

CHAPTER Ec-Air 100 DEFINITIONS, ORGANIZATION AND PUBLIC INFORMATION

Statutory Authority: RSA 21-O:14, IV; RSA 541-A:16, I(a); and RSA 541-A:30-a

REVISION NOTE:

Document #13642, effective 5-23-23, readopted with amendments former Part Env-AC 201 and Part Env-AC 202 in Chapter Env-AC 200 titled “Procedural Rules” of the Air Resources Council and renumbered the rules as Chapter Ec-Air 100 on organizational rules titled “Definitions, Organization and Public Information.” The renumbering of rules with the subtitle “Env-AC” to “Ec-Air” was done pursuant to a rules redesignation plan for the Council’s rules approved by the Director of the Office of Legislative Services in 2021. There were no prior filings for the former Chapter Env-AC 100.

The prior filings for the former Part Env-AC 201 and Part Env-Ac 202 included the following documents:

#6586, eff 9-23-97
#8267-A, eff 1-25-05

As organizational rules Chapter Ec-Air 100 in Document #13642 will not expire except pursuant to RSA 541-A:17, II.

PART Ec-Air 101 PURPOSE

Ec-Air 101.01 Purpose. The purpose of this chapter is to provide organizational rules to implement the statutory responsibilities for all matters under the jurisdiction of the air resources council created by RSA 21-O:11.

Source. (See Revision Note at chapter heading for Ec-Air 100) #13642, eff 5-23-23

PART Ec-Air 102 DEFINITIONS

Ec-Air 102.01 Definitions.

(a) “Appeal” means an appeal of a department decision initiated by filing a notice of appeal pursuant to RSA 21-O:14 and Ec-Air 203.01.

(b) “Appeals clerk” means the individual designated by the commissioner to perform for the council the clerical support duties outlined in RSA 21-O:3, VIII(a).

(c) “Appellant” means the party who initiates an appeal pursuant to RSA 21-O:14.

(d) “Appearance” means a written notification to the council that a party or party’s representative intends to actively participate in a hearing.

(e) “Commissioner” means the commissioner of the department.

(f) “Council” means the air resources council established by RSA 21-O:11.

(g) “Council secretary” means the individual designated by the commissioner to perform for the council the clerical support duties outlined in RSA 21-O:3, VIII (c).

(h) “Department” means the department of environmental services.

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- (i) “Department decision” means “department decision” as defined in RSA 21-O:14, I(c).
- (j) “Department enforcement decision” means “department enforcement decision” as defined in RSA 21-O:14, I(b).
- (k) “Department permitting decision” means “department permitting decision” as defined in RSA 21-O:14, I(a).
- (l) “Director” means the director of the division.
- (m) “Division” means the division of air resources of the department.
- (n) “Filing” means any petition, appeal, notice, comment, or other document submitted to the council under this chapter. “Filing” does not include any document distributed to all parties at a prehearing conference or hearing.
- (o) “Hearing” means “adjudicative proceeding” as defined in RSA 541-A:1, I.
- (p) “Hearing officer” means the individual appointed under RSA 21-M:3, VIII to serve as the hearing officer for an appeal before the council.
- (q) “Intervenor” means a person allowed by the council to intervene in an appeal pursuant to RSA 541-A:32 and Ec-Air 203.08.
- (r) “Rulemaking petition” means a petition to adopt, amend, or repeal a council rule, filed pursuant to Ec-Air 201.01.
- (s) “Service list” means a list maintained by the appeals clerk containing the names, physical address, and email address of all parties, representatives of parties, and intervenors in a proceeding, as well as all other interested persons who request to be included on the service list.

Source. (See Revision Note at chapter heading for Ec-Air 100) #13642, eff 5-23-23

PART Ec-Air 103 COUNCIL ORGANIZATION

Ec-Air 103.01 Office Hours, Electronic Mail Address, and Location.

- (a) The council’s office is located at:

Department of Environmental Services
29 Hazen Drive
P.O. Box 95
Concord, NH 03302-0095

- (b) The council’s electronic email address is appeals@des.nh.gov.
- (c) The council’s regular business hours shall coincide with those of the department.

Source. (See Revision Note at chapter heading for Ec-Air 100) #13642, eff 5-23-23

Ec-Air 103.02 Council Responsibilities. The responsibilities of the council are as follows:

- (a) As required by RSA 21-O:11, III, the council shall consult with and advise the commissioner of the department of environmental services, or his or her designee, on a continuing basis with respect to the policy,

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programs, goals, and operations of the department as they relate to RSA 21-O:10, with particular emphasis on long-range planning for the department and on education of the public relative to the functions of the department;

(b) As required by RSA 21-O:11, IV, the council shall hear all administrative appeals from department decisions made and shall decide all disputed issues of fact in such appeals, in accordance with RSA 21-O:14;

(c) As required by RSA 21-O:11, V, the council shall consider all proposed rules of the commissioner relative to the department and shall present any objections to proposed rules to the commissioner in writing within 15 days;

(d) As required by RSA 21-O:14, IV, the council shall adopt rules in accordance with the rulemaking provisions of RSA 541-A to govern its proceedings; and

(e) The council shall perform any additional functions assigned to it by amendment to RSA 21-O:11.

