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CHAPTER Env-WMC 200 PROCEDURAL RULES

Statutory Authority: RSA 21-0:14, IV; RSA 541-A:16, I

PART Env-WMC 201 PURPOSE AND APPLICABILITY

Env-WMC 201.01 Purpose. The purpose of these rules is to set forth the procedures that will be used in the proceedings of the New Hampshire waste management council.

Source. #4846, eff 6-21-90, EXPIRED: 6-21-96  
New. #6334, eff 9-20-96; ss by #8031, eff 1-24-04

Env-WMC 201.02 Applicability.

- (a) The provisions of Env-WMC 202 and Env-WMC 203 shall apply to all proceedings of the council.
- (b) The provisions of Env-WMC 204 and 205 shall apply to all appeals allowed by law to be taken to the council.
- (c) Pursuant to RSA 21-0:14, I, this chapter shall not apply to any decision pertaining to rulemaking or declaratory rulings as provided for in RSA 541-A.

Source. #4846, eff 6-21-90, EXPIRED: 6-21-96  
New. #6334, eff 9-20-96; ss by #8031, eff 1-24-04

PART Env-WMC 202 DEFINITIONS

Env-WMC 202.01 “Appeals clerk” means the individual designated by the commissioner of the department pursuant to RSA 21-O:3, VIII as support staff for appeals to the council.

Source. #4846, eff 6-21-90, EXPIRED: 6-21-96  
New. #6334, eff 9-20-96; ss by #8031, eff 1-24-04

Env-WMC 202.02 “Appellant” means the person who initiates an appeal by filing a notice of appeal in accordance with Env-WMC 204.

Source. #4846, eff 6-21-90, EXPIRED: 6-21-96  
New. #6334, eff 9-20-96; ss by #8031, eff 1-24-04

Env-WMC 202.03 “Council” means the waste management council established by RSA 21-0:9.

Source. #4846, eff 6-21-90, EXPIRED: 6-21-96  
New. #6334, eff 9-20-96; ss by #8031, eff 1-24-04

Env-WMC 202.04 “Council clerk” means the individual designated by the commissioner of the department pursuant to RSA 21-O:3, VIII as clerical support staff to the council.

Source. #4846, eff 6-21-90, EXPIRED: 6-21-96  
New. #6334, eff 9-20-96; ss by #8031, eff 1-24-04

Env-WMC 202.05 “Department” means the department of environmental services.

Source. #4846, eff 6-21-90, EXPIRED: 6-21-96  
New. #6334, eff 9-20-96; ss by #8031, eff 1-24-04

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Env-WMC 202.06 “Director” means the director of the waste management division of the department of environmental services.

Source. #8031, eff 1-24-04

Env-WMC 202.07 “Intervener” means a person allowed by the council to intervene in an appeal proceeding pursuant to RSA 541-A:32.

Source. #8031, eff 1-24-04

Env-WMC 202.08 “Party” means any person identified as a party pursuant to Env-WMC 204.06.

Source. #8031, eff 1-24-04

Env-WMC 202.09 “Person” means:

(a) For the purpose of general proceedings, any individual, partnership, joint venture, association, corporation, trust, agency, private or municipal corporation, any political subdivision of the state or of the United States, or any other private entity, governmental entity, including the department, or quasi-governmental entity; or

(b) For the purpose of an appeal of a decision under a specific statute, "person" as defined by that statute.

Source. #8031, eff 1-24-04

Env-WMC 202.10 “Sitting member” means an individual who has been appointed to the council and to whom the oath of office has been administered, and includes any member of the council whose term has expired until such time as a replacement is appointed, but does not include any member who has resigned from the council, regardless of whether a replacement has been appointed.

Source. #8031, eff 1-24-04

PART Env-WMC 203 GENERAL PROCEDURES

Env-WMC 203.01 Quorum.

(a) A quorum of the council shall be a simple majority of the total number of sitting members, provided, however, that in the context of an appeal proceeding, a quorum shall be a simple majority of those sitting members who have not recused themselves from the proceeding.

(b) The council shall take formal or official action only when a quorum is present.

Source. #4846, eff 6-21-90, EXPIRED: 6-21-96  
New. #6334, eff 9-20-96; ss by #8031, eff 1-24-04

Env-WMC 203.02 Place of Meetings.

(a) All regular meetings of the council shall be held in Concord.

(b) Special meetings, including meetings held to inform the public or solicit public comments, shall be held in Concord or such other places as the council shall determine based on consideration of maximizing access of interested parties to the meeting.

Source. #4846, eff 6-21-90, EXPIRED: 6-21-96  
New. #6334, eff 9-20-96; ss by #8031, eff 1-24-04

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Env-WMC 203.03 Scheduling Meetings.

- (a) Regular meetings of the council shall be held at least quarterly.
- (b) Special meetings shall be those which are other than quarterly meetings and shall be held at the call of the chairman or of 3 council members.

Source. #4846, eff 6-21-90, EXPIRED: 6-21-96  
New. #6334, eff 9-20-96; ss by #8031, eff 1-24-04

Env-WMC 203.04 Notice of Meetings. Notice of meetings shall be publicized as required by RSA 91-A, Access to Public Records. The notice shall contain the time, date and place of meeting and the scheduled agenda for the meeting. The council clerk shall maintain a record demonstrating that all statutory notice requirements have been met.

Source. #4846, eff 6-21-90, EXPIRED: 6-21-96  
New. #6334, eff 9-20-96; ss by #8031, eff 1-24-04

Env-WMC 203.05 Record of Meetings. A record of all regular and special meetings of the council shall be kept by tape recording. Minutes of the meeting shall be prepared by the council clerk and distributed to the council members.

Source. #4846, eff 6-21-90, EXPIRED: 6-21-96  
New. #6334, eff 9-20-96; ss by #8031, eff 1-24-04

Env-WMC 203.06 Presiding Officer.

(a) The presiding officer at a meeting or for an appeal shall be the chairman of the council if present and willing to preside. If the chairman is unavailable for any reason, the presiding officer shall be the vice-chairman, if available, or a member of the council selected by those members present at the hearing.

