

This rule was filed as 20 NMAC 1.4.

TITLE 20 ENVIRONMENTAL PROTECTION
CHAPTER 1 ENVIRONMENTAL PROTECTION GENERAL
PART 4 PERMIT PROCEDURES – ENVIRONMENT DEPARTMENT

20.1.4.1 ISSUING AGENCY: Environment Department.
[12/1/97; 20.1.4.1 NMAC – Rn, 20 NMAC 1.4.I.101, Recompiled 11/27/01]

20.1.4.2 SCOPE: This Part sets forth procedural regulations for public hearings before the Environment Department involving permit issuance, renewal, denial, or modification, license, and variance petitions, except to the extent any provision of this Part is inconsistent with any rule promulgated by the Environmental Improvement Board or the Water Quality Control Commission. These regulations may be adopted by the Environmental Improvement Board or Water Quality Control Commission; however, nothing in this Part shall be construed as limiting or affecting, in any manner, the authority of the Board or Commission to adopt rulemaking for permit procedures as provided by law.
[12/1/97; 20.1.4.2 NMAC – Rn, 20 NMAC 1.4.I.102, Recompiled 11/27/01]

20.1.4.3 STATUTORY AUTHORITY: This Part is adopted under the authority of NMSA 1978, 9-7A-6.D, 74-1-1 through 13, 74-4-4.A.7, 74-9-28.A (1) and (3) and 74-9-29.
[12/1/97; 20.1.4.3 NMAC – Rn, 20 NMAC 1.4.I.103, Recompiled 11/27/01]

20.1.4.4 DURATION: Permanent.
[12/1/97; 20.1.4.4 NMAC – Rn, 20 NMAC 1.4.I.104, Recompiled 11/27/01]

20.1.4.5 EFFECTIVE DATE: December 1, 1997, unless a later date is cited at the end of a section or paragraph.
[12/1/97; 20.1.4.5 NMAC – Rn, 20 NMAC 1.4.I.105, Recompiled 11/27/01]

20.1.4.6 OBJECTIVE: The objective of this Part is to establish hearing procedures for permit issuance, renewal, denial, or modification, license and variance petitions; to ensure due process for all persons; to ensure the ability to participate of all persons and entities who desire to take part; and to give an orderly structure to the proceedings.
[12/1/97; 20.1.4.6 NMAC – Rn, 20 NMAC 1.4.I.106, Recompiled 11/27/01]

20.1.4.7 DEFINITIONS: GENERAL:

A. As used in this Part:

- (1) "Act" means, as the context requires:
 - (a) the Department of Environment Act, NMSA 1978, Chapter 9, Article 7A;
 - (b) the Air Quality Control Act, NMSA 1978, Chapter 74, Article 2;
 - (c) the Radiation Protection Act, NMSA 1978, Chapter 74, Article 3;
 - (d) the Hazardous Waste Act, NMSA 1978, Chapter 74, Article 4;
 - (e) the Water Quality Act, NMSA 1978, Chapter 74, Article 6;
 - (f) the Solid Waste Act, NMSA 1978, Chapter 74, Article 9; and
 - (g) any rule adopted or amended by the Board or Commission that utilizes this Part;
- (2) "Administrative Record" means all public records used by the Division in evaluating the application or petition, including the application or petition and all supporting data furnished by the applicant or petitioner, all materials cited in the application or petition, public comments, correspondence, and as applicable, the draft permit and statement of basis or fact sheet, and any other material used by the Division to evaluate the application or petition;
- (3) "Applicant" means any person whose application for a permit, renewal or modification to a permit, or license is the subject of the proceeding under this Part;
- (4) "Application" means an application for a permit, renewal or modification to a permit, or license;
- (5) "Completeness Determination" means a determination made by the Secretary that an application under the Solid Waste Act contains all information required by the Act and Regulations;