Source. (See Revision Note at chapter heading for Ec-Air 100) #13642, eff 5-23-23

PART Ec-Air 104 PUBLIC INFORMATION

Ec-Air 104.01 Request for Access to Records.

(a) Any person requesting access to council records under RSA 91-A shall direct a request as specified in (b) below.

(b) A request to access council records shall be in writing and:

(1) Identify as particularly as possible the information being sought;

(2) Include a statement whereby the requestor agrees to pay a copying fee of \$0.25 per page, if applicable; and

(3) Be sent to the council secretary at the address specified in Ec-Air 103.01(a).

Source. (See Revision Note at chapter heading for Ec-Air 100) #13642, eff 5-23-23

CHAPTER Ec-Air 200 PROCEDURAL RULES

REVISION NOTE:

Document #13642, effective 5-23-23, readopted with amendments former Part Env-AC 203 through Part Env-AC 207 in Chapter Env-AC 200 on procedural rules of the Air Resources Council and renumbered them as rules Ec-Air 201 through Ec-Air 202.02 and rules Ec-Air 202.04 through Ec-Air 203 in Chapter Ec-Air 200. Document #13642 also adopted again the former Part Env-AC 208 containing Env-AC 208.01 on explanation of rules, which had expired 1-25-13, and renumbered the rule as Ec-Air 202.03 in Chapter Ec-Air 200. The renumbering of rules from Env-AC 200 to Ec-Air 200 was done pursuant to a rules redesignation plan for the Council's rules approved by the Director of the Office of Legislative Services in 2021. Document #13642 replaces all prior filings for the former Chapter Env-AC 200.

The prior filings for the former Part Env-AC 203 through Part Env-AC 207 included the following documents:

#6586, eff 9-23-97

#8267-A, eff 1-25-05

The prior filings for the former Part Env-AC 208 included the following documents:

#6586, eff 9-23-97

#8267-B, eff 1-25-05, EXPIRED: 1-25-13

As practice and procedure rules Chapter Ec-Air 200 in Document #13642 will not expire except pursuant to RSA 541-A:17, II.

PART Ec-Air 201 GENERAL PROCEDURES

Statutory Authority: RSA 21-O:11, IV; RSA 21-O:14, IV; RSA 541-A:16, I(b)-(d); RSA 541-A:30-a

Ec-Air 201.01 Form and Content of Filings.

(a) Any filing submitted to the council shall:

(1) Be submitted electronically in PDF format to appeals@des.nh.gov;

(2) Following electronic submission in (1) above, be filed within 5 business days as one copy-on durable paper, hand-delivered or sent by first class mail, postage prepaid, in the United States mail to the “Air Resources Council, Attention: Appeals Clerk” at the address listed in Ec-Air 103.01(a);

(3) Be signed by the individual submitting the filing;

(4) Specify the name, address, and daytime telephone number and, if available, the fax number and e-mail address of the individual submitting the filing;

(5) Specify the name and address of any and all organizations, entities, or other persons whom the individual submitting the filing represents, if any; and

(6) Be typewritten or clearly printed.

(b) In any proceeding before the council, no person shall file on behalf of any other person any filing unless the filer concurrently files or has, in the same proceeding, previously filed an appearance in accordance with Ec-Air 201.06.

(c) The signature of an individual submitting a filing shall constitute certification that:

(1) The signer has read the filing;

(2) The signer is authorized to file it;

(3) To the best of the signer’s knowledge, information, and belief, there are good and sufficient grounds to support it; and

(4) The filing has not been filed for purposes of delay.

(d) Any filing submitted to the council in compliance with paragraph (a)(1) above shall be deemed to have been filed with and received by the council on the actual date of receipt by the department, as evidenced by an electronic mail date and time stamp.

Source. (See Revision Note at chapter heading for Ec-Air 200) #13642, *eff 5-23-23*

Ec-Air 201.02 Computation of Time and Deadlines.

(a) All time periods referenced in this chapter shall be calendar days.

(b) Computation of any period of time referred to in these rules shall begin with the day after the action which sets the time period in motion, and shall end at the close of council business on 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 period shall be extended to the close of council business on the first business day following the Saturday, Sunday, or state legal holiday.

(d) Any filing not delivered to the council address before the close of council business hours on the last day of any time period computed under these rules shall be deemed untimely filed and shall not be considered by the council.

Source. (See Revision Note at chapter heading for Ec-Air 200) #13642, *eff 5-23-23*

Ec-Air 201.03 Service of Documents.

(a) All petitions, motions, exhibits, memoranda, comments, correspondence, or other documents filed by any party to a proceeding governed by these rules shall be served by that party upon all other parties on the service list maintained in accordance with Ec-Air 203.05.

(b) All notices, orders, decisions, or other documents issued pursuant to these rules shall be served by the presiding officer upon all parties on the service list maintained in accordance with Ec-Air 203.05.

(c) Service of all documents relating to a proceeding shall be made by electronic mail, unless a party or person on the service list has indicated an inability to receive service by electronic mail, in which case service shall be made by first class mail, postage prepaid, in the United States mail.

(d) If a party serving any document does not have the ability to serve such document by electronic mail, service shall be made by first class mail, postage prepaid, in the United States mail.

