

STATE OF NEW HAMPSHIRE DEPARTMENT OF ENVIRONMENTAL SERVICES

AIR RESOURCES DIVISION

CHAPTER Env-A 200 PROCEDURAL RULES

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Statutory Authority: RSA 125-C:4; RSA 125-C:12 – C:16

PART Env-A 201 PURPOSE OF THE RULES

Env-A 201.01 Scope. The rules in this chapter shall govern proceedings before the council and director. These rules shall be constructed to secure the just, expedient, and inexpensive determination of every proceeding.

Env-A 201.02 Nature of Proceedings. All proceedings governed by this part are inquisitorial in nature. The purpose of any proceeding governed by this part is to permit the council and director to acquire sufficient information to make a reasoned decision, and to afford persons who may be affected by decisions of the council or director the opportunity to present data and argument prior to the making of that decision.

PART Env-A 202 APPEARANCE BEFORE COUNCIL OR DIRECTOR

Env-A 202.01 Who May Appear. A person may appear in a proceeding either in person or by a representative.

Env-A 202.02 Representatives. A representative may be an attorney-at-law, licensed in New Hampshire, or such other individual as the person appearing shall designate in writing in substantially the following form:

BEFORE THE
NEW HAMPSHIRE AIR RESOURCES COUNCIL/DIRECTOR

Sir/Madam:

(name of representative) is designated as my representative in the matter now pending before the council/director, and entitled: _____ . This designation shall continue until it is revoked by me in writing.

Signature of Party
and Date

Env-A 202.03 Denial of Representation. The council or the director may, after notice and opportunity for hearing, prohibit an individual from acting as a representative before the council or the director upon a finding of misconduct by any individual, relating to the representative or the matter for which the representative is before the council or the director. The prohibition shall be for any or all pending or future matters, or any combination thereof.

PART Env-A 203 TIME

Env-A 203.01 Computation. In computing any period of time under the rules in this chapter, the time shall begin with the day following the act, event or default, and shall include the last day of the period, unless it is a Saturday, Sunday, or state or federal legal holiday, in which event the period shall run until the end of the next day which is not a Saturday, Sunday, or state or federal legal holiday. When the period of time prescribed or allowed is less than 7 days, intermediate Saturdays, Sundays, and state or federal legal holidays shall be excluded from the computation.

Env-A 203.02 Change in Allowed Times. Notwithstanding any other provision of this chapter, except where the time has been fixed by statute, the council or director may enlarge or shorten the time provided for the filing of any document, or advance or postpone the time set for any oral hearing. A motion for a change of time shall be granted by the council or the director upon a finding of diligence and probable injury to the moving party, which outweighs any detriment likely to be suffered by any other party to the moving party, which outweighs any detriment likely to be suffered by any other party to the proceeding or the public.

Env-A 203.03 Limitations. A motion to change time shall be filed no later than 5 days prior to the event for which time is sought to be changed.

PART Env-A 204 RULEMAKING

Env-A 204.01 How Adopted. Rules of the division, or any amendment or repeal thereof, shall be adopted in accordance with RSA 541-A:3.

Env-A 204.02 Petition for Rulemaking. Any person may petition the division to commence a rulemaking proceeding for the purpose of issuing, amending, or repealing a rule. The petition shall contain the following:

- (a) A statement of the interest of the petitioner in the subject matter of the proposed rule;
- (b) The text of the proposed rule or a statement of the particular results intended by the petitioner if the proposed rule is implemented;

- (c) An identification of the particular rule sought to be amended or repealed, if the petitioner proposes to amend or repeal an existing rule;
- (d) Any data or argument the petitioner believes would be useful to the division in deciding whether to commence a rulemaking proceeding;
- (e) The name and address of the petitioner; and
- (f) The name and address of the representative of the petitioner, if any.

Env-A 204.03 Disposition of Petition. The division shall, within 30 days, forward the petition to the commissioner together with a recommendation that the petition be granted or denied. Before forwarding the information, the division shall require additional data or argument from the petitioner if the information submitted does not meet the requirements of Env-A 204.02. If the commissioner denies the petition, the division shall notify the petitioner and shall state the reason(s) for the denial. If the commissioner grants the petition, a rulemaking proceeding, in accordance with RSA 541-A:3, shall be commenced.