- (6) "Department" means the Environment Department or its successor agency;
 - (7) "Division" means the appropriate Division within the Environment Department;
 - (8) "document" means any pleading, motion, response, reply, memorandum, decision, order, entry of appearance, or other writing filed in a proceeding under this Part;
 - (9) "Draft Permit" means a document prepared by the Division indicating the Division's proposed decision to issue, deny, or modify a permit;
 - (10) "final order" means the order issued by the Secretary that is dispositive of the matter;
 - (11) "Hearing Clerk" means the person designated by the Secretary to maintain the Hearing Record;
 - (12) "Hearing Determination" means a determination made by the Secretary that a public hearing is required under the Act or Regulations;
 - (13) "Hearing Officer" means the person designated under this Part or appointed by the Secretary to conduct a proceeding under this Part;
 - (14) "Hearing Record" means the Record Proper and the written transcript or recorded tape of the public hearing, including all exhibits offered into evidence, whether or not admitted;
 - (15) "license" means a license issued pursuant to the Radiation Protection Act, NMSA 1978, Chapter 74, Article 3;
 - (16) "party" means the Petitioner, the Applicant, the Division, or a person who files an entry of appearance on or before the deadline set forth in the Notice of Hearing;
 - (17) "Petition" means a Petition for Variance;
 - (18) "Petitioner" means a person who timely files a Petition;
 - (19) "Record Proper" means the Administrative Record and all documents filed by or with the Hearing Clerk;
 - (20) "Regulations" means any rule adopted pursuant to the Act;
 - (21) "Secretary" means the Secretary of Environment, the Secretary's designee, or any person who assumes the role of the Secretary for purposes of this Part in the event of the Secretary's recusal or disqualification;
 - (22) "technical testimony" means scientific, engineering, economic or other specialized testimony, whether oral or written, but does not include legal argument, general comments, or statements of policy or position concerning matters at issue in the hearing;
 - (23) "technical materials" means all data, studies and tangible materials used to form the basis of opinion(s) held by a witness presenting technical testimony; and
 - (24) "Variance" means a waiver from one or more substantive regulations under the Solid Waste Act.
- B. Terms Used In Act or Regulations: Terms defined in the Act or Regulations and not defined in this Part are used consistent with the meanings given in the Act or Regulations.

20.1.4.8 to 20.1.4.99 [RESERVED]

20.1.4.100 GENERAL PROVISIONS:

- A. Applicability of Rules of Civil Procedure and Evidence: 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 shall not apply to proceedings under this Part. At the discretion of the Hearing Officer, the rules may be used for guidance and shall not be construed to limit, extend, or otherwise modify the authority and jurisdiction of the Secretary under any Act.
- B. Liberal Construction: This Part shall be liberally construed to carry out its purpose and the purposes of the statute or statutes and regulations pursuant to which the proceeding at issue is conducted. This part shall also be liberally construed to facilitate participation by members of the public, including those who are not represented by counsel.
- C. Severability: If any section or application of this Part is held invalid, the remainder of this Part or any other application shall not be affected.
- D. Savings Clause:
 - (1) Limitation of Applicability: This Part does not apply to pending proceedings for which a Notice of Hearing has been published as provided in Section 202 of 20 NMAC 1.4 [Paragraph C. of Section 200 of 20.1.4 NMAC] filed October 31, 1995, does not affect any permit issued prior to the effective date of this Part until the permittee applies for a modification or renewal of the permit, and does not affect any license or variance issued prior to the effective date of this Part. Any amendment to this Part shall not apply to a proceeding pending on the effective date of the amendment.

(2) References In Other Rules: Any reference in any other rule to NMED 91-1, or to 20 NMAC 1.4 as filed October 31, 1995 and amended May 17, 1996, or to any provision thereof shall be construed as a reference to this Part, or to the corresponding provision thereof.

E. Powers and Duties of the Secretary and Hearing Officer:

(1) Secretary: The Secretary 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. The Secretary may specify procedures in addition to or that vary from those provided in this Part in order to expedite the efficient resolution of the action or to avoid obvious injustice, so long as such procedures do not conflict with the Act or the Regulations or prejudice the rights of any party.

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

- (a) conduct hearings under this Part;
- (b) rule upon motions, procedural requests, and offers of proof;
- (c) issue all necessary orders, except final orders issued by the Secretary under this Part;
- (d) issue subpoenas, as authorized under the Solid Waste Act and Section 205.D [Paragraph 4, Subsection E., of 20.1.4.200 NMAC];
- (e) administer oaths and affirmations, examine witnesses and admit or exclude evidence; and
- (f) require parties to attend conferences for the settlement or simplification of the issues, or the expedition of the proceedings.

