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*Appeals*  
*Non-HWA*  
*IV-VI*  
STATE DEPARTMENT  
OFFICE OF THE DIRECTOR

NEW MEXICO HEALTH AND ENVIRONMENT DEPARTMENT  
1190 ST. FRANCIS DRIVE  
SANTA FE, NEW MEXICO 87503

HED 90-10 (EID)

**RULES GOVERNING APPEALS FROM COMPLIANCE ORDERS  
UNDER THE HAZARDOUS WASTE ACT AND THE SOLID WASTE ACT**

**PART I  
GENERAL PROVISIONS**

101. **AUTHORITY.**-- These rules are adopted under the authority of §§ 9-7-6.F, 74-4-10, and 74-9-28.A(2) NMSA 1978.

102. **SCOPE OF RULES; APPLICABILITY OF RULES OF CIVIL PROCEDURE.**--

A. **Scope.** These rules govern all adjudicatory proceedings for the issuance of compliance orders under § 74-4-10 or § 74-9-36 NMSA 1978.

B. **Rules of Civil Procedure.** In the absence of a specific provision in these rules governing an action, procedure shall be in accordance with the New Mexico Rules of Civil Procedure, SCRA 1986, 1-001 to 1-102. The incorporation of the Rules of Civil Procedure shall not be construed to extend or otherwise modify the authority and jurisdiction of the Director under § 74-4-10 or § 74-9-36 NMSA 1978.

103. **DEFINITIONS.**--

A. **General.** As used in these rules:

1. "Act" means, as the context requires, the Hazardous Waste Act, §§ 74-4-1 to 74-4-13 NMSA 1978, or the Solid Waste Act, §§ 74-9-1 to 74-9-42 NMSA 1978;

2. "Board" means the Environmental Improvement Board;

3. "Complainant" means the Division employee to whom the Director has delegated the authority to issue Compliance Orders and to prosecute any adjudicatory proceeding resulting from the issuance of such Compliance Orders.

4. "Compliance Order" means a written administrative order asserting one or more violations of specific provisions of the Act, or regulations or a permit promulgated thereunder, issued

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by the Complainant pursuant to the Act, and ordering the person to whom it is issued to take specified action, and which may include an order to pay a specified civil penalty;

5. "Consent Agreement" means any written document signed by all parties, containing the terms upon which the parties have agreed to settle their dispute regarding a Compliance Order, and approved by the Director;

6. "Department" means the New Mexico Health and Environment Department;

7. "Director" means the Director of the Division, or any person designated by the Secretary to replace the Director in the event of the Director's disqualification;

8. "Division" means the Environmental Improvement Division of the Department;

9. "Document" means, except as otherwise used in Part III, any pleading, motion, response, memorandum, decisions, order, or other document filed in a proceeding under these rules, but does not include a brief, non-argumentative cover letter accompanying a document transmitted for filing;

10. "Final Order" means:

a. an order issued by the Director following a hearing; or

b. a consent agreement approved by the Director;

11. "Hearing" means an adjudicatory proceeding, on the record and open to the public, in which the legal rights, duties, or privileges of a party are to be determined, and conducted under these rules;

12. "Hearing Clerk" means the person designated to maintain the official record of the hearing;

13. "Hearing Officer" means the person appointed to conduct the hearing for a particular matter under these rules;

14. "Party" means the Complainant, the Respondent, or any person who is permitted to intervene in the hearing pursuant to SCRA 1986, 1-024;

15. "Regulations" means the regulations promulgated by the Board to implement the Act;

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16. "Respondent" means any person proceeded against in the Compliance Order; and

17. "Secretary" means the Secretary of the Department.

B. **Terms used in Act or Regulations.** Terms defined in the Act or Regulations and not defined in these rules are used consistent with the meanings given in the Act or Regulations.

104. **USE OF NUMBER AND GENDER.**-- As used in these rules, words in the singular also include the plural and words in the masculine gender also include the feminine, and vice versa.

105. **POWERS AND DUTIES OF THE DIRECTOR, HEARING OFFICER AND, HEARING CLERK.**--

A. **Director.** The Director shall exercise all powers and duties as prescribed under the Act and these rules, and not otherwise delegated to a staff member, the Hearing Officer, or the Hearing Clerk.

B. **Hearing Officer.** The Director shall appoint one or more independent Hearing Officers to perform the functions described in Paragraph 2 of this subsection.