(e) Notwithstanding paragraphs (a) through (c), when a party appears by representative, service shall be upon the representative by electronic mail, unless the representative has indicated an inability to receive service by electronic mail, in which case service shall be made by first class mail, postage prepaid, in the United States mail at the address stated in the appearance filed by the representative.

Source. (See Revision Note at chapter heading for Ec-Air 200) #13642, *eff 5-23-23*

Ec-Air 201.04 Waiver of Rules. The presiding officer shall, upon his or her own initiative or upon request by any party, waive the application of any rule in this chapter upon reasonable notice to all affected persons if he or she determines that such waiver:

(a) Would not violate any applicable statutory or constitutional requirement;

(b) Would not unduly prejudice any party; and

(c) Would be more likely to promote the fair, accurate, and efficient resolution of an issue pending before the council than would adherence to the rule.

Source. (See Revision Note at chapter heading for Ec-Air 200) #13642, eff 5-23-23

Ec-Air 201.05 Issuance of Documents. All orders, decisions, notices, or other written correspondence or documents issued by or at the direction of the council or presiding officer shall be rebuttably presumed to have been issued on the date noted on the document.

Source. (See Revision Note at chapter heading for Ec-Air 200) #13642, eff 5-23-23

Ec-Air 201.06 Communications with the Council.

(a) No person shall directly or indirectly communicate with the presiding officer, the council, or any council member about any matter that is or will likely be before the council except:

- (1) Through a filing submitted in accordance with Ec-Air 201.01; or
- (2) At a proceeding duly convened by the council.

(b) Any council member who receives any communication in violation of paragraph (a) above shall, at the next council meeting, inform the council on the record of the 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.

Source. (See Revision Note at chapter heading for Ec-Air 200) #13642, eff 5-23-23

Ec-Air 201.07 Appearances, Withdrawals, and Removal.

(a) A notice of appearance shall include:

- (1) The name of the representative filing the appearance and of any and all parties represented by the individual submitting the appearance;
- (2) An identification of the matter in which the representative represents the parties;
- (3) The representative's daytime address and telephone number and, if available, fax number, and email address;
- (4) If the representative filing the appearance is an attorney licensed to practice in the state of New Hampshire, the representative's New Hampshire bar number; and
- (5) If the representative filing the appearance is not an attorney licensed to practice in the state of New Hampshire, a signed statement by the represented party certifying that the representative is authorized to act on the represented party's behalf in the matter.

(b) An appearance shall remain valid until:

- (1) The representative withdraws the appearance;

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- (2) The council issues a final order on the matter in which the representative has appeared and all deadlines for appeal or rehearing thereto have expired;
 - (3) A new appearance naming a new representative for the party is filed; or
 - (4) The representative is removed from representation.
- (c) A notice of withdrawal shall include:
- (1) A statement that the representative no longer represents the party; and
 - (2) The date that the representation ended.
- (d) The presiding officer may remove a representative from representing any party upon determining that the representative has engaged in misconduct, subject to the following:
- (1) For the purposes of removal, misconduct shall include behavior that is disruptive to the orderly conduct of the appeal and recurring failure to comply with the provisions of Ec-Air 200; and
 - (2) Before removing a representative, the presiding officer shall give notice to all parties to the matter and provide a reasonable opportunity for any party to the matter to address the presiding officer regarding why the removal should or should not be imposed.

Source. (See Revision Note at chapter heading for Ec-Air 200) #13642, eff 5-23-23

Ec-Air 201.08 Presiding Officer. In all council proceedings in which a hearing officer has not been designated presiding officer, the council chair, acting chair or vice chair, shall serve as presiding officer.

Source. (See Revision Note at chapter heading for Ec-Air 200) #13642, eff 5-23-23

PART Ec-Air 202 RULEMAKING, EXPLANATIONS OF ADOPTED RULES, AND DECLARATORY RULINGS

Ec-Air 202.01 Rulemaking Petitions.

- (a) Any person may petition the council to adopt, amend, or repeal a council rule by submitting an original rulemaking petition and one copy in accordance with this section.
- (b) Each rulemaking petition shall:
 - (1) Conform to the filing requirements of Ec-Air 201.01;
 - (2) Be clearly marked "Attention: Council Secretary" on the envelope;
 - (3) If the rulemaking petition is a petition to amend or repeal a rule, identify specifically the rule to be amended or repealed;
 - (4) If the rulemaking petition is a petition to adopt or amend a rule, contain a draft of the proposed rule or amendment;
 - (5) State generally the nature and effect of the proposed rule, amendment, or repeal; and

(6) State in detail the reason(s) why the proposed rule, amendment, or repeal will improve the accuracy, efficiency, or equity of the appeals process.

(c) A rulemaking petition may include exhibits, illustrations, sworn statements, and any other such information as the petitioner may deem relevant.

(d) At the council's first meeting held more than 30 days from the receipt by the council secretary of the rulemaking petition, the council shall either:

(1) Deny the rulemaking petition unless it concludes that:

- a. The petition meets the requirements of paragraphs (a) and (b) above;
- b. The requested action is within the jurisdiction of the council;
- c. The requested action is consistent with statutory and case law;
- d. The requested action would not result in a rule that is incapable of practical application or enforcement due to the absence of sufficient staff, funding, or mechanisms of enforcement; and
- e. The requested action would likely improve the accuracy, efficiency, or equity of the appeals process; or

(2) Initiate rulemaking proceedings in accordance with RSA 541-A:4, I and notify the petitioner.