(b) The presiding officer at a prehearing conference shall be the chairman of the council or the council member who is designated to preside by the chairman.

(c) The presiding officer at a meeting shall regulate the course of the meeting and take such other action that is necessary for the efficient and orderly conduct of the meeting, consistent with these rules and any other applicable state law.

(d) The presiding officer at an appeal hearing or prehearing conference shall:

- (1) Rule on issues of evidence;
- (2) Regulate the course of the proceeding;
- (3) Rule on issues of procedure;
- (4) Administer oaths or affirmations; and
- (5) Take such other action that is necessary for the efficient and orderly conduct of the proceeding, consistent with these rules and any other applicable state law.

Source. #4846, eff 6-21-90, EXPIRED: 6-21-96  
New. #6334, eff 9-20-96; ss by #8031, eff 1-24-04

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Env-WMC 203.07 Withdrawal of Presiding Officer.

(a) Upon individual initiative or upon the motion or request of any party, a presiding officer shall, for good cause or to avoid the appearance of impropriety or lack of impartiality, withdraw from serving as presiding officer for that proceeding.

(b) For purposes of this section, good cause means evidence of any fact that would cause a reasonable person to conclude that the presiding officer cannot be impartial.

Source. #4846, eff 6-21-90, EXPIRED: 6-21-96  
New. #6334, eff 9-20-96; ss by #8031, eff 1-24-04

Env-WMC 203.08 Computation of Time.

(a) All time periods referenced in these rules shall be calendar days unless otherwise specified.

(b) Computation of any period of time referred to in these rules shall begin with the first day following the day on which the act or other occurrence which initiates such period of time occurs, and shall include the last day of the period so computed.

(c) If the last day of the period so computed falls on a Saturday, Sunday, or state legal holiday, then the time shall be extended to include the first business day following the Saturday, Sunday, or state legal holiday.

Source. #4846, eff 6-21-90, EXPIRED: 6-21-96  
New. #6334, eff 9-20-96; ss by #8031, eff 1-24-04

Env-WMC 203.09 Filing of Documents.

(a) Any correspondence filed with the council other than correspondence relating to an appeal shall be filed by mailing or delivering the original to the following address:

Waste Management Council  
c/o DES, Waste Management Division  
29 Hazen Drive  
Concord, NH 03301

(b) Any document required or allowed by these rules to be filed in conjunction with an appeal shall be filed by mailing or delivering the original and 20 copies of the document to the appeals clerk at the following address:

Waste Management Council  
Attn: Appeals Clerk  
c/o DES Legal Unit  
29 Hazen Drive  
P.O. Box 95  
Concord, NH 03302-0095

Source. #4846, eff 6-21-90, EXPIRED: 6-21-96  
New. #6334, eff 9-20-96; ss by #8031, eff 1-24-04

Env-WMC 203.10 Signatures.

(a) Every document filed with the council that is not related to an appeal shall be signed by the individual submitting the document or, if the document is filed on behalf of an entity, by a duly-authorized representative of the entity.

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(b) Every document filed with the council that relates to an appeal, including any notice of appeal, motion, petition, brief, memorandum, or other document, but not including exhibits submitted at a hearing, shall be signed by the filing party or by the representative of the filing party who has filed an appearance in accordance with Env-WMC 204.07.

(c) The signature on a document filed with the council shall constitute a certification that:

- (1) The signer has read the document;
- (2) The signer is authorized to file it;
- (3) To the best of the signer's knowledge, information, and belief, there are good grounds to support it; and
- (4) The document has not been filed for purposes of delay or harassment.

Source. #4846, eff 6-21-90, EXPIRED: 6-21-96  
New. #6334, eff 9-20-96; ss by #8031, eff 1-24-04

Env-WMC 203.11 Issuance or Filing of Documents.

(a) All orders, decisions, notices, or other written correspondence or documents issued by or at the direction of the council shall be deemed to have been issued on the date noted on the document.

(b) All written correspondence or documents issued by or at the direction of the council that are sent to the addressee's last address of record shall be presumed to have been received by the addressee.

(c) All written documents governed by these rules, including but not limited to notices of appeal, requests for findings or conclusions, correspondence, and motions, shall be deemed to have been filed with or received by the council on the actual date of receipt by:

- (1) The council clerk, for items that do not relate to an appeal; or
- (2) The appeals clerk, for items that relate to an appeal.

Source. #4846, eff 6-21-90, EXPIRED: 6-21-96  
New. #6334, eff 9-20-96; ss by #8031, eff 1-24-04

Env-WMC 203.12 Communications with the Council.

(a) All communications with the council shall be filed in accordance with Env-WMC 203.09 and shall identify the name and address of the communicator and the subject matter of the communication.

(b) No person shall submit any documents or exhibits or otherwise communicate any information which pertains either directly or indirectly to the subject matter of a pending appeal directly to any member of the council, other than at a hearing or pre-hearing conference for which all parties have been given notice in accordance with these rules.

(c) Any member of the council who receives any direct communication from any person which pertains directly or indirectly to the subject matter of a pending appeal shall, at the next council meeting, inform the council on the record of the improper communication and submit a copy of the same or, if the communication was made orally, relate the substance of the communication to the council on the record.

(d) No information shall be considered as evidence or made part of the record of an appeal before the council unless the information is introduced as evidence in accordance with Env-WMC 205.

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Source. #4846, eff 6-21-90, EXPIRED: 6-21-96  
New. #6334, eff 9-20-96; ss by #8031, eff 1-24-04

Env-WMC 203.13 Appearance Before the Council.

- (a) Any person may request the opportunity to present information to the council.
- (b) If made in advance of a council meeting, the request shall be filed in writing in accordance with Env-WMC 203.09.
- (c) If made at a council meeting, the request may be made in writing or orally on the record.
- (d) The request shall include:
  - (1) The name of the individual who wishes to present the information;
  - (2) The name of the person represented by the individual, if any;
  - (3) The subject of the information; and
  - (4) The length of time needed to present the information.
- (e) The council shall allow the individual to present the information if the council determines that:
  - (1) The information does not relate to a matter that is the subject of a pending appeal or for which the time in which to file an appeal has not expired;
  - (2) The information relates to a subject over which the council has statutory jurisdiction; and
  - (3) Allowing the information to be presented will not unduly prolong or otherwise unreasonably interfere with the conduct of the meeting.
- (f) If the council grants the request to provide information, the council shall inform the individual of the date and time at which the information can be presented.