1. **Qualifications.** A Hearing Officer shall be an independent contractor and not an employee of the Department, a member of the Board, a person directly associated with the type of violation at issue in the proceeding, nor an employee or agent of such a person. The Hearing Officer shall not have performed prosecutorial or investigative functions in connection with any hearing in which he serves as Hearing Officer or any factually related hearing.

2. **Functions.** The Hearing Officer shall exercise all powers and duties prescribed or delegated under the Act or these rules. 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:

a. conduct administrative hearings under these rules;

b. issue subpoenas for the attendance and testimony of witnesses and the production of documentary evidence;

c. rule upon motions, requests, and offers of proof, dispose of procedural requests, and issue all necessary orders to carry out those duties;

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- d. administer oaths and affirmations and take evidence;
- e. examine witnesses and receive documentary or other evidence;
- f. admit or exclude evidence;
- g. require parties to attend conferences for the settlement or simplification of the issues, or the expedition of the proceedings; and
- h. do all other acts and take all measures necessary for the maintenance of order and for the efficient, fair and impartial adjudication of issues arising in proceedings governed by these rules.

C. **Hearing Clerk.** The Director shall appoint a Hearing Clerk to perform the functions described in Subsection C.2 of this Rule.

1. **Qualifications.** The Hearing Clerk shall be a permanent employee of the Division, who may also perform other duties within the Division.

2. **Functions.** The Hearing Clerk shall:

- a. immediately upon docketing a Request for Hearing, issue a Notice of Docketing, as specified in Rule 205;
- b. receive and file all documents regarding a particular hearing under these rules;
- c. forward to the Hearing Officer any document upon which the Hearing Officer must act under these rules;
- d. avoid delay; and
- e. exercise all other powers and duties prescribed or delegated under the Act or these rules.

D. **Disqualification; withdrawal.**

1. Neither the Director nor any Hearing Officer may perform functions provided for in these rules regarding any matter in which:

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a. he has a personal bias or prejudice concerning a party or personal knowledge of disputed evidentiary facts concerning the proceeding;

b. he served as a lawyer in the matter in controversy, or a lawyer with whom he practices or previously practiced law served or is serving during such association as a lawyer concerning the matter, or he or such lawyer has been a witness concerning it;

c. he acted in an official capacity in any previous stage of the matter, except that the Director shall not be disqualified solely because of having been briefed concerning the matter, or having directed or authorized further investigation of the matter; or

d. he or his spouse, or a person within the third degree, by blood, marriage, or other relationship, to either of them:

(1) is a party to the proceeding, or an officer, director or trustee of a party, except that the Director shall not be disqualified solely because of his position as an officer or employee of the Division or the Department;

(2) is acting as a lawyer in the proceeding;

(3) is known by the Director or Hearing Officer, as applicable, to have an interest that could be substantially affected by the outcome of the proceeding; or

(4) is to the knowledge of the Director or Hearing Officer, as applicable, likely to be a material witness in the proceeding.

2. Any party may, by motion filed within the following time limits, request that the Director or the Hearing Officer disqualify himself from the proceeding:

a. A motion seeking disqualification of the Director shall be filed within ten (10) days after the case has been docketed, or if a new Director is appointed, within ten (10) days after the Director takes office.

b. A motion seeking disqualification of a person appointed by the Secretary to replace the Director shall be filed within ten (10) days after the party seeking such disqualification has been notified of the name of such person.

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c. A motion seeking disqualification of any Hearing Officer shall be filed within ten (10) days after the case has been docketed, or after the party seeking such disqualification has been notified of the name of the Hearing Officer (including any replacement for the original Hearing Officer), whichever is later.

3. Any motion seeking disqualification of the Director or a Hearing Officer shall be ruled upon initially by the person whose disqualification is sought.

4. Denial of a motion seeking disqualification of a Hearing Officer may be appealed to the Director, and denial of a motion seeking disqualification of the Director or any person appointed to replace the Director may be appealed to the Secretary, within ten (10) days after denial of such motion. If such appeal is not specifically ruled upon within fifteen (15) days after filing, denial of the motion shall be deemed to have been sustained.

5. If the Hearing Officer is disqualified or withdraws from the proceeding, the Director shall appoint another qualified Hearing Officer to replace him. If the Director is disqualified or withdraws from the proceeding, the Secretary shall appoint another employee of the Department to replace him.