(e) If the council denies the rulemaking petition for failure to comply with the requirements of Ec-Air 202.01 (a) and (b) above, the council shall notify the petitioner of each such failure to comply. Denial of a rulemaking petition under this paragraph shall not prevent a petitioner from curing the identified defects and refiling the rulemaking petition.

(f) The denial of a rulemaking petition shall not entitle the petitioner to a hearing.

Source. (See Revision Note at chapter heading for Ec-Air 200) #13642, *eff 5-23-23*

Ec-Air 202.02 Public Comment for Rulemaking.

(a) The council shall hold at least one public hearing on any proposed rulemaking. The presiding officer shall control the conduct of any rulemaking hearing held in accordance with RSA 541-A:11.

(b) Control of the conduct of any rulemaking hearing shall include, but not be limited to:

- (1) Calling the hearing to order;
- (2) Affording each person wishing to comment on the proposed rulemaking a reasonable opportunity to speak;
- (3) Refusing to recognize for speaking or revoke the recognition of any person who:
 - a. Speaks in an abusive or disruptive manner;
 - b. Fails to keep comments relevant to the proposed rules that are the subject matter of the hearing; or

c. Restates more than once what the person, or the organization or entity upon whose behalf the person is speaking, has already stated;

(4) Calling for recesses as needed; and

(5) Adjourning the hearing.

(c) Persons who wish to testify at a public comment hearing shall be asked to write on the speaker's list:

(1) Their full names and addresses; and

(2) The name and address of any organization, entity, or other person whom they represent, if any.

(d) Written comments, which may be submitted in lieu of or in addition to oral testimony, shall:

(1) Conform to the filing requirements of Ec-Air 201.01; and

(2) Be clearly marked "Attention: Council Secretary" on the envelope.

(e) Public comment hearings shall be open to the public and members of the public shall be allowed to testify, subject to control of the presiding officer.

(f) All comments shall be recorded in full by audio recording or other method that will provide a verbatim record of the hearing.

Source. (See Revision Note at chapter heading for Ec-Air 200) #13642, *eff 5-23-23*

Ec-Air 202.03 Requests for Explanations of Rules as Adopted.

(a) Pursuant to RSA 541-A: 11, VII, any interested person may, within 30 days of the final adoption of a rule, request a written explanation of that rule by filing an original written request and one copy in accordance with this section.

(b) The request for an explanation shall:

(1) Conform to the filing requirements of Ec-Air 201.01; and

(2) Be clearly marked "Attention: Council Secretary" on the envelope.

(c) The council shall, within 120 days of receiving a request in accordance with (a) above, provide a written response which:

(1) Concisely states the meaning of the rule adopted;

(2) Concisely states the principal reasons for and against the adoption of the rule in its final form; and

(3) States, if applicable, why the council was not persuaded by arguments and considerations presented against the rule.

Source. (See Revision Note at chapter heading for Ec-Air 200) #13642, *eff 5-23-23*

Ec-Air 202.04 Declaratory Rulings.

(a) Any person may petition the council in writing for a declaratory ruling concerning the applicability of a council rule, a statute within the council's jurisdiction, or an order of the council by filing an original written petition and one copy in accordance with this section.

(b) The petition for a declaratory ruling shall:

- (1) Conform to the filing requirements of Ec-Air 201.01;
- (2) Be clearly marked "Attention: Council Secretary" on the envelope;
- (3) Cite in full the statute, council rule, or council order for which the petitioner seeks a ruling;
- (4) Describe in detail the specific factual circumstances regarding which the declaratory ruling is sought;
- (5) Contain the specific question presented, stated in terms of whether the particular statute, rule, or order would apply to the stated factual circumstances; and
- (6) Include any explanation, argumentation, or exhibits that the petitioner deems relevant and material to the petition.

(c) If the presiding officer determines that a petition for declaratory ruling does not meet the requirements of Ec-Air 202.04(a) and (b), the presiding officer shall promptly dismiss the petition and inform the petitioner, in writing, of the defects necessitating dismissal of the petition. Dismissal of a petition for a declaratory ruling under this paragraph shall not prevent a petitioner from curing the identified defects and refile the petition.

(d) At the council's first meeting held more than 30 days from the receipt by the council secretary of the petition, the council shall either:

- (1) Rule on the petition;
- (2) Request additional information from the petitioner, if it determines that such additional information is necessary to rule on the petition; or
- (3) Request assistance from the department of justice, if it determines that such assistance is necessary to rule on the petition.

(e) If the council requests additional information or assistance under paragraph (d)(2) or (d)(3) above, it shall:

- (1) Inform the petitioner in writing within 30 days of the meeting at which it determined that additional information or assistance was necessary; and
- (2) Rule on the petition at its first meeting held more than 30 days from the receipt of such additional information or assistance.

(f) If the petitioner fails to produce necessary information requested by the council pursuant to paragraph (d)(2) above within 30 days of informing the petitioner pursuant to paragraph (e)(1) above, the presiding officer shall dismiss the petition. Dismissal of a petition for a declaratory ruling under this paragraph shall not prevent a petitioner from curing the identified defects and refile the petition.

