filing of proposed findings and conclusions under Subsection B of 20.1.3.21 NMAC. The recommended decision shall contain the hearing officer's:

- (a) findings of fact;
- (b) conclusions regarding all material issues of law or discretion, as well as reasons therefor;
- (c) a proposed final order; and
- (d) for compliance order hearings, if the hearing officer determines that a violation has

occurred, the hearing officer shall review the proposed civil penalty to determine if the department acted within its discretion in setting the penalty amount; if the hearing officer decides to recommend a penalty different in amount or nature from the department's proposed penalty, the hearing officer shall set forth the reasons for the change.

(2) Comment on recommended decision: At the commission's discretion, any party may file, within 15 days after service of the recommended decision, comments regarding the recommended decision, including arguments to adopt, reject or modify the recommended decision.

(3) Argument before the commission: The commission may, upon request of a party or its own initiative, allow oral argument on the recommended decision. If oral argument is allowed, the commission 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 commission: The commission shall reach a final decision at a public meeting, but may deliberate on the decision in closed session in accordance with the Open Meetings Act. The commission may circulate a draft order during closed session so long as no final decision is reached during closed session. After reaching a decision, the commission shall direct a member, its counsel or a party to prepare a final order. The commission may approve the order at a meeting or direct the commission chair to sign the order.

(1) Decision: The commission may adopt, modify, or set aside the hearing officer's recommended decision, and shall set forth in the final order the reasons for its actions.

(2) Penalty: For a compliance order hearing, the commission may change the amount and nature of the civil penalty, if any, recommended by the hearing officer and shall set forth the reasons for the change.

(3) The hearing clerk shall send copies of the final order to each party, and to all other persons who have made written requests for notification of the action taken.

E. Payment of civil penalty: The respondent shall pay the full amount of the civil penalty, if any, assessed in the final order within 60 days after receipt of the final order, unless otherwise ordered by the commission. Payment shall be made by forwarding to the hearing clerk a cashier's check or certified check in the amount of the penalty assessed, payable to the fund specified in the act.

F. Judicial review: Judicial review of the final order shall be as provided by law. The filing of an appeal does not stay any action or payment of penalty required by the final order, unless otherwise ordered by the commission or a court.

G. Preparation of record proper: The hearing clerk shall prepare the record proper for any appeal, which shall include a transcript of the hearing before the commission. The appellant shall make satisfactory arrangements for payment of preparation of the record proper with the hearing clerk, including copying costs and transcription costs.

[20.1.3.21 NMAC - Rp, 20 NMAC 1.3.VI.600-606, 10/15/2010]

#### **20.1.3.22 ALTERNATE RESOLUTION:**

A. Summary procedures:

(1) Use of summary procedures: The commission may dispose of a abatement plan petition, variance petition or request for compliance order hearing after an expedited hearing if a party requests that the matter be decided solely on legal arguments presented in written briefs and oral arguments.

(2) Expedited hearing: If the hearing officer determines that the motion or request has a likelihood of success and could fairly expedite the resolution of the proceeding, the hearing officer may submit a recommended decision to the commission based on briefs and oral arguments presented at an expedited hearing. If an expedited hearing is conducted, public notice shall be given in accordance with Subsection C of 20.1.3.17 NMAC, Subsection C of 20.1.3.18 NMAC or Subsection C of 20.1.3.19 NMAC. For abatement plan or variance hearings, the hearing officer shall also:

(a) include in the public notice instructions for persons other than parties who wish to participate in the oral argument to submit a statement of intent equivalent to the statement provided in Subsection E of 20.1.3.17 NMAC; and

(b) allow the public to attend the expedited hearing but may limit presentations at the hearing to oral arguments by parties on the specific issue before the commission.

(3) Commission: Upon a referral of a recommended expedited decision, the commission may either reach a final decision and issue a final order or remand to the hearing officer to proceed with a full hearing under this part.

B. Settlement: The commission encourages the settlement of a proceeding at any time if the settlement is consistent with the provisions and objectives of the act and regulations.

(1) Compliance order hearing: The commission may approve a stipulated final order signed by all 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 respondent admits the jurisdictional allegations of the compliance order and consents to the relief specified, including the assessment of the stated civil penalty, if any.

(2) Permit reviews: The commission may approve a settlement that modifies a permitting action only after evidence supporting such modification is presented at a hearing. The department, however, may withdraw and reissue a modified permitting action under Subsection C of 20.1.3.22 NMAC.

(3) Disapproval of settlement: If the commission disapproves the settlement or stipulated final order, the matter shall proceed as if there had been no settlement or stipulated final order.

C. Withdrawal:

(1) Notice of withdrawal: A petitioner or respondent may withdraw a petition or request for compliance order hearing, or the department may withdraw the compliance order or the permitting action or abatement plan action which is the subject of the proceeding, at any time prior to a decision by the commission by filing a notice of withdrawal with the commission and serving the notice on all other parties. A party may file a written objection to the notice within 10 days after receipt. If an objection is filed, the commission shall rule on the notice.

(2) Effect of withdrawal: An effective notice of withdrawal under this section results in the following:

- (a) when a petitioner withdraws an permit review petition, the permitting action becomes final;
- (b) when a petitioner withdraws an abatement plan appeal petition, the abatement plan action becomes final;
- (c) when a petitioner withdraws a variance petition, the petitioner is barred from petitioning for the same variance without permission from the commission;
- (d) when a respondent withdraws a request for compliance order hearing, the compliance order becomes final;
- (e) when the department withdraws a compliance order, the request for compliance order hearing is vacated; and
- (f) when the department withdraws a permitting action or an abatement plan action, the petition is vacated and the department must issue a new permitting action or an abatement plan action within 60 days unless either the commission approves a different time period, the applicant withdraws its application, or the department determines that a permitting action or abatement plan action is no longer required. Upon issuance of a new permitting action or abatement plan action, the right to file a new petition under the act, Section 74-6-5 (O), or regulations, 20.6.2.41 14 NMAC, is available.

[20.1.3.22 NMAC - Rp, 20 NMAC 1.3.VII.700-702, 10/15/2010]

**20.1.3.23 APPENDIX A:**

[Preferred Format]

**STATE OF NEW MEXICO  
WATER QUALITY CONTROL COMMISSION**

[A. Petition Hearing]

**IN THE MATTER OF THE PETITION FOR  
[A VARIANCE FROM \_\_\_\_\_ ]  
[HEARING ON DISCHARGE PLAN NO. \_\_\_\_ ]  
[HEARING ON ABATEMENT ACTION DATED \_\_\_\_\_ ]**

**[Name of Petitioner],  
Petitioner**

[B. Order Hearing]

**[name of constituent agency issuing Compliance Order],  
Complainant**

v.

**[Name of Respondent],  
Respondent**

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing [name of document] was [hand-delivered] [faxed] [mailed first class to all parties [and interested participants] on [date].

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[20.1.3.23 NMAC - Rp, 20 NMAC 1.3.VIII.800, 10/15/2010]

**HISTORY OF 20.1.3 NMAC:**

**Pre-NMAC History:** none.

**History of Repealed Material:**

20 NMAC 1.3, Adjudicatory Procedures - Water Quality Control Commission (filed 10/15/1996) repealed 10/15/2010.

**NMAC History:**

20 NMAC 1.3, Adjudicatory Procedures - Water Quality Control Commission (filed 10/15/1996) was renumbered, reformatted and replaced by 20.1.3 NMAC, Adjudicatory Procedures - Water Quality Control Commission, effective 10/15/2010.