6. The Director may, at any stage in the proceeding, reassign the case to another qualified Hearing Officer if the original Hearing Officer (or any subsequently assigned Hearing Officer) becomes unavailable, or if reassignment will result in efficiency in the scheduling of hearings and would not prejudice any party.

#### 106. COMPUTATION AND EXTENSION OF TIME.--

A. **Computation.** In computing any period of time prescribed or allowed by these rules, by any applicable statute, or by order of the Hearing Officer, 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.

B. **Extensions of time.** The Hearing Officer may grant an extension of time for the filing of any document:

1. upon timely motion of a party to the proceeding, for good cause shown, and after consideration of prejudice to other parties; or

2. upon his own motion.

C. **Motion for extension.** A motion for extension of time by a party may be made only after notice to all other parties, unless the movant can show good cause why serving notice is impracticable. The motion shall be filed in advance of the date on which the document for which the extension is sought is due to be filed, unless the failure of a party to file a timely motion for extension of time was the result of excusable neglect.

D. **Service by mail.** Service of all documents is complete upon mailing. Where a document is served by mail, three (3) days shall be added to the time allowed by these rules for the filing of a responsive document.

107. **EX PARTE DISCUSSIONS.--** At no time shall the Director or the Hearing Officer discuss ex parte the merits of the proceeding with any party or with any representative of a party. Any communication, other than a brief, non-argumentative cover letter, addressed to the Director or the Hearing Officer during the pendency of the proceeding and relating to the merits thereof, by or on behalf of any party, shall comply with the format and service requirements set forth in Part II of these rules. The other parties shall be given an opportunity to reply to such communication.

108. **EXAMINATION OF DOCUMENTS FILED.--**

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 any document filed in any proceeding. Such documents shall be made available by the Hearing Clerk, as appropriate.

B. **Cost of duplication.** The cost of duplicating documents filed in any proceeding shall be borne by the person seeking copies of such documents.

109. **SETTLEMENT; CONSENT AGREEMENT.--**

A. **Settlement policy.** The Division encourages settlement of a proceeding at any time if the settlement is consistent with the provisions and objectives of the Act and Regulations. Settlement conferences shall not affect any party's obligation to timely respond to any matter governed by these rules, including the Respondent's obligation to file a timely Request for Hearing and Answer under Rule 204.

**B. Consent agreement.** Any consent agreement entered into by the parties shall state that, for the purpose of this proceeding, the Respondent:

1. admits the jurisdictional allegations of the Compliance Order; and

2. consents to the relief specified, including the assessment of the stated civil penalty, if any.

**C. Consent Agreement to contain all terms and be signed by all parties.** The consent agreement shall include any and all terms of the agreement, and shall be signed by all parties or their counsel or representatives.

1. The signed consent agreement shall be presented to the Hearing Officer, who shall make a recommendation of approval or disapproval, and forward such consent agreement and recommendation to the Director within ten (10) days after his receipt thereof.

2. If the Director approves the consent agreement, it shall constitute the Director's final order in the matter, and shall be enforceable to the same extent as any other final order of the Director. If the Director disapproves the consent agreement, it shall be null and void, and the case shall proceed as if there had been no consent agreement. The Director's decision shall be based only on a review of the consistency of the consent agreement with the Act.

3. The Director's disapproval of a consent agreement shall not preclude the parties from negotiating and submitting a subsequent consent agreement.

## PART II DOCUMENT REQUIREMENTS

### 201. FILING, SERVICE, AND FORM OF DOCUMENTS.--

#### A. Filing of documents.

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

2. A certificate of service shall accompany each document filed or served. Except as otherwise provided, a party filing documents with the Hearing Clerk shall serve copies thereof upon all other parties.

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3. When the Hearing Officer corresponds directly with the parties, the original of the correspondence shall be sent to the Hearing Clerk and a copy shall be sent to all parties. Parties who correspond directly with the Hearing Officer shall send the original to the Hearing Officer, and serve all other parties, including a copy to the Hearing Clerk. A certificate of service shall accompany each document served under this subsection.

B. **Service of documents.** Except as otherwise provided, all documents may be served personally or by first class mail.