(g) The presiding officer shall issue to the petitioner a written decision explaining the council's ruling on the petition within 30 days of the meeting at which the ruling was made.

Source. (See Revision Note at chapter heading for Ec-Air 200) #13642, eff 5-23-23

PART Ec-Air 203 APPEALS

Ec-Air 203.01 Initiating an Appeal.

(a) Any person who wishes to appeal a department decision shall file a notice of appeal and one copy in accordance with this section and RSA 21-O:14, I-a.

(b) The notice of appeal shall:

- (1) Conform to the filing requirements of Ec-Air 201.01;
- (2) Conform to the notice of appeal requirements of RSA 21-O:14, I-a;
- (3) Identify and include a complete copy of the department decision being appealed;
- (4) Include a clear and concise statement of facts and law that explains why the department decision was unlawful or unreasonable; and
- (5) Include a certification statement that a notice of appeal has been served in accordance with Ec-Air 201.03 and Ec-Air 203.01(d), specifying the name and electronic mail address to whom the notice was sent.

(c) The notice of appeal may include such other information as the appellant deems material and relevant, including illustrations, charts, photographs, and sworn written testimony.

(d) The appellant shall serve the notice of appeal to:

- (1) The director;
- (2) Any party to the department decision being appealed other than the appellant;
- (3) Each party listed on the copy line of the department decision being appealed; and
- (4) Any party entitled to notice pursuant to RSA 482-A:10, V, if applicable.

Source. (See Revision Note at chapter heading for Ec-Air 200) #13642, eff 5-23-23

Ec-Air 203.02 Preliminary Notice of Appeal (PNA) and Offer to Enter into Settlement Discussions.

(a) Any person who wishes to file a preliminary notice of appeal (PNA) and offer to enter into settlement discussions shall file a PNA in accordance with this section and RSA 21-O:14, I-b.

(b) The PNA shall:

- (1) Conform to the filing requirements of Ec-Air 201.01;
- (2) Conform to the PNA requirements of RSA 21-O:14, I-b; and
- (3) Be clearly marked "Attention: Appeals Clerk" on the envelope.

(c) The appellant shall serve the notice of the PNA either in person or via certified mail and in accordance with RSA 21-O:14, I-b (b).

(d) Any party providing notice to the preliminary appellant in accordance with RSA 21-O:14, I-b(d) shall submit a copy of the notice to the appeals clerk by submitting a filing that conforms to the requirements of Ec-Air 201.01.

(e) A notice of appeal filed pursuant to RSA 21-O:14, I-b(e) shall comply with Ec-Air 203.01.

Source. (See Revision Note at chapter heading for Ec-Air 200) #13642, eff 5-23-23

Ec-Air 203.03 Docketing and Review.

(a) Upon receipt of a notice of appeal, the appeals clerk shall:

- (1) Docket the appeal;
- (2) Notify the attorney general and request appointment of a hearing officer to act as presiding officer for the appeal in accordance with RSA 21-M:3, VIII; and
- (3) Inform the appellant of the docket number for the appeal.

(b) Upon appointment by the attorney general pursuant to RSA 21-M:3, VIII, the hearing officer shall serve as presiding officer for an appeal until removed or replaced by the attorney general.

(c) The presiding officer shall review the notice of appeal and dismiss any appeal that, viewed in the light most favorable to the appellant:

- (1) Is not timely filed;
- (2) Does not conform to the filing requirements of Ec-Air 203.01(b);
- (3) Is not within the jurisdiction of the council; or
- (4) Does not plead facts or law sufficient to:
 - a. State a claim that the department decision was unlawful or unreasonable; and
 - b. Establish that the appellant has standing to bring the appeal.

(d) An order of dismissal under paragraph (c) above shall:

- (1) Identify the defects in the notice of appeal that resulted in the dismissal; and
- (2) Grant the appellant 30 days to cure all identified defects, unless any of the defects is incurable and such opportunity to cure would be futile. An opportunity to cure identified defects under this section shall not include an opportunity to raise new claims not brought in the initial appeal. The presiding officer shall dismiss with prejudice any new claims so brought. In granting an appellant 30 days to cure identified defects, the presiding officer shall specify whether the appellant must:
 - a. Submit a fully revised notice of appeal; or
 - b. Submit a supplemental filing specifying only the specified information or documentation omitted from the original notice of appeal.

(e) If an appellant fails to cure defects in a notice of appeal after having opportunity to do so pursuant to paragraph (d)(2) above, the presiding officer shall dismiss the appeal with prejudice.

Source. (See Revision Note at chapter heading for Ec-Air 200) #13642, *eff 5-23-23*

Ec-Air 203.04 Filings in Appeals. Subsequent to the filing of a notice of appeal, all filings in appeals shall:

(a) Conform to the filing requirements of Ec-Air 201.01;

(b) Identify the docket number for the filing, if assigned;

(c) Be served prior to or on the date of filing with the council upon all parties to the on the service list, as maintained pursuant to Ec-Air 203.05; and

(d) Include a certification statement that the filing has been served upon all parties to the appeal.

Source. (See Revision Note at chapter heading for Ec-Air 200) #13642, *eff 5-23-23*

Ec-Air 203.05 Service List.