(3) Secretary and Hearing Officer; Qualifications; disqualification:

(a) Qualifications: The Secretary or the Hearing Officer shall not perform any function provided for in this Part regarding any matter in which the Secretary or the Hearing Officer:

- (i) has a personal bias or prejudice concerning a party, the Application or Petition, involved in the proceeding;
 - (ii) has a financial interest in the proceeding or facility that is the subject of the proceeding;
 - (iii) is related to a party to the proceeding; or
 - (iv) is an officer, director or trustee of a party to the proceeding.
- (v) The Secretary shall not be disqualified solely because of having been briefed on the matter prior to initiation of a proceeding under this Part.

(b) Disqualification:

(i) Any party, by motion and for cause listed in Section 112.C.1 [Item (i), Subparagraph (a), Paragraph (3), Subsection E. of 20.1.4.100 NMAC], may request the disqualification of the Hearing Officer at any time prior to the hearing, or of the Secretary at any time prior to filing of the Final Order.

(ii) The Hearing Officer shall file a recommended decision on a motion under this Section within five (5) days. The Secretary shall file an order on a motion under this Section within five (5) days of the filing of the recommended decision. If the Secretary grants the motion, the order shall designate the person who shall assume the duties of the Secretary or Hearing Officer.

F. Computation and Extension of Time:

(1) Computation: In computing any period of time prescribed or allowed by this Part, by any applicable statute, or by order of the Hearing Officer or Secretary, 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 (3) days is added to the prescribed period. The three days extension does not apply to any deadline mandated under the Act.3

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

G. Ex Parte Discussions: At no time shall any person discuss the merits of the proceeding ex parte with the Secretary or the Hearing Officer. "Ex parte" means any written or oral communication relating to the merits of the proceedings, between the Secretary or Hearing Officer and any person, including communications

between Department staff directly involved in the proceeding and the Secretary or Hearing Officer. Ex parte does not include communications between any party or person and department staff. This prohibition shall begin to apply on the date the Secretary or Division makes a completeness or hearing determination and shall terminate on the date of the final order.

H. Filing Service, and Form of Documents:

(1) Filing of Documents: Except as otherwise provided, the original of a document to be filed in the proceeding shall be filed with the Hearing Clerk.

(a) A telefax copy of a document may be filed in lieu of the original by telefaxing the document directly to the Hearing Clerk, provided:

(i) the document is preceded by a cover sheet addressed to the Hearing Clerk and indicating: the sender's name, address, telephone number, and telefax number; the case name and number; and the number of pages transmitted;

(ii) the document is no more than ten (10) pages in length excluding the telefax cover sheet; and

(iii) the sender does not request return of a conformed copy of the document; or

(b) for documents greater than 10 pages in length, telefaxing the document to a person other than the Department who files the document for the sender.

(c) A hand-delivered or mailed document, including a document telefaxed to a consenting agent who files the document for the sender, shall be deemed filed on the day the document is received by the Hearing Clerk, provided the document is received before the close of business on a working day. A document telefaxed directly to the Hearing Clerk shall be deemed filed upon completion of successful transmission of the document, provided successful transmission is completed before the close of business on a working day. The close of business on a working day shall be 5:00 p.m. or such earlier time when the Department's main offices are officially closed before 5:00 p.m. A working day shall not include a Saturday, Sunday, or state or federal holiday. A document received after close of business or on a non-working day shall be deemed filed on the next business day.

(d) A party filing a document by telefax shall retain the original of the document throughout the pendency of the proceeding. Any party shall have the right to inspect the original of the document.

(2) Service of Documents:

(a) Except as otherwise provided, a person filing a document shall serve a copy thereof upon all parties.

(b) Any service required under this Part shall be deemed adequate if the document is:

(i) hand-delivered or mailed first class or express to the most recent address provided by the person upon whom service is made; or

(ii) telefaxed to the most recent telefax number that: (1) appears on a document filed in the proceeding by the person upon whom service is made; or (2) has been provided to the person making service by the person upon whom service is made, with that person's consent to be served by telefax.

(c) A certificate of service, conforming substantially to Section 116.B, [Paragraph I. Of this Section] shall accompany a filed document.

(d) A person serving a document by telefax, upon request of the person upon whom service is made, shall provide to that person a hand-delivered or mailed copy of the document.

(3) Form of Documents: Unless otherwise ordered by the Hearing Officer, all documents, except exhibits, shall be on 8 1/2 x 11-inch white paper, and the first page of every document shall conform substantially to Section 116.A [Paragraph I. Of 20.1.4.100 NMAC].

(4) Documents Issued by Secretary or Hearing Officer: All documents issued by the Secretary or Hearing Officer shall be filed with the Hearing Clerk. The Hearing Clerk shall promptly serve copies of the document upon all parties.