C. **Form of documents.**

1. Unless otherwise ordered by the Hearing Officer, all documents filed in a case docketed under these rules shall comply with the following requirements:

a. The first page of every document, except exhibits, filed after the Request for Hearing and Answer shall contain a caption identifying the Respondent and the case number assigned by the Hearing Clerk.

b. The original of each document, except exhibits, shall be signed by the party or by his counsel or other representative. The signature constitutes a certificate by the signer that he has read the document, that to the best of the signer's knowledge, information, and belief, there is good ground to support it; and that, except for motions for extension of time, it is not interposed for delay. If a document is signed with the intent to defeat the purpose of this rule, it may be stricken as sham and false and the action may proceed as though the document had not been served.

c. The initial document filed by any person shall contain his name, address and telephone number. Any changes in this information shall be communicated promptly to the Hearing Clerk, Hearing Officer, and all parties to the proceeding. Any notice and service required under these rules shall be deemed adequate if given or made to the most recent address provided by the person.

2. The Hearing Clerk may refuse to file any document which does not substantially comply with the requirements of Paragraph 1 of this subsection. Notice of such refusal, stating the reasons therefor, shall be promptly given to the person submitting the document. Such person may, within ten (10) days after rejection, amend and resubmit any document refused for filing.

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**202. FILING AND SERVICE OF DOCUMENTS ISSUED BY HEARING OFFICER.--**  
All documents issued by the Hearing Officer shall be filed with the Hearing Clerk. The Hearing Clerk shall, within two (2) working days after receipt of any such document, serve copies thereof upon all parties, personally or by first class mail.

**203. COMPLIANCE ORDER.--** Any Compliance Order issued pursuant to § 74-4-10 or 74-9-36 NMSA 1978 shall contain:

A. specific reference to each provision of the Act or Regulations which the Respondent is alleged to have violated;

B. a concise statement of the factual basis for alleging each violation;

C. the amount of the civil penalty, if any, which is proposed to be assessed;

D. a statement explaining how the amount of the proposed penalty was calculated;

E. notice of the Respondent's right to request a hearing on any material fact or legal matter contained in the Compliance Order, or on the appropriateness of the amount of the proposed penalty, if any.

**204. REQUEST FOR HEARING; ANSWER TO COMPLIANCE ORDER.--**

A. Request for Hearing.

1. The Respondent shall, within thirty (30) days after the Compliance Order is served, file a written Request for Hearing if the Respondent:

a. contests any material fact or legal matter upon which the Compliance Order is based;

b. contends that the amount of the penalty, if any, proposed in the Compliance Order is inappropriate;

c. contends that he is entitled to prevail as a matter of law; or

d. otherwise contest the appropriateness of the compliance order.

2. The Respondent shall attach to his Request for Hearing, as an exhibit, a copy of the Compliance Order to which the Request for Hearing pertains.

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**B. Answer; requirement for; contents.** With his Request for Hearing, the Respondent shall file an Answer to the Compliance Order.

1. The Respondent's Answer shall 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.

2. The Respondent shall also include in the Answer any affirmative defenses upon which the Respondent intends to rely. Any affirmative defense not asserted in the Answer, except a defense asserting lack of subject matter jurisdiction, shall be deemed waived.

3. If the Answer raises or contains any of the defenses enumerated in SCRA 1986, 1-012.B, the Respondent shall bring such defense to the Hearing Clerk's attention, in writing; and such defense shall thereafter be treated as a motion under Rule 206. If the Respondent fails to bring any such defense to the Hearing Clerk's attention, such defense shall be deemed waived, except for a defense asserting lack of subject matter jurisdiction.

**205. NOTICE OF DOCKETING; NOTICE OF HEARING OFFICER ASSIGNMENT.--**

**A. Docketing notice.** The Hearing Clerk shall, within five (5) working days after receipt of a Request for Hearing, issue and serve upon the parties a Notice of Docketing, containing:

1. the caption and docket number of the case;
2. the date upon which the Request for Hearing was received by the Hearing Clerk; and
3. the name and address of the Hearing Officer to whom the case has been assigned, if such assignment has been made.

**B. Untimely Request for Hearing.** The Hearing Clerk shall docket any Request for Hearing, without regard to whether it appears to be timely; but the Complainant may move to dismiss an untimely Request for Hearing for lack of jurisdiction.

**C. Hearing Clerk action upon docketing.** Immediately upon issuing the Notice of Docketing, the Hearing Clerk shall

1. open a new case file;

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2. file the original of the Request for Hearing, Answer, and Notice of Docketing in the case file;

3. serve a copy of the Notice of Docketing, with a copy of these rules, upon the Respondent;

4. serve copies of the Request for Hearing, Answer, and Notice of Docketing upon the Complainant; and

5. forward copies of the Request for Hearing, Answer, and Notice of Docketing to the Hearing Officer, if a Hearing Officer has been assigned.