Env-A 204.04 Notice of Rulemaking. At least 30 days before the date of any oral hearings on rulemakings related to State Implementation Plan revisions, public notice shall be published once in a newspaper of general daily statewide circulation and in the New Hampshire Rulemaking Register. At the same time, the director shall also send a copy of the order of public notice to the petitioner, if any, and those persons who, prior to the date of the order of public notice, filed a written request for personal notice of rulemaking proceedings, as well as the director of legislative services and chairmen of the appropriate committees of the house and senate.

PART Env-A 205 PERMIT NOTICE AND HEARING PROCEDURES

Env-A 205.01 Permit Application Procedures. The permit applications procedures can be found under the Statewide Permit System in Env-A 600 and the permit fees can be found under the Permit Fee System in Env-A 700.

Env-A 205.02 Public Notice of Application.

- (a) Within 10 days of determining that a temporary permit application is complete within the meaning of Env-A 605.07, and that a temporary permit is required, the director shall issue a public notice of application
- (b) The public notice shall be published once in a newspaper of general daily statewide circulation, and may, in cases of potential major emission sources, be published in a newspaper in the general locality of the potential stationary source.

(c) Public notice of the issuance of permits to operate and/or the assignment, transfer, amendment, and renewal of permits shall be given in cases of significant increases or changes in stationary source emissions from that specified in the initial public notification. The public notice shall contain the following information:

- (1) The name and address of the applicant;
- (2) A brief description of the air pollution device sought to be permitted;
- (3) The location or locations where persons may examine the complete application and other pertinent information to the extent permitted by RSA 125-C:6, VII, and the hours during which that examination may be conducted;
- (4) The date by which, and the address where, written comments and/or requests for an oral hearing shall be filed, said date to be not sooner than 10 days from the publication of said notice. A copy of all written comments and requests for hearing shall also be sent to the applicant at the address indicated on the public notice.

Env-A 205.03 Applications Subject to PSD Requirements. For permit applications subject to the requirements of 40 CFR 52.21, the public notice procedures of 40 CFR 52 shall supersede the provisions specified in Env-A 205.02.

Env-A 205.04 Applications Subject to Nonattainment Requirements. For permit applications subject to the requirements of Env-A 614, the following public notice procedures shall supersede the provisions specified in Env-A 205.02:

- (a) Within 10 days after the completion of a draft temporary permit, permit to operate, or draft decision and findings of fact, the director shall issue a public notice of the receipt of the permit application and the intent to issue, amend, or deny such permit.
- (b) The public notice shall be published once in a newspaper of general daily statewide circulation and once in a newspaper circulated at least once per week in the immediate area of the proposed Source.
- (c) Public notice of the intent to issue, amend, or deny a temporary permit or permit shall contain the following information:

- (1) The name and address of the applicant;
- (2) The location of the source;

- (3) A brief description of the stationary source, area source or device sought to be permitted;
- (4) For new sources or devices, the emissions resulting from the installation;
- (5) For modified sources or devices, the significant net emissions increase resulting from the modification, if any;
- (6) For new or modified sources or devices, the quantity and geographical location(s), in terms of street address, if applicable, or longitude and latitude, of the donor source(s) and devices from which the offsets will be obtained;
- (7) The determination of LAER, including the type of equipment, such as a carbon adsorption system, and, if applicable, the prescribed emission limit;
- (8) The location(s) where, and the hours during which, the completed application and other pertinent information may be examined; and
- (9) The date by which, and the address where, written comments and/or requests for a public hearing shall be filed.

(d) The deadline for written comments and/or public hearing requests shall not be sooner than 30 days after the publication of the notice.

(e) The director shall distribute copies of the public notice to the following parties:

- (1) The applicant;
- (2) The EPA;
- (3) The current official(s) of the city or town where the source is or would be located;
- (4) The regional planning agency, if applicable, where the source is or would be located; and
- (5) The Federal Land Manager.