(a) The service list for each appeal shall identify the name and service contact information for each party to the appeal. Service contact information includes, at minimum, the party's email address and physical mailing address.

(b) A party may update its contact information in the service list at any time by filing a notice in accordance with Ec-Air 203.04.

(c) Any person may request from the appeals clerk a copy of the current service list for an appeal.

(d) Timely delivery to a party at any contact information specified in the service list shall be deemed effective.

Source. (See Revision Note at chapter heading for Ec-Air 200) #13642, *eff 5-23-23*

Ec-Air 203.06 Delivery of Documents. All notices, orders, decisions, or other documents pertaining to an appeal that are issued by the council or presiding officer shall be delivered to all parties on the most current and up-to-date service list, as compiled and maintained pursuant to Ec-Air 203.05.

Source. (See Revision Note at chapter heading for Ec-Air 200) #13642, *eff 5-23-23*

Ec-Air 203.07 Recusal.

(a) Upon his or her own initiative or upon the motion of any party, a council member or presiding officer, shall, for good cause recuse himself or herself from any appeal. If a member recuses himself or herself, no explanation of the reason for recusal shall be required from the member.

(b) A party may move for the recusal of the presiding officer or any council member by submitting a filing in accordance with Ec-Air 203.04 that demonstrates good cause for the requested recusal.

(c) Good cause for recusal shall exist if the council member or presiding officer has had direct personal involvement with the matter under appeal or with a party, such that a reasonable person would conclude that

the council member or presiding officer could not hear the appeal impartially. Mere general knowledge of the issues, the appeal, or any party shall not constitute good cause for recusal.

(d) The presiding officer shall rule on all motions for recusal prior to any hearing held on the merits of the appeal.

(e) Upon recusal of a hearing officer acting as presiding officer, the attorney general shall be requested to appoint a new hearing officer to the appeal pursuant to RSA 21-M:3, VIII.

Source. (See Revision Note at chapter heading for Ec-Air 200) #13642, eff 5-23-23

Ec-Air 203.08 Intervenors.

(a) A request to intervene shall conform to the requirements of RSA 541-A:32 and Ec-Air 203.04.

(b) The presiding officer shall rule on all petitions for intervention in accordance with RSA 541-A:32.

(c) Once a petition to intervene is granted, the intervenor shall be entitled to participate in the proceeding as a party, subject to any limitations imposed upon the intervention pursuant to RSA 541-A:32, III.

Source. (See Revision Note at chapter heading for Ec-Air 200) #13642, eff 5-23-23

Ec-Air 203.09 Motions and Objections.

(a) Unless made orally on the record as part of a proceeding before the council or presiding officer, written motions shall be in the form of a filing compliant with Ec-Air 203.04. A party filing a motion or objection under this section shall submit an original and one copy.

(b) A motion shall:

- (1) Include a clear and concise statement of the specific relief or ruling requested;
- (2) Include a clear and concise statement of the facts and law that support the motion; and
- (3) For written motions, be submitted no later than 30 days prior to the hearing on the merits of the appeal.

(c) Any party filing a motion other than a dispositive motion shall certify that a good faith attempt was made to obtain concurrence in the relief sought. If the moving party has obtained concurrence, a statement of concurrence shall be included in the body of the motion and the motion shall contain the words “assented-to” in its title.

(d) Any party who would be adversely affected by a ruling on the motion shall have an opportunity to object to the motion. The lack of any objection shall not, in and of itself, constitute grounds for granting the motion.

(e) An objection shall:

- (1) Include a clear and concise statement of the reasons the motion should be denied;
- (2) Include a clear and concise statement of the facts and law that support denial of the motion;

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- (3) For written motions, be submitted in the form of a filing compliant with Ec-Air 203.04 no later than 10 days after the filing date of the motion; and
 - (4) For oral motions, be made orally during the proceeding at which the oral motion was made.
- (f) After the opportunity to object pursuant to paragraph (d) above, the presiding officer shall:
- (1) Rule on the motion, if he determines that no material facts are in dispute and there is adequate information upon which to base a ruling as a matter of law;
 - (2) Request from the parties such additional information as is necessary to rule on the motion, to be filed within such time as is reasonable and necessary for the accurate and speedy resolution of the motion; or
 - (3) Deny the motion if ruling on the motion would require the resolution of a material factual dispute.

Source. (See Revision Note at chapter heading for Ec-Air 200) #13642, eff 5-23-23

Ec-Air 203.10 Withdrawal of Appeal. An appellant may withdraw his or her appeal at any time prior to a final decision by submitting a notice of withdrawal in accordance with Ec-Air 203.04.

Source. (See Revision Note at chapter heading for Ec-Air 200) #13642, eff 5-23-23

Ec-Air 203.11 Continuances and Extensions.

(a) Any party may request the continuance of a proceeding or the extension of a deadline by filing a motion with the presiding officer in accordance with Ec-Air 203.09.

(b) The presiding officer shall grant any motion for a continuance or extension if he or she determines that good cause has been demonstrated, including:

- (1) The unavailability of a party, witness, or attorney necessary for a proceeding;
- (2) The likelihood that a proceeding will not be necessary because the parties have reached or will imminently reach a settlement; or
- (3) Any other circumstances demonstrating that a continuance or extension would assist in resolving the appeal fairly.