(5) Examination of Hearing Record:

(a) 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 the Hearing Record or any part thereof.

(b) Cost of Duplication: Unless waived by the Department, the cost of duplicating the Hearing Record or any part thereof shall be borne by the person seeking duplication.

I. Sample Forms:

(1) Preferred Format For Documents:

STATE OF NEW MEXICO
BEFORE THE SECRETARY OF ENVIRONMENT

IN THE MATTER OF THE [APPLICATION/PETITION]
OF [NAME OF APPLICANT/PETITIONER]
FOR A [TYPE OF PERMIT/LICENSE/VARIANCE] FOR
[NAME OR DESCRIPTION OF FACILITY]
TITLE OF DOCUMENT

No.

Text of document.

Signature

NAME

ADDRESS

TELEPHONE NUMBER

(2) Preferred Format For Certificates of Service:

I hereby certify that on [month/day/year] a copy of [name of document] was [hand-delivered/mailed express or first class/faxed] to:

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

Signature

NAME

[12/1/97; 20.1.4.100 NMAC – Rn, 20 NMAC 1.4.I.108 through 116, Recompiled 11/27/01]

20.1.4.101 to 20.1.4.199 [RESERVED]

20.1.4.200 PREHEARING PROCEDURES:

A. Initiation of Hearing:

(1) Filing of Completeness or Hearing Determination: A proceeding under this Part shall be initiated by the filing of a Completeness or Hearing Determination by the Secretary.

(2) Administrative Record to Hearing Clerk: Upon the filing of a Completeness or Hearing Determination, the Division shall, no later than the hearing, forward the Administrative Record to the Hearing Clerk. Material readily available at the Division's office, or published material which is generally available, need not be physically included in the Administrative Record, provided that the material is identified in an index to the Administrative Record filed with the Hearing Clerk. The Administrative Record is available for public review at all times.

(3) Petition: A Petition shall:

(a) specify each provision of the Solid Waste Managements Regulations from which the variance is sought;

(b) specify the length of time for which the variance is sought; and

(c) contain a recitation of all facts the Petitioner relies upon to support the Petition, including a showing that:

(i) application of the provisions from which variance is sought would result in an arbitrary and unreasonable taking of the Petitioner's property or would impose an undue economic burden upon the Petitioner's lawful business, occupation, or activity;

(ii) granting the variance will not result in any condition injurious to human health, safety, or welfare, or the environment; and

(iii) if the variance is requested for longer than one (1) year, facts showing that there are no practicable means known or available for the adequate prevention of degradation of the environment or the risk to the public health, safety, or welfare.

(4) Combined Action: Nothing in this Part shall preclude the filing of a combined Application and Petition by the same person, provided the caption and title clearly indicate that the document is to be treated as both an Application and a Petition.

(5) Division Response to Petition: The Division shall promptly review the Petition to determine whether it is complete and if not, notify the Petitioner of that fact, and of the reasons the Petition is deemed incomplete.

(6) Completeness Determination: In making a Completeness Determination, the Division shall consider whether the Applicant has addressed all the administrative requirements required by the Act and the Regulations. The Completeness Determination shall not be considered to be a determination that the Application is approvable.

B. Notice of Docketing; Identification of Secretary or Designee and hearing Officer: The Hearing Clerk shall, as soon as practicable after receipt of a Completeness or Hearing Determination, issue a Notice of

Docketing. The Notice of Docketing shall contain the caption and docket number of the case, the date upon which the Completeness or Hearing Determination was received by the Hearing Clerk, the name of the Secretary or designee who will issue the Final Order, 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 of the Hearing Officer as soon as one is assigned. The Hearing Clerk shall include a copy of this Part with the Notice of Docketing sent to the Applicant or Petitioner.

C. Scheduling the Hearing:

(1) Hearing Date: Unless otherwise provided by law, the Hearing Clerk shall distribute the Notice of Public Hearing as set forth in Section 203.B [Subparagraph (2) of Paragraph C of this Section] no later than sixty (60) days after the filing of a Completeness or Hearing Determination.