Source. #4846, eff 6-21-90, EXPIRED: 6-21-96  
New. #6334, eff 9-20-96; ss by #8031, eff 1-24-04

Env-WMC 203.14 Recess and Adjournment. The council shall, from time to time, recess or adjourn any meeting or hearing as might be necessary for the orderly conduct of the proceeding on its own initiative or at the request of:

- (a) Any person scheduled to present information at a meeting; or
- (b) Any party to an appeal.

Source. #4846, eff 6-21-90, EXPIRED: 6-21-96  
New. #6334, eff 9-20-96; ss by #8031, eff 1-24-04

Env-WMC 203.15 Waiver of Rules. Any person may request the council to waive, for good cause, the application of any of these rules not mandated or required by any New Hampshire statute. Requests made prior to or subsequent to a hearing shall be made in writing and shall state the basis for the request. Requests made at a hearing may be made orally, stating the basis for the request, and shall be entered into the record. If no party objects to the waiver and if council determines that good cause for the waiver exists and the interests of the parties to the proceeding will not be prejudiced by the waiver, the council shall grant the request. For

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purposes of this section, good cause shall be determined with reference to the specific rule for which a waiver is sought.

Source. #4846, eff 6-21-90, EXPIRED: 6-21-96  
New. #6334, eff 9-20-96; ss by #8031, eff 1-24-04

PART Env-WMC 204 APPEALS: FILING; NOTICE; PARTIES AND REPRESENTATIVES; SCHEDULING; MOTIONS

Env-WMC 204.01 Time for Filing of Appeals. An appeal shall be filed within 30 days of the date the decision being appealed was issued, as evidenced by the date on the decision. As specified in Env-WMC 203.09, the appeal shall be deemed to have been filed on the date it is received by the appeals clerk.

Source. #8031, eff 1-24-04

Env-WMC 204.02 Notice of Appeal.

(a) An appeal shall be commenced by filing a notice of appeal as specified by this section with the council.

(b) A notice of appeal shall include the following:

(1) For each appellant, the appellant's full legal name, mailing address, and daytime telephone number and, if available, a fax number and e-mail address;

(2) If the notice of appeal is being filed by the appellant's representative, the representative's name, mailing address, and daytime telephone number and, if available, a fax number and e-mail address;

(3) A clear and concise statement of the relief sought and the statutory provision under which the relief is sought;

(4) A clear and concise statement of the facts upon which the council is expected to rely in granting relief;

(5) A clear and concise statement as to why the appellant has standing to bring the appeal, for example, why the appellant will suffer a direct and adverse affect as a result of the decision being appealed in a way that is more than any impact of the decision on the general public;

(6) A copy of the decision or order which is being appealed; and

(7) Notice of and support for a request for expedited review, if one is being made pursuant to Env-WMC 204.14.

(c) A notice of appeal may also include such other information as the appellant deems pertinent and relevant, including attachments of exhibits, illustrations, and sworn written testimony.

(d) The appellant shall provide a copy of the notice of appeal to the director and to the commissioner of the department.

(e) If the appeal relates to the issuance of a permit and the appellant is not the permit holder, the appellant shall serve a copy of the notice of appeal on the permit holder in accordance with Env-WMC 204.09.

Source. #8031, eff 1-24-04

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Env-WMC 204.03 Determination of Sufficiency of Notice of Appeal.

(a) Upon receipt of a document purporting to be a notice of appeal, the appeals clerk shall assign a docket number to the document and review the document for compliance with the requirements of Env-WMC 204.01 and Env-WMC 204.02(b).

(b) If the document appears to comply with the requirements of Env-WMC 204.01 and Env-WMC 204.02(b), the appeals clerk shall distribute a copy of the notice of appeal to the council.

(c) If the document was not filed within the time limit established by Env-WMC 204.01, the appeals clerk shall distribute a copy of the document to the council with a statement that the appeal was not timely filed.

(d) If the document was timely filed but does not appear to comply with the requirements of Env-WMC 204.02(b), the appeals clerk shall:

(1) Send a written notice to the person who filed the document to inform the person that:

- a. The document does not meet the requirements of Env-WMC 204.02(b); and
- b. If the person wishes to pursue the appeal, the person has 30 days in which to file a document that meets the requirements of Env-WMC 204.01 and Env-WMC 204.02(b); and

(2) Provide a copy of the written notice and the document to the council.

(e) After the expiration of the 30-day period referred to in (d)(1)b., above, the appeals clerk shall:

(1) Provide the council with a copy of any document received from the person; or

(2) If no document was received, so inform the council at the first council meeting following the end of the 30-day period.

Source. #8031, *eff 1-24-04*

Env-WMC 204.04 Identification of Documents. Subsequent to the filing of a notice of appeal, the docket number assigned by the appeals clerk pursuant to Env-WMC 204.03(a) shall be used by all parties to identify all correspondence and other documents submitted to the council relating to the appeal, including any written testimony or exhibits used at a hearing.

Source. #8031, *eff 1-24-04*

Env-WMC 204.05 Interveners.

(a) A request to intervene in an appeal shall be filed in accordance with RSA 541-A:32, I and Env-WMC 203.09(b).

(b) The council, or, if an expedited review has been requested, the presiding officer, shall consider and grant or deny all petitions for intervener status in accordance with the provisions of RSA 541-A:32.

(c) The order issued pursuant to RSA 541-A:32, V shall specify the extent to which the intervener shall be considered a party for purposes of these rules.

Source. #8031, *eff 1-24-04*

Env-WMC 204.06 Parties.

(a) The parties to an appeal of an administrative order shall be:

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- (1) The person to whom the order was issued;
  - (2) The department; and
  - (3) Any person allowed by the council to intervene.
- (b) The parties to an appeal of the denial of a permit application shall be:
- (1) The person who filed the permit application;
  - (2) The department; and
  - (3) Any person allowed by the council to intervene.
- (c) The parties to an appeal of the issuance of a permit shall be:
- (1) The person who filed the appeal;
  - (2) The department;
  - (3) The permit holder, if not the appellant; and
  - (4) Any person allowed by the council to intervene.