(c) An order granting a continuance or extension shall specify the new date of the proceeding or deadline.

Source. (See Revision Note at chapter heading for Ec-Air 200) #13642, eff 5-23-23

Ec-Air 203.12 Prehearing Conferences.

(a) At the request of any party to an appeal or on his or her own initiative, the presiding officer shall schedule a prehearing conference in accordance with RSA 541-A:31, V to consider:

- (1) Status of offers of settlement, including, if applicable, settlement pursuant to mediation in accordance with RSA 21-O:14, I-b and I-c;
- (2) Simplification of the issues;

- (3) Stipulations or admissions as to issues of fact or proof by consent of the parties;
- (4) The witnesses to be called at the hearing and a brief description of each witness's testimony;
- (5) The exhibits to be presented at the hearing;
- (6) Changes to standard procedures as specified in these rules;
- (7) The date and time of the hearing in the appeal;
- (8) The time allotted to and the order of each party's presentation at the hearing; and
- (9) Any other matters that may aid in the disposition of the appeal.

(b) Notwithstanding paragraph (a) above, the presiding officer shall schedule no more than one prehearing conference in any appeal, unless the presiding officer determines that an additional prehearing conference is necessary for the fair, accurate, and expeditious resolution of the appeal.

(c) At least 20 days prior to a prehearing conference, the presiding officer shall issue a written notice that complies with Ec-Air 203.06 and states:

- (1) The date, time, and location of the prehearing conference; and
- (2) The matters to be discussed, including those specified in paragraph (a) above.

(d) Any agreements reached at the prehearing conference shall be documented in a prehearing order issued in accordance with Ec-Air 203.06.

(e) The prehearing conference shall be recorded in full by audio recording or other method that will provide a verbatim record.

Source. (See Revision Note at chapter heading for Ec-Air 200) #13642, eff 5-23-23

Ec-Air 203.13 Exchange of Information.

(a) Unless otherwise agreed to at a prehearing conference, the parties shall exchange the following information not less than one week prior to the hearing in the appeal:

- (1) A list of witnesses expected to testify, including a brief description of each witness's testimony; and
- (2) A list of all exhibits to be presented at the hearing.

(b) Parties shall attempt in good faith to respond in a complete and timely manner to requests for relevant, nonprivileged information and documents in addition to the disclosures required under paragraph (a) above.

(c) If good faith efforts to exchange information pursuant to paragraph (b) above fail, any party may request that the presiding officer issue a subpoena pursuant to RSA 21-M:3, X. A request for a subpoena shall comply with Ec-Air 203.04.

(d) Within 7 days of receiving a request for a subpoena, the presiding officer shall:

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- (1) Grant the request and issue a subpoena, if he or she determines that the information or document is relevant to the appeal and is not confidential, privileged, or excessively burdensome; or
- (2) Deny the request.

Ec-Air 203.14 Hearings.

- (a) The presiding officer shall as necessary:
 - (1) Regulate and control the course of a hearing;
 - (2) Administer oaths and affirmations;
 - (3) Receive relevant evidence at hearings and exclude irrelevant, immaterial, or unduly repetitious evidence; and
 - (4) Rule on procedural requests, including adjournments or postponements, at the request of a party or on the presiding officer's own motion.
- (b) At least 20 days prior to a hearing, the presiding officer shall issue a written notice that complies with Ec-Air 203.06 and includes:
 - (1) The information required by RSA 541-A:31, III;
 - (2) Instructions on marking exhibits for the hearing, if applicable; and
 - (3) Any other information that the presiding officer deems necessary to the orderly conduct of the hearing.
- (c) Unless otherwise agreed to at a prehearing conference, each party to an appeal shall, at any hearing, provide 15 hard copies of all exhibits that the party plans to introduce at the hearing.
- (d) Unless otherwise agreed to at a prehearing conference, hearing testimony shall be offered in the following order:
 - (1) The appellant and such witnesses as the appellant calls;
 - (2) The department and such witnesses as the department calls; and
 - (3) Intervenors and such witnesses as the intervenors call.
- (e) At any time prior to the issuance of a decision on the merits of an appeal, the presiding officer shall, on his or her own initiative or on the motion of any party, reopen the record to receive relevant, material, and non-duplicative evidence that was not available to the proponent of the evidence at the time of the hearing and that is necessary to a full and fair consideration of the appeal.

Source. (See Revision Note at chapter heading for Ec-Air 200) #13642, *eff* 5-23-23

Ec-Air 203.15 Default. If any party to whom notice has been given in accordance with Ec-Air 203.14(b) fails to attend a hearing, the presiding officer shall declare the party to be in default and shall either:

- (a) Dismiss the appeal, if the party with the burden of proof fails to appear; or

(b) Hear the testimony and receive evidence offered by any party with burden of proof in the case.

Source. (See Revision Note at chapter heading for Ec-Air 200) #13642, eff 5-23-23

Ec-Air 203.16 Evidence, Burden of Proof, and Record.

(a) Evidence shall:

(1) Be received in accordance with the provisions of RSA 541-A:33;

(2) Be admitted unless excluded by the presiding officer as irrelevant, immaterial, unduly repetitious, or legally privileged; and

(3) Be public records unless the presiding officer determines that all or part of a transcript or document is exempt from disclosure under RSA 91-A:5 or applicable case law.