(f) The director shall make available for public inspection, at a location in the immediate area of the proposed source, copies of the following materials:

- (1) All information, to the extent required or permitted by RSA 91-A and RSA 125-C:6, VII, submitted by the applicant;
- (2) The division's analysis of the effect of the proposed facility on air quality; and
- (3) The preliminary determination to issue, amend, or deny the permit and all other materials, if any, considered in making such determination.

Env-A 205.05 Opportunity for Response. Within 10 days of the close of the comment period specified in the public notice issued pursuant to Env-A 205.02, the applicant may file with the director a written response to any of the written comments received by the director during the comment period.

Env-A 205.06 Decisions.

(a) Within 20 days of the close of the comment and oral hearing request period specified in the public notice issued pursuant to Env-A 205.02, the director shall take the following steps:

- (1) Approve the application, subject to conditions, and set forth in writing, his/her findings with an explanation to make interested persons aware of the basis for approval;
- (2) Deny the application and set forth, in writing, his/her findings with an explanation to make interested persons aware of the basis of disapproval;
or
- (3) Schedule an oral hearing on the application which shall be conducted in accordance with Env-A 207, and notify the applicant and all persons who requested said hearing;

(b) Within 15 days of the close of any oral hearing held pursuant to subparagraph (3) of this section, the director shall issue a decision in accordance with either subparagraph (1) or (2) of this section.

Env-A 205.07 Appeals.

(a) Within 10 days of a decision by the director granting or denying a permit pursuant to Env-A 205.06, any person aggrieved by the decision may file with the director a petition for appeal to the council. Such petition shall set forth, in detail, the following:

- (1) The basis of the petitioner's grievance;

- (2) The findings of the director to which the petitioner objects;
- (3) Conclusions or conditions to which the petitioner objects;
- (4) The basis of the objections, and
- (5) The nature of the evidence or argument to be offered.

(b) The director shall, within 10 days of the receipt of such a petition, provide notice to all parties to the application process, and schedule a hearing on the petition, which shall be limited to the submission of additional written evidence, or written or oral argument but which may at the discretion of the council be conducted in accordance with Env-A 207.

(c) If no petition for appeal is filed within the 10 day period specified, the director's decision shall become final upon the expiration of that period.

(d) In reaching a decision pursuant to paragraph (d) of this section, the council shall review the record of the hearing before the director, along with any additional evidence and argument presented pursuant to paragraph (b) of this section.

(e) The director's decision under Env-A 205.06 becomes final if no petition for appeal is filed within the time period specified in Env-A 205.07 (a), above.

Env-A 205.08 Rehearing. Upon application, the council may grant a rehearing in accordance with Env-A 210.

Env-A 205.09 Burden of Proof. An applicant for a new, renewed, extended or transferred permit shall have the burden of proof and the burden of going forward unless otherwise provided by law or regulation. The "burden of proof" means the burden of presenting sufficient evidence for the director or council to make the affirmative findings required by law regarding matters about which no questions are raised and the burden of presenting a preponderance of the evidence regarding a matter about which a question is raised.

Env-A 205.10 Applications Subject to PSD Requirements. The director shall follow the permit notice and hearing procedures of 40 CFR 52 in processing permit applications subject to federal regulations governing Prevention of Significant Deterioration.

PART Env-A 206 * * *

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PART Env-A 207 ORAL HEARINGS

Env-A 207.01 Applicability.

(a) This title shall govern oral hearings:

(1) Held by the director on applications for new, renewed, amended or transferred permits pursuant to Env-A 205.06 (a)(3) and on proposed suspensions or revocations of permits pursuant to Env-A 209.05 (d);

(2) Held by the council on certain appeals from decisions of the director on the issuance, denial, suspension or revocation of a permit pursuant to Env-A 205.07 and Env-A 209.05 (f) and on certain appeals from orders of abatement issued by the director pursuant to Env-A 209.04; and

(3) Held by the council on request for variances pursuant to Env-A 206.03.

(b) Except in cases of variance requests, the holding of an oral hearing is discretionary with the hearing body.

Env-A 207.02 Hearing Procedures.