Source. #8031, *eff 1-24-04*

Env-WMC 204.07 Representation and Appearances.

(a) Any party to an appeal before the council may be represented by an attorney licensed to practice law in New Hampshire or such other individual as the party may designate. This provision shall not be construed to permit the unauthorized practice of law as defined by the New Hampshire supreme court or the New Hampshire general court.

(b) Each party's representative shall file an appearance with the appeals clerk which identifies the party being represented, the representative's name, mailing address, and daytime telephone number and, if available, a fax number and e-mail address. If the representative files the original notice of appeal which includes the information specified by this paragraph, a separate appearance shall not be required.

(c) All representatives shall obtain and become familiar with these procedural rules prior to appearing before the council.

(d) For each appeal, the department shall designate a representative for purposes of that appeal. The designated representative shall file an appearance pursuant to (b), above.

Source. #8031, *eff 1-24-04*

Env-WMC 204.08 Removal of Representatives.

(a) Upon a finding of misconduct on the part of any representative appearing before the council, the council shall prohibit that individual from acting as a representative before the council for the pending matter.

(b) For purposes of this section, misconduct means:

- (1) Behavior that is disruptive to the orderly conduct of the appeal; or
- (2) A consistent or recurring failure to:

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- a. Meet deadlines;
  - b. Comply with the provisions of Env-WMC 200; or
  - c. Provide information that has been requested by the council or by other parties, unless the representative believes in good faith that the information is protected by law from disclosure.
- (c) Prior to making a finding of misconduct so as to warrant the imposition of such prohibition, the council shall:
- (1) Inform the representative, the party represented by the representative, and all other parties and their representatives, if any, to the proceeding of the proposed prohibition; and
  - (2) Provide an opportunity for the representative, the party represented by the representative, and all other parties and their representatives, if any, to the proceeding to address the council regarding why the prohibition should or should not be imposed.

*Source. #8031, eff 1-24-04*

Env-WMC 204.09 Service List; Service of Documents.

- (a) For each appeal, the appeals clerk shall maintain a service list that identifies:
  - (1) Each party or, if the party is represented and the representative filed the notice of appeal or has otherwise filed an appearance, the party's representative;
  - (2) Each person who has filed a motion to intervene that has not yet been ruled on by the council; and
  - (3) The mailing address, daytime telephone number, and, if available, fax number and e-mail address of each person identified in (1) and (2), above.
- (b) The appeals clerk shall provide a copy of the service list to any person upon request.
- (c) Any person who files an appeal-related document with the council shall serve a copy of the document on each person identified on the service list.
- (d) Service as required by (c), above, shall be made:
  - (1) By first class mail, postage prepaid, or by delivery in hand;
  - (2) On or before the date of filing of the original document with the appeals clerk; and
  - (3) On the representative of a party for whom a representative has filed an appearance, provided however that timely service inadvertently made on a party for whom a representative has filed an appearance shall be sufficient regardless of whether the party's representative also was served.
- (e) Every document required to be served upon the parties to an appeal shall be accompanied by a certificate of service, signed by the person making service, attesting to the method and date of service and the person(s) served.
- (f) If time is of the essence in a filing and service will be made by mail, the person filing the document shall send a copy of the document by fax or e-mail to all other parties for whom a fax number or e-mail address is available, and shall notify any party for whom a fax number or e-mail address is not available of the filing by telephone.

*Source. #8031, eff 1-24-04*

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Env-WMC 204.10 Scheduling.

(a) The council shall schedule an appeal hearing no later than the second regularly scheduled council meeting following receipt by the council of a complete notice of appeal that complies with Env-WMC 203.09(b).

(b) Once a hearing has been scheduled, the appeals clerk shall send written notice of the date, time, and place of the hearing to the parties or, as applicable, their representatives, and to all other persons who have filed an appearance with the appeals clerk. The notice shall include a statement that the hearing is to consider the issues raised in the notice of appeal, a statement of the legal authority under which the hearing is to be held, and a reference to the particular statute(s), rule(s), or permit(s), as applicable, involved in the appeal.

(c) If the hearing is rescheduled, the appeals clerk shall send a notice of the date, time, and place of the rescheduled hearing to the parties or their representatives, as applicable.

Source. #8031, *eff 1-24-04*

Env-WMC 204.11 Calendar of Hearings. The appeals clerk shall maintain a record of all appeals pending before the council.

Source. #8031, *eff 1-24-04*

Env-WMC 204.12 Extensions of Time.

(a) Any party to an appeal may petition the council to extend any time limit established by Env-WMC 200 in accordance with this section.

(b) Prior to filing an extension request, the party shall seek concurrence with the request from all other parties to the appeal.

(c) A request for an extension shall be in writing and shall be filed in accordance with Env-WMC 203.09(b) at least 10 business days prior to the expiration of the prescribed period.

(d) The request shall state the reason(s) for the extension request and whether the other parties to the appeal agree or disagree with the request or did not respond to the request for concurrence.

(e) A copy of the request shall also be served in accordance with Env-WMC 204.09. If the request is filed within 20 days of the expiration of the prescribed period, the party filing the request shall implement the procedure specified in Env-WMC 204.09(f).

(f) Any party who did not concur with the request may object to the request by filing a written objection with the council within 5 business days of receipt of the request, stating the reasons why the request should not be granted.

(g) The council shall grant the request if the council determines that the delay will not prejudice the interests of any party to the appeal and:

- (1) Meeting the prescribed time limit would unduly burden the party; or
- (2) An extension is otherwise necessary to conduct a more effective hearing.

(h) The council shall notify all parties in writing of its decision.

Source. #8031, *eff 1-24-04*

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Env-WMC 204.13 Continuances.

(a) Any party may request that a hearing conducted pursuant to this part be continued for reasonable cause and reconvened or rescheduled.