D. **Notice of Hearing Officer Assignment.** If a Hearing Officer had not yet been assigned at the time the Hearing Clerk issued the Notice of Docketing, or if a new Hearing Officer is subsequently assigned, the Hearing Clerk shall notify the parties of the name and address of the Hearing Officer within two (2) working days after such assignment. The Hearing Clerk shall also, at that time, forward to the Hearing Officer copies of all documents filed to date.

#### 206. MOTIONS.--

A. **General.** All motions, except those made orally on the record during a hearing, shall:

1. be in writing;
2. state the grounds therefor with particularity;
3. set forth the relief or order sought;
4. be accompanied by any affidavit, certificate, or other evidence relied upon; and
5. be served as provided by Rule 201.B.

B. **Determination of opposition.** The movant shall determine whether a motion will be opposed, except that the movant may assume that a motion will be opposed if:

1. the motion seeks dismissal or other relief with the effect of ultimately disposing of the case; or
2. the movant has been unable, after reasonable effort, to contact the other party or parties to determine whether the motion will be opposed.

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C. **Unopposed motions.** If the motion will not be opposed, the motion shall state that concurrence of all other parties was granted.

1. The movant shall submit, with any unopposed motion, a proposed order for the Hearing Officer's signature.

2. The proposed order shall be approved by all parties. Approval of the movant shall be indicated by the signature of the movant or his counsel or other representative. Approval of a non-moving party may be indicated by the signature of the non-moving party or his counsel or other representative, or by a statement on the proposed order indicating that the concurrence of such party was obtained by telephone.

D. **Opposed motions.** Any opposed motion shall state either that concurrence was sought and denied, or why concurrence was not sought, and shall be accompanied by a memorandum brief in support of such motion. If the movant fails to submit a memorandum brief with an opposed motion, the movant shall be deemed to have waived any objection to denial of the motion.

E. **Response to motions.** Any party upon whom an opposed motion is served shall have fifteen (15) days after service of such motion to file a response and any documentary evidence in support thereof. Any party failing to file a response within the period, or any extension thereof granted by the Hearing Officer, shall be deemed to have waived any objection to the granting of the motion.

F. **Reply to response.** The movant 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.

G. **Decision.** All motions shall be decided by the Hearing Officer without a hearing, unless otherwise ordered by the Hearing Officer sua sponte or, in his discretion, upon written request of any party.

H. **Applicability to certain affirmative defenses.** This rule shall be applicable to any affirmative defense based on the grounds enumerated in SCRA 1986, 1-012.B, except that a defense asserting a lack of subject matter jurisdiction shall not be denied solely for failure to comply with the procedural requirements of this rule.

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**PART III  
PREHEARING PROCEDURES AND DISCOVERY**

**301. GENERAL RULES REGARDING DISCOVERY.--**

**A. Non-filing of discovery request and responses; exceptions.** Except as otherwise provided, neither a request for discovery nor any response thereto shall be filed with the Hearing Clerk. Instead, a party requesting discovery shall file a certificate of service, indicating the date of service, the type of discovery sought, and the party from whom discovery is sought; and a party responding to a discovery request shall file a certificate of service, indicating the date of service of the response, the type of discovery request to which he is responding, and the party or parties upon whom the response was served.

1. A party wishing to rely upon facts established through discovery shall, subject to the Hearing Officer's ruling on any objections raised by another party, offer such discovery into evidence at the hearing.

2. A party seeking to compel discovery from another party, or seeking sanctions against another party for failure to comply with a request for discovery, shall file, with his motion to compel or for sanctions, copies of the relevant request or requests, and any responses thereto.

**B. 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 his responses with relevant information obtained after serving of the initial response and any previous supplemental responses. Unless otherwise ordered by the Hearing Officer, supplemental responses shall be served within the same time, after the new information is obtained, as required for the initial response after service of the discovery request; provided, if the hearing is set for a time sooner than the supplemental response would otherwise be due, the supplemental response shall be served at least:

1. ten (10) days prior to the hearing, if served by first-class mail;

2. seven (7) days prior to the hearing, if served by a courier service with guaranteed overnight delivery; or

3. five (5) days prior to the hearing, if served by hand-delivery or by facsimile transmission.