(a) The presiding officer at a permit or order or abatement appeal conducted pursuant to Env-A 205.07, Env-A 209.05 (f) or Env-A 209.04 or a variance hearing conducted pursuant to Env-A 206.03 shall be the chairperson of the council if present and willing to preside, the vice-chairperson, or a member of the council selected by those members present at the hearing.

(b) The presiding officer shall have the authority to:

(1) Rule on issues of evidence;

(2) Regulate the course of the hearing;

(3) Rule upon issues of procedure; and

(4) Take such other action for the efficient and orderly conduct of the hearing, consistent with these rules and RSA 125-C.

(c) In cases where good cause appears, the presiding officer may permit deviation from these procedural rules.

(d) The presiding officer shall open the hearing by describing, in general terms, the purpose of the hearing and the general procedure governing its conduct.

(e) All oral testimony at the hearing shall be recorded. It shall not be transcribed unless requested and the requesting party shall have paid the division the expense of such transcription.

(f) Witnesses may be sworn and shall be required to state for the record their names, residence and who they represent, if anyone, for the purpose of the hearing.

(g) At any time, prior to or during the course of the hearing, the presiding officer may require that all or part of the testimony to be offered at such a hearing be submitted in written form at such time and in such form as may be specified. The presiding officer reserves the right to require written testimony in cases where, due to the complex and technical nature of the testimony, written testimony would facilitate the flow of the hearing. All persons offering testimony in written form shall be subject to questioning. This paragraph shall not be construed to prevent oral testimony at a scheduled hearing by any member of the public who requests and is granted time to testify at a hearing.

Env-A 207.03 Continuance. All hearings conducted pursuant to these rules may be continued for cause and reconvened from time to time and from place to place by the director or the presiding officer as circumstances require. All orders for continuance shall specify the time and place at which such hearing shall be reconvened. The director or the presiding officer shall notify interested persons and the public, to insure that notice be given of the time and place of such reconvened hearing.

Env-A 207.04 General Evidence.

(a) Evidence which is relevant and material to the subject matter of the hearing and is of a type commonly relied upon by reasonably prudent persons in the conduct of a their affairs shall be admissible. Evidence which is irrelevant, immaterial, or unduly repetitious shall be excluded. The division's experince, technical competence, and specialized knowledge may be utilized in the evaluation of all evidence submitted to the director or the council.

(b) The director or the council may, at any time, 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 its specialized knowledge. The director or the council shall include in its final decision those facts of which it took official notice unless those facts are included in the transcript of the record.

(c) All documents, materials and objects offered in evidence as exhibits shall, if accepted, be numbered or otherwise identified. Documentary evidence may be received in the form of copies or excerpts if the original is not readily available. The presiding officer nay require, after prior oral or written notice, that any

person offering documentary or photographic evidence provide the director or the council with a specified number of copies of such documents or photographs, unless such documents or photographs are determined to be of such forms, size or character as not to be reasonably susceptible of reproduction.

(d) All written testimony, documents, materials and objects admitted into evidence shall be made available during the course of the hearing for public examination. All such evidence shall also be available at the division offices in Concord, New Hampshire during normal business hours.

(e) In any proceeding involving an application, the application filed with the director, including exhibits and amendments thereto, shall be placed into evidence.

(f) All objections to rulings of the presiding officer regarding evidence or procedure and the grounds therefore shall be timely stated during the course of the hearing. If during the course of or after the close of the hearing and during its deliberations the director or the council determines that the ruling of the presiding officer was in error, it may reopen the hearing or take such action as it deems appropriate to correct such error. Nothing herein shall be construed to permit interlocutory appeal of rulings of the director in Env-A 205.06(a)(3) hearing.

(g) Notwithstanding any other provision of this chapter, the presiding officer at a hearing before the council conducted pursuant to Env-A 205.07, Env-A 209.04 or Env-A 209.05, reviewing a decision of the director, made subsequent to an oral hearing before the director and pursuant to Env-A 205.06(a)(3) or Env-A 209.05(d), shall, except in exceptional cases for good cause shown, limit the evidence presented to the council to information not placed in the record during the hearing held by the director.