(b) Prior to filing a request for a continuance of a hearing made in advance of the hearing, the party seeking the continuance shall seek concurrence with the request from all other parties to the appeal.

(c) A request made in advance of the hearing shall:

- (1) Be in writing;
- (2) State the reason(s) for the request;
- (3) Be filed at least 5 business days prior to the scheduled hearing date; and
- (4) State whether the other parties to the appeal agree or disagree with the request or did not respond to the request for concurrence.

(d) A request for a continuance made at a hearing may be made orally provided it is entered in the record of the hearing.

(e) The council shall grant the request if the council determines that reasonable cause exists and that no other party will be prejudiced by the delay. For purposes of this section, reasonable cause shall include, but not be limited to:

- (1) Unavailability of an individual party, a representative, or critical witness;
- (2) The parties believe that an informal resolution is possible and need more time to resolve the matter; or
- (3) The parties are awaiting information, reports, data, or a related court decision which is material to the appeal.

(f) The council shall deny the request if the council determines that the request is not supported by reasonable cause. Grounds for determining that the request is not supported by reasonable cause include, but are not limited to:

- (1) An individual party, representative, or critical witness is chronically unavailable;
- (2) No progress towards a settlement has been demonstrated by the parties; or
- (3) There have been repeated or unreasonable delays in obtaining information, reports, data, or a related court decision which is material to the appeal.

(g) All orders for continuance shall specify the time and place at which such hearing shall be reconvened. The presiding officer shall notify the parties and the public, if applicable, in such a manner as is appropriate to ensure that reasonable notice shall be given of the time and place of such continued hearing.

Source. #8031, eff 1-24-04

Env-WMC 204.14 Expedited Review of Appeals.

(a) Any party may request the council to provide an expedited review of an appeal.

(b) If the request for expedited review is filed after the notice of appeal has been filed, the party

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wishing to file the request shall seek concurrence with the request from all other parties to the appeal prior to filing the request.

(c) The request for an expedited review shall include the following:

- (1) The docket number assigned to the appeal, unless the request is part of the notice of appeal;
- (2) The date on which the notice of appeal was or is being filed with the council;
- (3) The reason(s) why the expedited review is being sought; and
- (4) If the request is being filed after the notice of appeal was filed, a statement that the other parties to the appeal agree or disagree with the request or did not respond to the request for concurrence.

(d) If not included in the notice of appeal, the party shall file the request for an expedited review in accordance with Env-WMC 203.09(b) at least 10 business days prior to the next scheduled council meeting.

(e) The presiding officer shall review the request and determine whether to grant the request.

(f) The presiding officer shall grant the request for an expedited review if the presiding officer determines that the expedited review will not unduly burden the opposing party and:

- (1) There is an imminent and substantial threat to public health or the environment that will remain unaddressed until the appeal is resolved; or
- (2) The party will suffer an economic hardship if the appeal is not promptly resolved.

(g) If the presiding officer grants the request, the presiding officer shall direct the appeals clerk to schedule the appeal hearing for the next scheduled council meeting.

*Source. #8031, eff 1-24-04*

Env-WMC 204.15 Motions.

(a) Any party may file a written motion or make an oral motion in accordance with this section.

(b) Prior to filing a written motion, the party shall seek concurrence with the relief requested in the motion from all other parties to the appeal, provided however that if the motion would result in a ruling that is adverse to another party's interests, the moving party shall not be required to seek concurrence from that party.

(c) The motion shall contain:

- (1) The specific relief or ruling being requested;
- (2) A clear and concise statement of the facts and law which support the motion; and
- (3) A statement that the other parties to the appeal agree or disagree with the motion or did not respond to the request for concurrence.

(d) The moving party shall have the burden of persuasion on all matters raised in the motion.

(e) If the need for a motion does not become apparent until after the hearing has started, a party may make an oral motion. An oral motion shall be recorded in full on the tape recording of the hearing.

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(f) All parties who would be adversely affected by the ruling sought in a motion shall have an opportunity to respond to the motion. For a written motion, responses shall be in writing and shall be filed no later than 5 days after receipt of the motion. For an oral motion, responses shall be made during the hearing at which the oral motion was made unless the presiding officer determines, based on the nature of the motion, that it is appropriate to grant additional time to prepare a response to the motion.

*Source. #8031, eff 1-24-04*

### Env-WMC 204.16 Withdrawal of Appeal.

(a) The appellant may withdraw the appeal at any time prior to a final decision being made by the council.

(b) To withdraw the appeal, the appellant shall submit a written notice of withdrawal to the appeals clerk stating that the appeal is being withdrawn and shall serve a copy on all other parties to the appeal pursuant to Env-WMC 204.09. If the appeal was resolved by a settlement, the appellant shall attach a copy of the settlement to the notice of withdrawal.

*Source. #8031, eff 1-24-04*

## PART Env-WMC 205 APPEALS: PREHEARINGS; HEARINGS

### Env-WMC 205.01 Settlement Discussions; Prehearing Conferences.

(a) After receiving a notice of appeal, the department's designated representative shall contact the appellant and all other parties to the appeal to offer the opportunity to meet to determine whether the matter can be resolved without need for a formal hearing. If the parties meet and agree to a resolution of the matter, then the appellant shall withdraw the appeal in accordance with Env-WMC 204.16.

(b) If the parties agree to meet but a meeting cannot be scheduled prior to the council meeting for which the hearing has been scheduled, the department's representative shall inform the appeals clerk and the hearing shall be rescheduled for the following council meeting.

(c) Nothing herein shall preclude any party or the council from requesting a prehearing conference in accordance with RSA 541-A:31, V, in lieu of or in addition to a meeting scheduled or held under (a), above.

*Source. #8031, eff 1-24-04*

Env-WMC 205.02 Supplemental Materials. Memoranda, briefs, and other written materials designed to supplement a notice of appeal shall be filed in accordance with Env-WMC 203.09(b) and shall be served in accordance with Env-WMC 204.09 at least 10 business days prior to the scheduled hearing on the appeal.