(b) Any objection to the admissibility of evidence shall be filed as a motion compliant with Ec-Air 203.09 or stated as early as possible in the hearing, but not later than the time when the evidence is offered.

(c) All testimony shall be made under oath or affirmation administered in accordance with RSA 541-A:33, I.

(d) All evidence and testimony shall be subject to cross-examination provided, however, that the presiding officer shall limit cross-examination that is disorderly or disruptive to the orderly conduct of the hearing.

(e) Any person offering testimony, evidence, or argument shall state for the record his or her name and role in the proceeding. If the person represents another person, the person being represented shall also be identified.

(f) The party asserting a proposition shall bear the burden of proving the truth of the proposition by a preponderance of the evidence.

(g) The record of an appeal shall include:

(1) All filings submitted in the appeal pursuant to Ec-Air 203.04;

(2) The recordings of all hearings and prehearings;

(3) All documents issued by the presiding officer or council pursuant to Ec-Air 203.06; and

(4) Any other applicable items specified in RSA 541-A:31, VI.

(h) After the conclusion of the final hearing on the merits of an appeal, the record shall be closed and no other evidence shall be received into the record unless, on the motion of any party or on the presiding officer's own initiative, the presiding officer determines that the submission of additional evidence and rebuttal thereto is necessary to the full consideration of the issues raised in the appeal and keeps the record open for such time as he or she determines reasonably necessary to accept the additional evidence and rebuttal into the record.

Source. (See Revision Note at chapter heading for Ec-Air 200) #13642, eff 5-23-23

Ec-Air 203.17 Decisions.

(a) The presiding officer and the council shall decide questions of fact, questions of law, and mixed questions of fact and law consistent with RSA 21-M:3, IX.

(b) The final decision issued in any appeal shall:

- (1) Be in writing and conform to the requirements of Ec-Air 203.06 and RSA 541-A:35;
- (2) Either affirm or remand the department decision being appealed;
- (3) State the reasons for the decision;
- (4) Inform the parties of any applicable rights to rehearing or appeal of the decision.

(c) The council shall keep any decision issued pursuant to paragraph (b) above on file in its records for at least 5 years following the date of the final decision, 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. (See Revision Note at chapter heading for Ec-Air 200) #13642, *eff 5-23-23*

Ec-Air 203.18 Rehearing.

(a) A motion for rehearing shall conform to the requirements of RSA 541 and Ec-Air 203.09.

(b) Within 10 days of the receipt of a motion for rehearing, the presiding officer shall:

- (1) Deny the motion if he or she concludes that:
 - a. The motion was not timely filed; or
 - b. The motion does not identify any error of fact, reasoning, or law that could change the outcome of the appeal;
- (2) Suspend the council's decision and schedule the motion for consideration by the council at the council's next scheduled meeting if he or she concludes that ruling on the motion requires consultation with counsel; or
- (3) Grant the motion, schedule a rehearing, and suspend the council's decision pending the outcome of the rehearing.

(c) The presiding officer shall, consistent with Ec-Air 203.06, provide notice to the parties of any action taken pursuant to paragraph (b) above.

(d) The scope of a rehearing shall be limited to the issues upon which the motion for rehearing was granted.

(e) After a rehearing, the council shall issue a written decision, consistent with Ec-Air 203.17, either affirming, reversing, or modifying its initial decision and stating the reasons therefor.

Source. (See Revision Note at chapter heading for Ec-Air 200) #13642, *eff 5-23-23*

Ec-Air 203.19 Request to Confirm Consistency with Council Order.

(a) A request by a party pursuant to RSA 21-O:14, I-a(d) to confirm that a revised decision by the commissioner is consistent with the council's remand order shall:

- (1) Be in writing and conform to the filing requirements of Ec-Air 203.04; and
- (2) Include a copy of the revised decision.

(b) Upon receipt of a request under paragraph (a) above, the presiding officer shall, within 30 days:

- (1) Rule on the request, if he or she determines that doing so does not require consultation with the council; or
- (2) Refer the request to the council for resolution at its next scheduled meeting.

(c) A request under paragraph (a) above shall not entitle the requester to a hearing.

Source. (See Revision Note at chapter heading for Ec-Air 200) #13642, *eff 5-23-23*

Appendix

Rule	Statute Rule is Intended to Implement
Ec-Air 101	RSA 21-O:11; RSA 21-O:14; RSA 541-A:16, I(a)
Ec-Air 102	RSA 21-O:11; RSA 21-O:14; RSA 541-A:16, I(a)
Ec-Air 103	RSA 21-O:11; RSA 21-O:14; RSA 541-A:16, I(a)
Ec-Air 104	RSA 21-O:11; RSA 21-O:14; RSA 541-A:16, I(a); RSA 91-A
Ec-Air 201	RSA 21-O:11; RSA 21-O:14; RSA 541-A:16, I(b)(3); RSA 541-A:16, I(c); RSA 541-A:4; RSA 541-A:11
Ec-Air 202	RSA 21-O:11, V, RSA 541-A:16, I(c)-(d)
Ec-Air 203	RSA 21-O:11; RSA 21-O:14; RSA 541-A:16, I(b)(2); RSA 541-A:30-a