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C. **Failure to make discovery; sanctions.** The Hearing Officer may, upon motion by a party and a showing that another party from whom discovery was requested has failed to respond within the required time, enter an order requiring such other party to respond within the time specified by the Hearing Officer. If a party who has been ordered to respond to a discovery request persists in his failure to respond, the Hearing Officer may, upon subsequent motion by the requesting party, impose such sanctions as may be appropriate, including:

1. refusal to allow the testimony of a witness not identified in a response to a request for identity of witnesses;
2. denial of admission of a document not disclosed in response to a request for access to documents;
3. drawing of adverse inferences against the non-responsive party; and
4. in an extreme case, dismissal or default judgment against the non-responding party.

**302. IDENTITY OF WITNESSES.--**

**A. Request.**

1. Except as provided in Paragraph 2 of this subsection, any party, upon request made to another party prior to hearing, is entitled to obtain the names and addresses of witnesses, and a description of the general subject matter of the knowledge of each witness as to the facts and circumstances of any matter placed in issue by the pleadings, to the extent known to the other party.

2. The Hearing Officer may, upon motion and for good cause shown, protect the name of any witness from disclosure; provided that if such motion is granted, the moving party may not call such witness to testify at the hearing unless the moving party files a supplemental response, not later than ten (10) days before the hearing, disclosing the witness's name and address, and a description of the general subject matter of that witness's knowledge of the facts and circumstances of any matter placed in issue by the pleadings.

**B. Definition.** As used in Subsection A of this rule, "witness" means any person having first-hand knowledge of the facts or circumstances of any matter placed in issue by the pleadings in the case, whether or not intended to be called to testify at the hearing.

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C. **Response.** A request for identity of witnesses shall be answered within twenty (20) days after service, unless otherwise ordered by the Hearing Officer upon motion and for good cause.

### 303. PRODUCTION OF DOCUMENTS.--

A. **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, whether or not such documents are intended to be offered into evidence, subject only to such privilege or claim of federal classified status as may be interposed. The request shall set forth the items to be inspected either by individual item or by category and describe each item and category with reasonable particularity. The request shall specify a reasonable time (not less than twenty (20) days after service of the request), place and manner of making the inspection and performing the related acts.

B. **Definition.** As used in Subsection A of this rule, "document" includes writings, drawings, graphs, charts, photographs, phonorecords and other data compilations from which information can be obtained, translated, if necessary, by the Respondent through detection devices into reasonable usable form.

C. **Response.** A party upon whom a request for access to documents is served shall fully comply with the request unless, no later than seven (7) days prior to the date specified in the request, such party serves upon the requesting party a written objection to the time or place specified for such inspection and copying, or to production of specified documents.

1. If objection is made to the time or place specified for inspection and copying of documents, the responding party shall specify an alternate time or place, or both.

2. If objection is made to production of specified documents, the specific ground for objection as to each such document shall be stated, and inspection of such specified documents shall not be allowed except upon order of the Hearing Officer.

304. **REQUEST FOR ADMISSIONS.--** At any time after docketing of the case, any party may serve upon any other party a written request for the admission of, for the purposes of the pending action only, any matters relevant to the proceedings set forth in the request that relate to statements or opinions of fact or of the application of law to fact, including the genuineness of any documents. Copies of documents shall be served with the request unless they have been or are otherwise furnished or made available for inspection and

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copying. Each such matter shall be deemed admitted unless, within twenty (20) days after service of the request or within such shorter or longer period as the Hearing Officer may prescribe, the party to whom the request is directed serves upon the requesting party a sworn written response specifically denying such matter.

**305. SUBPOENAS.--**

**A. Issuance.** The Hearing Clerk shall, on the oral or written request of any party, 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, and forward it to the Director or Hearing Officer for issue. A request for subpoenas may be made ex parte, and shall not be subject to any other requirements of these rules. Subpoenas may be issued with the name and address of the witnesses blank, to be completed by the requesting party.

**B. Motion to quash.** Any person to whom the subpoena is directed may move, in writing, to quash or modify the subpoena.

1. A motion to quash or modify a subpoena shall be filed within ten (10) days after service on the party seeking to quash or modify it, or on or before the time specified in the subpoena for compliance if such time is less than ten (10) days after service. Such motion shall comply with all requirements of Rule 206, and shall be served upon all parties to the proceeding, except that no copy need be served upon any party represented by the same person representing the person filing such motion.