*Source. #8031, eff 1-24-04*

### Env-WMC 205.03 Pre-hearing Exchange of Information.

(a) More than one week prior to the commencement of a hearing, the parties shall exchange the following:

- (1) A list identifying each witness expected to be called at the hearing with a brief description of that witness's testimony;
- (2) A list of all exhibits expected to be presented at the hearing; and

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(3) Any requests for changes to or waivers of the standard procedures as specified in these rules or other matters concerning the conduct of the hearing.

(b) If a party wishes to obtain information other than that specified in (a), above, from another party, the requesting party shall request the information in writing and shall file a copy of the request with the appeals clerk and serve a copy on the party from whom the information is sought.

(c) Requests pursuant to (b), above, shall be limited to information directly related to the matter for which the hearing will be conducted.

(d) A party receiving a request for information pursuant to (b), above, shall respond to the request within 10 days by:

- (1) Providing the information requested;
- (2) Explaining why the information will not be provided; or
- (3) Identifying a date and time when the information can be made available for inspection, which date and time shall be sufficiently in advance of the hearing on the matter that the information can be reasonably reviewed prior to the hearing.

(e) A party who has received a request for information pursuant to (b), above, may decline to provide information which the party believes is:

- (1) Confidential;
- (2) Privileged;
- (3) Not directly related to the matter at hand; or
- (4) Excessively burdensome to produce.

(f) If a party declines to provide information pursuant to (e), above, the explanation provided pursuant to (d)(2), above, shall include a detailed explanation of the reason(s) why the information is not being provided.

(g) A party who has requested information pursuant to (b), above, that is not provided may request the presiding officer to require the party of whom the information was requested to provide the information. Such requests shall be in the form of a written motion and shall be filed and handled in accordance with Env-WMC 204.15.

(h) The party shall file a motion pursuant to (g), above, within 7 days of receiving the denial of the information under (e), above, but no later than 5 days prior to the scheduled hearing. No motion shall be accepted within 5 days before a scheduled hearing unless the presiding officer determines that good cause exists for the late filing. For purposes of this paragraph, good cause shall mean that the party requesting the information did not discover the existence of the information in time to request the information, receive the denial, and file a timely motion and could not have discovered the existence of the information with reasonable diligence.

(i) The presiding officer shall grant a motion filed pursuant to (h), above, if the presiding officer determines that:

- (1) The information is directly related to the matter at hand such that the requesting party will be materially prejudiced in the case by the lack of the requested information; and

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(2) The information is not confidential, privileged, or excessively burdensome to produce.

(j) If the presiding officer grants the motion and the party asked to provide the information fails or refuses to provide it, the presiding officer shall fashion such remedy as is appropriate to the circumstances, including:

- (1) Delaying the hearing until the information is provided;
- (2) Ruling that such information shall not be admissible at the hearing on the matter or in any subsequent proceeding on the matter, unless the information is already a matter of public record; or
- (3) Finding in favor of the requesting party.

Source. #8031, eff 1-24-04

Env-WMC 205.04 Opening the Proceeding. The presiding officer at an appeal hearing or prehearing conference shall open the proceeding by describing in general terms the purpose of the proceeding and the general procedures governing its conduct.

Source. #8031, eff 1-24-04

Env-WMC 205.05 Hearing Record.

(a) The record of the hearing shall include:

- (1) The notice(s) of the hearing;
- (2) The tape recording of the hearing;
- (3) All exhibits, motions, requests for findings and conclusions, and other written materials submitted by the parties at or for the hearing;
- (4) Any other item(s) specified by RSA 541-A:31, VI; and
- (5) All decisions of the presiding officer on procedural matters and the decision of the council on the merits.

(b) The entirety of the appeal hearing shall be recorded. The council, upon request of a party, shall provide, at cost, a duplicate tape of the hearing. Any person desiring a transcript of the hearing prepared by a qualified stenographer shall provide the stenographer and shall bear all expenses associated with the preparation of the transcript. Any transcript so prepared shall be made available to the council for copying at the council's expense.

Source. #8031, eff 1-24-04

Env-WMC 205.06 Testimony.

(a) All testimony of witnesses shall be made under oath or affirmation.

(b) Any individual testifying before the council shall state for the record his or her name, address, and if a representative of a party, the identity of the party so represented.

(c) Any individual testifying before the council shall be subject to cross-examination as provided in (f) below.

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(d) Whenever it appears that testimony to be offered at the hearing would be more readily understood if presented in written form, the presiding officer shall require the party offering such testimony to submit the testimony in written form, provided such requirement will not substantially prejudice the interests of any party to the hearing. Upon request of the party who has been requested to submit written testimony, the presiding officer shall direct that the record be held open after the close of the hearing or that the hearing be continued to a later date for the purpose of allowing sufficient time to prepare the written submission. All persons offering testimony in written form shall be subject to cross-examination as provided in (f) below.

(e) Unless otherwise agreed at a prehearing conference, direct testimony shall be offered in the following order:

- (1) The person who filed the notice of appeal and such witnesses as the person may call;
- (2) Any other non-state party and such witnesses as the party may call; and
- (3) The department, by such staff members and other witnesses as the department may call.

(f) If the presiding officer, members of the council, or legal counsel to the council have questions regarding any witness's testimony, the individual having the question shall cross-examine the witness during or at the conclusion of the testimony of that witness, as allowed by the presiding officer. The presiding officer shall allow other parties or their representatives a reasonable opportunity to cross-examine each witness. Cross-examination shall be by asking questions directly of the witness, so long as such direct questioning is not disruptive to the orderly conduct of the hearing. If the presiding officer determines that such cross-examination is disruptive to the orderly conduct of the hearing, then the presiding officer shall require the cross-examination to be conducted indirectly, by addressing questions to the witness through the presiding officer.

Source. #8031, *eff 1-24-04*

### Env-WMC 205.07 General Evidence.

(a) Pursuant to RSA 541-A:33, II, the rules of evidence shall not apply.

(b) Evidence which is relevant and material to the subject matter of the hearing shall be admissible. Evidence which is irrelevant, immaterial, or unduly repetitious shall be excluded. The experience, technical competence, and specialized knowledge of the councilors, if relevant, may be used in the evaluation of all evidence submitted to the council.