(2) Notice of Hearing:

(a) Content: The Department shall promptly prepare and file with the Hearing Clerk a Notice of Hearing setting forth:

- (i) the date, time, and location of the hearing;
- (ii) a brief description of the nature and location of the action to be considered in the Draft Permit, Application or Petition, including the name and address of the Applicant or Petitioner;
- (iii) the name, address and telephone number of a person from whom further information, including a copy of the Draft Permit, Application or Petition, may be obtained;
- (iv) the requirements for an Entry of Appearance, a Statement of Intent to Present Technical Testimony, and a general written or oral statement;
- (v) a statement that this Part shall apply at the hearing; and
- (vi) any other requirement set forth in the Act or applicable regulation.

(b) Service: Except as provided under Section 205,[Paragraph E. of this Section] the Hearing Clerk shall, no later than thirty (30) days prior to the hearing:

- (i) send copies of the Notice of Hearing, with requests for publication, to at least one newspaper of general circulation in the state, and to at least one additional newspaper, if any, published or distributed at least weekly in the area where the facility is located;
- (ii) mail a copy of the Notice of Hearing to each party and to each person who filed a written request for a hearing or who expressed to the Department in writing an interest in the facility that is the subject of the proceeding;
- (iii) mail a copy of the Notice of Hearing to each local, state, or federal agency and Tribal government affected by the facility that is the subject of the proceeding;
- (iv) immediately upon receipt of an entry of appearance received after the initial mailing, mail a copy of the Notice of Hearing to such person; and
- (v) file in the Hearing Record the Affidavits of Publication from the newspapers in which the Notice of Hearing was published.

(3) Continuance of Hearing: A request to continue a hearing may be granted upon motion by a party, for good cause shown, and after consideration of prejudice to other parties and undue delay to the proceeding.

(4) Location of the Hearing: Unless otherwise provided by law, the hearing shall be in Santa Fe or at a place in the area affected by the facility which is the subject of the proceeding.

D. Motions:

(1) General: Any party may file a motion with the Hearing Clerk. All motions, except those made orally on the record during a hearing, shall be in writing, specify the grounds for the motion, state the relief or order sought and state whether it is opposed or unopposed. Each motion may be accompanied by affidavits, certificates, or other evidence relied upon, and shall be served as provided by Section 115.B [Subparagraph (2) of Paragraph H. of 20.1.4.100 NMAC].

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

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

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

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

(6) Decision: Except as provided in Section 112.C.2 [XX Paragraph of 20.1.4.100 NMAC] or otherwise ordered by the Hearing Officer, all motions shall be decided by the Hearing Officer without a hearing.

E. Special Procedures for Hearings Under the Solid Waste Act:

(1) Service of Public Notice: No later than sixty (60) days after the Hearing Clerk receives a Completeness Determination, the Hearing Clerk shall provide public notice of the hearing and service in the form and manner set forth under NMSA 1978, 74-9-22.

(2) Discovery: Discovery shall only be permitted upon a determination by the Hearing Officer that:

(a) the discovery will not unreasonably delay the proceeding and is not unreasonably burdensome or expensive;

(b) the information sought is not privileged and is relevant to the subject matter of the proceeding; and

(c) the information to be obtained is not unreasonably cumulative or duplicative, or not otherwise reasonably obtainable.

(3) Order For Discovery: Upon motion for discovery by a party and determination that such motion should be granted, the Hearing Officer shall issue an order for the taking of such discovery together with any conditions and terms of the discovery.

(4) Subpoenas: The Secretary has and may delegate to the Hearing Officer the power to issue subpoenas for the attendance and testimony of witnesses and the production of relevant documentary evidence. [12/1/97; 20.1.4.200 NMAC – Rn, 20 NMAC 1.4.I.201 through 205, Recompiled 11/27/01]

20.1.4.201 to-20.1.4.299 [RESERVED]

20.1.4.300 PARTICIPATION:

A. Participation:

(1) Entry of Appearance: Any person who wishes to be a party shall file, and serve upon all other parties of record, an Entry of Appearance, on or before the deadline set forth in the Notice of Hearing. A timely Statement of Intent to Present Technical Testimony shall be considered an Entry of Appearance, if the person filing such statement has not previously filed a separate Entry of Appearance.

(2) Effect of Failure to File: Failure to file a timely Entry of Appearance shall preclude a person from being a party in the proceeding, but shall not preclude a person from presenting a general written or oral statement or non-technical testimony in the proceeding.