2. The Hearing Officer shall quash or modify the subpoena if he finds that:

a. the evidence whose production is sought does not relate to any matter in question in the proceeding;

b. the subpoena does not describe with sufficient particularity the evidence whose production is sought;

c. the evidence whose production is sought is privileged; or

d. the subpoena is invalid for any other reason sufficient in law.

**306. OTHER DISCOVERY.--**

**A. Additional discovery not favored.** Discovery not specifically provided for under these rules, including

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interrogatories and discovery depositions, shall be permitted only upon determination by the Hearing Officer that:

1. such discovery will not unreasonably delay the proceeding;

2. the information to be obtained is not otherwise reasonably obtainable, may be lost, or may become unavailable because of physical illness or infirmity; and

3. 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.

**B. Motion for additional discovery.** Any party to the proceeding desiring an order of discovery shall file a motion therefor setting forth;

1. the circumstances warranting the taking of the discovery;

2. the nature of the information expected to be discovered; and

3. the proposed time and place where the discovery will be taken.

**C. Order for additional discovery.** If the Hearing Officer determines that the motion should be granted, he shall issue an order for the taking of such discovery together with the conditions and terms thereof.

#### PART IV HEARING PROCEDURES

##### 401. SCHEDULING THE HEARING.--

**A. Notice of hearing.** The Hearing Officer shall, as soon as practicable after receipt of a Request for Hearing, but no later than thirty (30) days prior to the hearing date, issue and serve upon the parties a Notice of Hearing setting forth the date, time, and place for the hearing.

**B. Postponement of hearing.** No request for postponement of a hearing shall be granted except upon motion and for good cause shown.

**C. Location of the hearing.** The hearing shall be in Santa Fe.

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**402. EVIDENCE.--**

**A. General.** The Hearing Officer shall admit all evidence which is not irrelevant, immaterial, unduly repetitious, or otherwise unreliable or of little probative value, except that evidence relating to settlement which would be excluded in the courts under SCRA 1986, 11-408 is not admissible.

1. In the presentation, admission, disposition, and use of evidence, the Hearing Officer may issue appropriate orders binding on all parties, witnesses, and counsel or other representatives, preserve the confidentiality of privileged information, including trade secrets and other commercial and financial information. The privileged status of any information shall not, however, preclude its being introduced into evidence.

2. The Hearing Officer may make such orders as may be necessary to consider evidence in camera, including the preparation of a supplemental initial decision to address questions of law, fact, or discretion which arise out of that portion of the evidence which is privileged.

**B. Examination of witnesses.** Witnesses shall be examined orally, under oath or affirmation, except as otherwise provided in these rules or by the Hearing Officer. Parties shall have the right to cross-examine a witness who appears at the hearing provided that such cross-examination is not unduly repetitious.

**C. Admission of affidavit where the witness is unavailable.**

1. The Hearing Officer may admit into evidence the affidavit of any witness who is unavailable; provided that a copy of any such affidavit has been provided by the party tendering it, to each other party at least ten (10) days prior to the hearing. Any party wishing to do so may, without prior approval of the Hearing Officer, take the deposition of any person whose affidavit will be introduced.

2. The term "unavailable" shall have the meaning accorded to it by SCRA 1986, 11-804.A.

**D. Exhibits.** Where practicable, an original and one copy of each exhibit shall be filed with the Hearing Officer for the record and a copy shall be furnished to each party. A true copy of any exhibit may be substituted for the original.

**E. Official notice.** Official notice may be taken of any matter that may be judicially noticed in the New Mexico courts.

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Opposing parties shall be given adequate opportunity to show that such facts are erroneously noticed.

**403. OBJECTIONS AND OFFERS OF PROOF.--**

A. **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. An exception to each objection overruled shall be automatic and is not waived by further participation in the hearing.

B. **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. 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 Director 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.

**404. BURDEN OF PRESENTATION; BURDEN OF PERSUASION.--**

A. **Complainant to have burden of going forward.** The Complainant has the burden of going forward with the evidence and of proving that the violation occurred as set forth in the Compliance Order 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 presenting and of going forward with any defense to the allegations set forth in the Compliance Order.

B. **Preponderance of evidence required for decision.** Each matter of controversy shall be determined by the Hearing Officer upon a preponderance of the evidence.