(c) Whenever necessary for a full and fair consideration of the appeal, the presiding officer shall take official notice of relevant laws, official rules, and transcripts of other hearings, judicially recognizable facts, generally recognized facts of common knowledge to the general public, and physical, technical or scientific facts within the council's specialized knowledge consistent with the requirements of RSA 541-A:33,V. The final decision of the council shall specifically identify those facts of which official notice was taken.

(d) All documents, materials, and objects offered in evidence as exhibits shall be marked by the offering party with the docket number and shall, if accepted, be numbered or otherwise identified in a sequential manner. Documentary evidence shall be received in the form of copies or excerpts if the original is not readily available. Any person offering any documentary or photographic evidence shall provide each member of the council and each party with a copy of such documents or photographs, unless such documents or photographs are determined by the presiding officer to be of such form, size or character as not to be reasonably suitable for reproduction.

(e) All written testimony and documents, materials, and objects admitted into evidence shall be made available during the course of the hearing for public examination. Following the hearing, all such evidence shall be available at the department's offices in Concord during normal business hours.

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(f) In any proceeding involving an application for a permit or other approval, the application filed with the department, including all supplemental information including but not limited to maps, plans, and specifications, and any amendments to the application or supplemental information, shall be placed into evidence by the department.

(g) All objections to rulings of the presiding officer regarding evidence or procedure and the grounds for the objections shall be timely stated during the course of the hearing. Nothing herein shall be construed as independent authorization for interlocutory appeals of rulings of the presiding officer.

(h) No information shall be considered as evidence or made part of the record in any proceeding before the council that is not introduced as evidence in accordance with this part.

Source. #8031, eff 1-24-04

Env-WMC 205.08 Exhibits.

(a) Where evidence to be presented consists of numerical or graphic data and such evidence would make oral presentation difficult to follow, such evidence shall be presented in exhibit form. Exhibits may be summarized, supplemented, and explained.

(b) Space shall be provided in the upper right hand corner of each exhibit for the insertion of the number of the exhibit and the name of the witness through whom it is presented.

(c) The party offering an exhibit shall supply the original and 20 copies thereof to the council and shall provide a copy to all other parties, unless exempted under Env-WMC 205.07(d).

Source. #8031, eff 1-24-04

Env-WMC 205.09 Requests for Findings and Conclusions. Any party may submit requests for findings of fact and conclusions of law by the close of the record, as established under Env-WMC 205.10.

Source. #8031, eff 1-24-04

Env-WMC 205.10 Close of the Record.

(a) After the conclusion of the hearing, no other evidence, testimony or exhibits shall be allowed into the record, except as allowed pursuant to (b) below.

(b) Prior to the conclusion of the hearing, a party may request that the record be left open for a specified period of time in which to file evidence or arguments not available at the hearing. If the council determines that such evidence or arguments is necessary to a full consideration of the issues raised in the appeal, the presiding officer shall set a date by which the additional material shall be filed.

(c) The party filing such additional material shall serve copies of all items filed in accordance with Env-WMC 204.09.

(d) If any other party to the hearing requests time to respond to the evidence or arguments submitted, the presiding officer shall set a specific time period following filing of the material for the filing of a response. If any other party to the hearing requests the opportunity to cross-examine on the additional evidence submitted, the presiding officer shall set a date and time for a hearing at which cross-examination on the additional evidence submitted shall be allowed, if the presiding officer determines that such cross-examination is required for a full and true disclosure of the facts.

(e) The determination to allow cross-examination shall be based on:

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- (1) The nature of the factual and legal issues in dispute in the proceeding;
- (2) The testimony and evidence submitted during the hearing and any cross-examination thereon;  
and
- (3) The nature of the additional evidence to be submitted.

Source. #8031, eff 1-24-04

Env-WMC 205.11 Reopening of the Record.

(a) At any time prior to a final decision on the appeal, any party to a proceeding or any member of the council may request the presiding officer to reopen the record to consider testimony, evidence, arguments, or exhibits not previously considered.

(b) If the request is made after one or more parties have left the hearing, the request shall be in writing and a copy of the request shall be served in accordance with Env-WMC 204.09.

(c) If the presiding officer determines that such testimony, evidence, arguments, or exhibits are necessary to a full consideration of the issues raised by the appeal, the record shall be reopened to accept the offered items.

(d) The presiding officer shall give written notice of the acceptance into the record of the offered items to all parties if the parties are no longer present. The presiding officer shall also set a time within which other parties may respond to or rebut the items made part of the record.

Source. #8031, eff 1-24-04

Env-WMC 205.12 Failure to Appear. If any party to whom notice of a hearing has been given in accordance with these rules fails to appear and fails to advise the appeals clerk of such non-appearance in advance of the hearing, and the council determines that delaying the hearing to a later date would cause undue inconvenience or prejudice to the party or parties present, the council shall hear the evidence and testimony of the parties present and shall render a decision thereon, subject to the provisions of Env-WMC 205.13.

Source. #8031, eff 1-24-04

Env-WMC 205.13 Reconvening of Hearings.

(a) If a hearing is held in a party's absence pursuant to Env-WMC 205.12, the party may file a motion within 10 days after the date of the hearing to reconvene the hearing.

(b) The motion shall:

- (1) State the reason(s) why the party was absent from the hearing;
- (2) State why the appeals clerk was not notified of the absence in advance of the hearing; and
- (3) Be supported by affidavits or other objective evidence.

(c) If the council determines that good cause exists to explain the party's failure to appear at the hearing and to explain the party's failure to notify the appeals clerk in advance of the hearing, the council shall reconvene the hearing by scheduling another hearing. Good cause shall mean accident, sudden illness, death of a family member, or other circumstance beyond the control of the party which prevents the party from attending the hearing and from notifying the appeals clerk.

Source. #8031, eff 1-24-04

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Env-WMC 205.14 Burden of Proof.

(a) The appellant shall bear the burden of proving, by a preponderance of the evidence, that the decision that is being appealed was:

- (1) Contrary to case law, statute, or rules; or
- (2) Arbitrary and capricious.

(b) For motions, waiver requests, and other non-dispositive matters, the party asserting the truth of a statement shall bear the burden of proving, by a preponderance of the evidence, that the statement is true.