(3) Orders for Conduct of Proceedings: In proceedings under this Part, the Hearing Officer may conduct pre-hearing conferences and issue pre-hearing orders that are not inconsistent with these rules, for purposes including but not limited to expediting the disposition of the proceeding, discouraging unnecessary, duplicative or wasteful pre-hearing activities, formulating and simplifying issues, obtaining stipulations or admissions of fact or law, obtaining advance rulings regarding the admissibility of evidence, avoiding the presentation of unnecessary or cumulative evidence or motions and adopting special procedures for managing proceedings involving difficult or complex issues and/or large numbers of parties. With respect to proceedings involving large numbers of parties, the Hearing Officer may require that service of documents under Section 115.B [Paragraph XX of 20.1.4.100 NMAC] be made on designated representatives of groups of parties with similar interests and may make such other orders as are consistent with this Subpart.

B. Procedure for Submittal of Statements and Testimony:

(1) Technical Written Statements and Oral Testimony: Any person who intends to provide a technical written statement or oral testimony concerning a Draft Permit, Application or Petition shall file a Statement of Intent to Present Technical Testimony on or before the deadline in the Notice of Hearing, but in no event later than fourteen (14) days prior to the hearing.

(a) Content of Statement of Intent: The Statement of Intent to Present Technical Testimony shall

(i) identify the person filing the statement;

(ii) state whether the person filing the statement supports or opposes the Draft Permit, Application, or Petition, or in the case of the Division, the Division's recommended decision to approve, deny, or approve with conditions the Draft Permit, Application, or Petition;

(iii) identify each witness, including name, address, affiliation(s), and educational and work background;

(iv) estimate the length of the direct testimony of each witness;

(v) identify all exhibits which are part of the Record Proper and, for exhibits not part of the Record Proper, attach a copy;

(vi) list or make available all technical materials relied upon by each witness in making statement of technical of fact or opinion contained in his or her direct testimony; and

(vii) attach a summary of the testimony of each witness, stating any opinion(s) to be offered by such witness, and an explanation of the basis for such opinion(s).

(b) Effect of Failure to File: Failure to file a timely Statement of Intent to Present Technical Testimony meeting the requirements of Section 302.A.1 [Paragraph B. of this Section] shall preclude a person from presenting technical testimony, and if the person has not filed a timely Entry of Appearance, from being a party in the proceeding, but shall not preclude a person from presenting a general written or oral statement or non-technical testimony in the proceeding.

(2) General Written and Oral Statements; Non-Technical Testimony: Any person may provide a general written statement concerning the Draft Permit, Application, or Petition at or before the hearing. Any person may provide a general oral statement or non-technical testimony concerning the Draft Permit, Application, or Petition at the hearing.

[12/1/97; 20.1.4.300 NMAC – Rn, 20 NMAC 1.4.III.301 and 302, Recompiled 11/27/01]

20.1.4.301 to 20.1.4.399 [RESERVED]

20.1.4.400 HEARING PROCEDURES:

A. Burden of Persuasion; Order of Testimony; Evidence Required:

(1) Burden of Persuasion: The Applicant or Petitioner has the burden of proof that a permit, license, or variance should be issued and not denied. This burden does not shift. The Division has the burden of proof for a challenged condition of a permit or license which the Department has proposed. Any person who contends that a permit condition is inadequate, improper, or invalid, or who proposes to include a permit condition shall have the burden of going forward to present an affirmative case on the challenged condition.

(2) Order of Testimony: Unless otherwise agreed to by the parties or ordered by the Hearing Officer, testimony shall be presented in the following order:

(a) testimony by, and examination of, the Applicant or Petitioner;

(b) testimony by, and examination of, technical witnesses in support of the Draft Permit, Application, or Petition;

(c) testimony by, and examination of, technical witnesses in opposition to the Draft Permit, Application, or Petition;

(d) all other testimony or oral statement;

(e) direct testimony by the parties, as appropriate, in the same order as testimony in the proceeding; and

(f) rebuttal testimony by the parties, as appropriate, in the same order as testimony in the proceeding.

(3) Standard for Decision: The Hearing Officer shall determine each matter in controversy by a preponderance of the evidence.

B. Evidence:

(1) General: Except as otherwise provided in this subsection, the Hearing Officer shall admit all relevant evidence that is not unduly prejudicial or repetitious, or otherwise unreliable or of little probative value.

(a) Evidence relating to settlement that would be excluded in the courts of New Mexico under SCRA 1986, 11-408 is not admissible.

(b) All privileges recognized in the courts of New Mexico shall be recognized to the same extent in proceedings under this Part.