**PART V  
POST-HEARING PROCEDURES**

**501. FILING THE TRANSCRIPT.--** The hearing shall be transcribed verbatim. Promptly following the taking of the last evidence, the reporter shall transmit to the Hearing Clerk the original and as many copies of the transcript of testimony as are called for in the reporter's contract with the Division. The Hearing Clerk shall promptly transmit a copy to the Hearing Officer, and notify all parties of the availability of the transcript. Any person other

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than the Complainant, including any other party to the proceeding, desiring a copy of the transcript must order a copy from the reporter.

**502. PROPOSED FINDINGS, CONCLUSIONS AND ORDERS.--** Within thirty (30) days after the parties are notified of the availability of the transcript, or within such longer time as may be fixed by the Hearing Officer, any party may submit for the consideration of the Hearing Officer, proposed findings of fact, conclusions of law, and a proposed order, together with briefs in support thereof. If the Hearing Officer determines that reply briefs are necessary, he shall set a time by which reply briefs must be submitted. All submissions shall be in writing, shall be served upon all parties, and shall contain adequate references to the record and authorities relied on.

**503. RECOMMENDED DECISION.--**

**A. Filing and contents.** The Hearing Officer shall issue and file with the Hearing Clerk his recommended decision as soon as practicable after the period for filing briefs (including reply briefs, if applicable) under Rule 502 has expired. The recommended decision shall contain the Hearing Officer's findings of fact; conclusions regarding all material issues of law or discretion, as well as reasons therefor; a recommended civil penalty assessment, if appropriate; and a proposed final order. Upon receipt of a recommended decision, the Hearing Clerk shall forward a copy to all parties and to the Director.

**B. Amount of civil penalty.**

1. If the Hearing Officer determines that a violation has occurred, the Hearing Officer shall determine the dollar amount of the recommended civil penalty, if any, to be assessed in accordance with any criteria set forth in the Act relating to the assessment of a civil penalty.

2. If the Hearing Officer decides to recommend a civil penalty different in amount or nature from the penalty recommended to be assessed in the Compliance Order, the Hearing Officer shall set forth in the recommended decision the specific reasons for the change.

**C. Comment on recommended decision.** Any party may file with the Hearing Clerk, within thirty (30) days after service of the recommended decision on such party, any comments such party may have regarding the recommended decision, including argument for or against the recommended decision or for modification of the

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recommended decision. The Hearing Clerk shall promptly forward all such comments to the Director.

D. **Argument before the Director.** The Director may, upon request of a party or sua sponte, allow oral argument on the recommended decision. If oral argument is allowed, the Director shall specify the time and place for such oral argument, after giving due consideration to the convenience of the parties.

**504. FINAL ORDER BY DIRECTOR.--**

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

1. The Director may adopt, modify, or set aside the Hearing Officer's recommended decision, and shall set forth in the final order the reasons for his actions.

2. The Director may, in his discretion, change the amount and nature of the assessed civil penalty from the amount recommended to be assessed in the Hearing Officer's recommended decision.

3. The Director shall file the original of his final order with the Hearing Clerk, who shall then promptly send copies to each party, and to all other persons who have made written requests for notification of the action taken.

B. **Payment of civil penalty.** The Respondent shall pay the full amount of the civil penalty, if any, assessed in the final order within sixty (60) days after receipt of the final order unless otherwise agreed by the parties. Payment shall be made by forwarding to the Hearing Clerk a cashier's check or certified check in the amount of the penalty assessed in the final order, payable to:

1. the Hazardous Waste Emergency Fund, if the Compliance Order was issued pursuant to the Hazardous Waste Act; or

2. the Solid Waste Facility Grant Fund, if the Compliance Order was issued pursuant to the Solid Waste Act.

**505. JUDICIAL REVIEW.--** Judicial review of the Director's final order shall be as provided by law. The filing of an appeal does not act as a stay of any action required by the Compliance Order.

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**PART VI  
MISCELLANEOUS PROVISIONS**

**601. LIBERAL CONSTRUCTION.--** These rules shall be liberally construed to carry out their purpose.

**602. SEVERABILITY.--** If any part or application of these rules is held invalid, the remainder of these rules, or their application to other persons or situations, shall not be affected.

**603. SUPERSESSSION OF PRIOR RULES.** These rules supersede the Rules Governing Appeals From Compliance Orders Under the Hazardous Waste Act, HED 89-13 (EID), filed November 20, 1989.

**604. SAVINGS CLAUSE.--** Supersession of the Rules Governing Appeals From Compliance Orders Under the Hazardous Waste Act, HED 89-13 (EID), does not affect pending litigation, nor any Compliance Orders issued prior to the effective date of such supersession.