(c) For purposes of this section, proof by a preponderance of the evidence means that what is sought to be proved is more probable than not.

Source. #8031, *eff 1-24-04*

Env-WMC 205.15 Decisions.

(a) Unless an appeal is withdrawn pursuant to Env-WMC 206.06, the council shall issue a final decision in writing.

(b) If a party has submitted proposed findings of fact, the council's decision shall include a ruling upon each proposed finding.

(c) The appeals clerk shall serve a copy of the council's decision on each party in accordance with Env-WMC 204.09.

(d) The appeals clerk shall keep a copy of each decision on file in the council's public records for at least 5 years following the date of the final decision or the date of the decision on any appeal, unless the director of the division of records management and archives of the department of state sets a different retention period pursuant to rules adopted under RSA 5:40.

Source. #8031, *eff 1-24-04*

Env-WMC 205.16 Motion for Rehearing.

(a) Any party whose rights are directly and adversely affected by a decision of the council may file with the council a motion for rehearing within 20 days of the date the written decision is issued. Copies of the motion shall be served in accordance with Env-WMC 204.09. No distinction shall be made between the terms "reconsideration" and "rehearing."

(b) A motion for rehearing shall set forth in detail the following:

- (1) The basis of the moving party's aggrievement;
- (2) The finding(s), conclusion(s), or condition(s) to which the moving party objects;
- (3) The basis for the objection(s);
- (4) Whether the moving party seeks to present new or additional evidence, and if so, the nature of such evidence to be offered; and
- (5) The nature of the relief requested.

(c) New or additional evidence shall be permitted when offered to:

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- (1) Cure any deficiencies in the original notice of appeal or testimony;
- (2) Correct errors of form in the decision;
- (3) Request reconsideration of the conditions of the approval or of the denial; or
- (4) Challenge any facts of which official notice was taken.

(d) The council shall, at its first scheduled meeting following the receipt of such a motion, order a hearing or dismiss the motion. Any hearing held under this section shall be limited to the issues raised in the motion for rehearing. The council shall provide reasonable notice to affected persons of record of the rehearing.

(e) A council decision shall become final if no motion for rehearing is filed within the period specified in (a), above.

*Source. #8031, eff 1-24-04*

### PART Env-WMC 206 RULEMAKING PETITIONS

Env-WMC 206.01 Applicability. The rules in this part shall apply to any petition to amend, adopt, or repeal a rule submitted to the council pursuant to RSA 541-A:4.

*Source. #8031, eff 1-24-04*

Env-WMC 206.02 Filing. Any person wishing to petition the council to amend, adopt, or repeal a rule shall file the original and one copy of the petition with the council clerk as provided in Env-WMC 203.09(a).

*Source. #8031, eff 1-24-04*

Env-WMC 206.03 Format and Content of Petition. The person filing a petition to adopt, amend, or repeal a rule shall provide the following information:

- (a) The exact legal name of each person requesting the adoption, amendment, or repeal of the rule, with a residence address or principal place of business of the person;
- (b) Whether the person is asking the department to adopt, amend, or repeal a rule;
- (c) If the petition is to adopt a rule:
  - (1) The chapter, part, and section, by alphanumeric code, where the person proposes the rule to be inserted; and
  - (2) The language that the person wants to have adopted as a rule;
- (d) If the petition is to amend a rule:
  - (1) The specific rule, by alphanumeric code, that is the subject of the petition; and
  - (2) The language that the person wants to have adopted as a rule;
- (e) If the petition is to repeal a rule, the specific rule, by alphanumeric code, that is the subject of the petition;
- (f) A concise and explicit statement of why the petitioner wants the department to undertake the action requested; and

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(g) Such other information as the person filing the petition deems pertinent and relevant, including sworn written testimony.

Source. #8031, eff 1-24-04

Env-WMC 206.04 Processing of Rulemaking Petitions.

(a) Upon receipt of a petition to adopt, amend, or repeal a rule, the council shall proceed in accordance with RSA 541-A:4.

(b) The petition shall be granted and a rulemaking proceeding shall be initiated if the council determines that the proposed action is:

- (1) Consistent with state and federal law and policy; and
- (2) In the best interests of the state, specifically including those who may appear before the council in any proceeding.

Source. #8031, eff 1-24-04

**APPENDIX**

<b>Rule</b>	<b>Statute Rule is Intended to Implement</b>
Env-WMC 201	RSA 21-O:14, I, II, V; RSA 541-A:16, I; 31-36
Env-WMC 202	RSA 21-O:14, I; RSA 541-A:7; 16, I
Env-WMC 203 (see also specific sections below)	RSA 21-O:9, V; RSA 541-A:16, I; 31; 35; 36
Env-WMC 203.06	RSA 541-A:30-a, III(f)
Env-WMC 203.09 - 203.10	RSA 541-A:30-a, III(a)
Env-WMC 203.12	RSA 541-A:36
Env-WMC 203.13	RSA 541-A:30-a, III(b)
Env-WMC 203.15	RSA 541-A:30-a, III(j)
Env-WMC 204 (see also specific sections below)	RSA 21-O:9, V; RSA 541-A:16, I; 31, IV: 32
Env-WMC 204.01-204.04	RSA 541-A:30-a, III(a)
Env-WMC 204.05	RSA 541-A:30-a, III(g)
Env-WMC 204.06-204.08	RSA 541-A:30-a, III(b)
Env-WMC 204.09	RSA 541-A:30-a, III(a)
Env-WMC 204.12	RSA 541-A:30-a, III(f),(j)
Env-WMC 204.13	RSA 541-A:30-a, III(h)
Env-WMC 205 (see also specific sections below)	RSA 21-O:9, V; RSA 541-A:16, I; 31, IV; 31, V; 33; 38
Env-WMC 205.01-205.03	RSA 541-A:30-a, III(c)
Env-WMC 205.09	RSA 541-A:35
Env-WMC 205.11	RSA 541-A:30-a, III(i)
Env-WMC 205.14	RSA 541-A:30-a, III(d),(e)
Env-WMC 206	RSA 541-A:16, I