(c) No person shall be allowed to testify as an expert unless identified as a technical witness in a timely filed Statement of Intent to Present Technical Testimony.

(2) Examination of Witnesses: All persons shall have an opportunity to examine witnesses at the hearing in the order set forth under Section 401.B[Subparagraph (2) of this Section]. Witnesses shall be examined orally, under oath or affirmation, except as otherwise provided in this Part or by the Hearing Officer. The Hearing Officer may limit cross-examination to avoid harassment, intimidation, needless expenditure of time, or undue repetition. Technical information, including but not limited to data, studies, and tangible materials, shall not be offered or introduced during the examination of witnesses unless the technical information is in the Hearing Record, and was filed on or before the deadline for a Statement of Intent to Present Technical Testimony. Nothing in this

Section shall be construed to limit the right of a party to offer or introduce technical information for impeachment or rebuttal.

(3) Exhibits: Each exhibit offered in evidence shall be marked with a designation identifying the person by whom the exhibit is offered, and shall be numbered serially in the sequence in which offered. A series of exhibits illustrative of the same subject, such as a series of photographs or diagrams showing different aspects of the same activity, may be numbered with the same number and sequential letters (e.g., 1a, 1b, etc.). The Record Proper and any part thereof shall be evidence, and shall not be offered as exhibits at the hearing, but persons may use copies in the course of testimony. Unless otherwise ordered by the Hearing Officer:

(a) A person offering an exhibit during the course of testimony shall provide a copy of the exhibit to each party.

(b) The original of the following types of exhibits shall be replaced in the Hearing Record with the indicated substitute:

(i) Charts, maps, diagrams, and photographs larger than 8 1/2 by 11 inches which cannot be folded or rolled shall be replaced with paper copies of 8 1/2 by 11 inches or larger which can be folded or rolled;

(ii) Photographic slides shall be replaced with photographic prints of 8 1/2 by 11 inches or smaller or paper copies of 8 1/2 by 11 inches;

(iii) Overhead projector slides shall be replaced with paper copies of 8 1/2 by 11 inches;

(iv) Models, samples, and other non-documentary exhibits shall be replaced with photographic prints of 8 1/2 by 11 inches or smaller, paper copies (of such photographic prints) of 8 1/2 by 11 inches, or oral testimony describing the exhibits.

(c) A person offering an exhibit for which a substitute is placed in the Hearing Record shall retain the original of the exhibit during the pendency of the proceeding, including any appeal(s), and shall, upon request, deliver the original of the exhibit to the Hearing Officer, Secretary, or court(s).

(4) Official Notice: The Hearing Officer may take official notice of any matter that may be judicially noticed in the courts of New Mexico.

C. Objections and Offers of Proof:

(1) Objection: A party may make any objection concerning the conduct of the hearing which may be stated orally or in writing during the hearing. The party raising the objection shall supply a short statement of its grounds. The objection, the short statement of its grounds, and the ruling by the Hearing Officer shall be included in the written transcript or recorded tape of the proceeding.

(2) Offer of Proof: Whenever evidence is excluded, the person offering the evidence may make an offer of proof, which shall be included in the written transcript or recorded tape of the proceeding.

(a) The offer of proof for excluded oral testimony shall consist of a brief statement describing the nature of the evidence excluded.

(b) The offer of proof for an excluded exhibit shall consist of the insertion of the excluded exhibit in the written transcript or recorded tape of the proceeding.

(c) Failure to make an offer of proof shall waive any error in the exclusion of evidence.

(3) Prejudicial Error: Where the Secretary decides that the ruling of the Hearing Officer in excluding the evidence was erroneous and prejudicial, the Secretary may remand the matter to the Hearing Officer for the taking of the excluded evidence, subject to examination and rebuttal, unless otherwise agreed to by the parties. [12/1/97; 20.1.4.400 NMAC – Rn, 20 NMAC 1.4.IV.401 through 403, Recompiled 11/27/01]

20.1.4.401 to 20.1.4.499 [RESERVED]

20.1.4.500 POST HEARING PROCEDURES:

A. Filing the Transcript: The hearing shall be transcribed or tape-recorded verbatim. If the hearing is transcribed, the Hearing Clerk shall promptly notify all parties of the availability of the transcript. Any person desiring a copy of the transcript shall order a copy from the court reporter at his or her own expense. Any person desiring a copy of the hearing tapes shall arrange copying with the Hearing Clerk at his or her own expense.

B. Proposed Findings and Conclusions and Closing Argument: Unless otherwise ordered by the Hearing Officer, any party may submit proposed findings of fact, conclusions of law, and closing argument within thirty (30) days after filing of the transcript. All submissions shall be in writing and shall contain adequate references to the Hearing Record and authorities relied upon. No new evidence shall be presented.

C. Hearing Officer's Report:

(1) Deadline and Content: Unless otherwise provided by law or ordered by the Secretary, the Hearing Officer shall file a report within thirty (30) days after expiration of the period under Section 502 [Subsection B. of

20.1.4.500 NMAC]. The report shall contain the Hearing Officer's findings of fact, conclusions of law, recommended decision, and proposed final order.

(2) Comment on Hearing Officer's Report: Unless otherwise ordered by the Secretary, a party may file comments on the Hearing Officer's Report, including argument for or against the Hearing Officer's Report or for or against modification of the Hearing Officer's Report, within fifteen (15) days after service of the Hearing Officer's Report. No new evidence shall be presented.

(3) Argument Before the Secretary: The Secretary may allow oral argument on the Hearing Officer's Report. A request for oral argument shall be filed no later than the expiration of the period under Section 503.B [Subparagraph (2) of this Section]. If oral argument is allowed, the Secretary shall notify the parties in writing regarding the time and place for oral argument, after giving due consideration to the convenience of the parties and to the deadline for issuance of the final order specified in Section 504 [Paragraph D. of this Section].

D. Final Order By Secretary:

(1) Deadline: Unless otherwise provided by law or by order of the Secretary, the Secretary shall file a final order no later than thirty (30) days after the expiration of the applicable deadline in Section 503.

(2) Order: The Secretary may adopt, modify, or set aside the Hearing Officer's recommended decision, and shall set forth in the final order the reasons for the action taken.

(3) Notification of Final Order: The Hearing Clerk shall send a copy of the final order, by certified mail, to each party and to each person who submits a written request for notification of the final order.

E. Judicial Review: Judicial or administrative review of the final order shall be as provided by law. The filing of an appeal does not act as a stay of the final order, the permit, license, or variance, or any provision of the Act or the Regulations, unless otherwise ordered by the Secretary or the court, or provided by law.

F. Preparation of hearing Record: The Hearing Clerk shall prepare the Hearing Record for an appeal from the final order. Appellant shall make satisfactory arrangements for the preparation of the Hearing Record, including costs for copies or transcripts, with the Hearing Clerk.

[12/1/97; 20.1.4.500 NMAC – Rn, 20 NMAC 1.4.V.501 through 506, Recompiled 11/27/01]

20.1.4.501 to 20.1.4.599 [RESERVED]

20.1.4.600 ALTERNATE RESOLUTION:

A. Withdrawal: No later than the beginning of the hearing, the Applicant or Petitioner may file a Motion for Withdrawal. The Secretary shall grant or deny the Motion for Withdrawal. [12-1-97]

B. Summary Procedures:

(1) Use of Summary Procedures: The Secretary may issue a final order after an expedited hearing on a motion by a party if not inconsistent with the law:

(a) to dismiss the Application or Petition for a jurisdictional defect; or

(b) to decide the merits of the Application or Petition on legal arguments presented in writing or oral argument.

(2) Expedited Hearing: If the Hearing Officer determines that the relief requested is likely to be granted, the Hearing Clerk shall prepare and file a Notice of Hearing as set forth in this Part. The hearing shall be conducted and post hearing procedures shall be followed as set forth in this Part. The final order of the Secretary on any expedited hearing under this Section may remand the matter to the Hearing Officer for a full hearing under this Part.

[12/1/97; 20.1.4.600 NMAC – Rn, 20 NMAC 1.4.VI. 601 and 602, Recompiled 11/27/01]

20.1.4.601 to 20.1.4.699 [RESERVED]

HISTORY OF 20.1.4 NMAC:

Pre-NMAC History: The material in this part was derived from that previously filed with the commission of public records - state records center and archives.

NMED 91-1, Rules Governing Hearings for Permits and Variances Under the Solid Waste Act, 6/18/1991.

History of Repealed Material: This Part repeals and replaces 20 NMAC 1.4, Permit Procedures -- Environment Department, filed October 31, 1995, as amended by 20 NMAC 1.4.112.C.1, filed May 17, 1996.