Env-A 207.05 Public Participation. Any person may participate in a hearing by making oral or written statements of such person's position on the issues, and submit written or oral questions through the presiding officer, within such limits and on such terms and conditions as may be fixed by the council or presiding officer.

Env-A 207.06 Testimony and Questions.

(a) Direct testimony shall be offered in the following order:

- (1) The applicant and representatives and witnesses the applicant selects;
- (2) Division staff members and consultants;
- (3) State, municipal, and other governmental agencies and representatives thereof;

(4) Other interested persons.

(b) At the conclusion of the testimony of each witness, questioning of witnesses shall be in the following order:

(1) Council members, counsel, staff members, and consultants may be permitted by the presiding officer to ask questions at any time;

(2) The applicant ;

(3) Federal, state, and other governmental agency representatives;

(4) All other persons by oral or written questions through the presiding officer.

(c) The presiding officer may require that all examination, either written or oral, be conducted at the conclusion of the testimony of each category of witnesses rather than at the conclusion of the testimony of each individual witness.

(d) The presiding officer may vary the order in which witnesses appear and the order in which testimony is given or witnesses are questioned.

Env-A 207.07 Conclusion of Hearing. At the conclusion of the hearing, no other evidence or testimony shall be allowed into the record, except as specified by the presiding officer.

Env-A 207.08 Reopening the Record. At any time prior to a final decision, the council or director may reopen the record for further proceedings consistent with these rules provided, however, that the director shall give notice of such further proceedings, in writing, to the applicant at least 10 days prior to such proceedings, and further provided that the director shall notify other interested persons and the public in such manner as is appropriate.

Env-A 207.09 Record. The record of the hearing shall consist of the application, all written comments, the transcript of the hearing, all exhibits, and proposed findings of fact and conclusions of the presiding officer, if any.

PART Env-A 208 * * *

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**PART Env-A 209 ENFORCEMENT; ORDER OF ABATEMENT; PERMIT
REVOCATION AND SUSPENSION**

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Env-A 209.05 Suspension or Revocation of Permits.

(a) If the director makes an initial decision pursuant to Env-A 209.03 that suspension or revocation of a stationary source's permit is appropriate, the director shall issue a notice to such permittee indicating the intention to suspend or revoke said permit.

(b) The notice shall :

(1) Provide that the permit shall be revoked or suspended, as the case may be, effective 10 days following the issuance of the notice unless an objection is filed with the director prior to that time;

(2) Advise the permittee of its right to request an oral hearing before the director within 10 days of the issuance of the notice;

(3) Advise the permittee of its right to present any written evidence or argument to the director within 25 days in support of its objections;

(4) State, with reasonable specificity, the nature of the actions and other pertinent information upon which the proposed suspension or revocation is based; and

(5) Advise the permittee of its right to inspect and copy, at its own expense and during normal business hours, all nonconfidential information in the possession of the division concerning its permit.

(c) In rendering a decision, the director need consider only those grounds specifically stated by the permittee in its objection filed pursuant to Env-A 209.05 (b)(1).

(d) Within 30 days of the notice of proposed permit suspension or revocation, the director shall:

(1) Suspend or revoke the permit as proposed;

(2) Amend the permit or attach certain conditions to the permit:

(3) Advise the permittee that no further administrative action is presently warranted;

(4) Request additional information from the permittee:

(5) Schedule an oral hearing to be held pursuant to Env-A 207.

(e) Within 15 days of the close of any oral hearing conducted pursuant or the receipt of information provided pursuant to paragraph (d)(4 and 5) of this section, the director shall issue a decision in accordance with paragraph (d)(1), (2) or (3) of this section.

(f) Within 10 days of the decision by the director suspending, revoking, or amending a permit pursuant to this section, the permittee may file with the director a petition for appeal to the council. The provisions of Env-A 205.07 shall govern such an appeal.

(g) Upon application, the council, may grant a rehearing in accordance with Env-A 210.

PART Env-A 210 MOTION FOR REHEARING.

Env-A 210.01 Filing. Any person may file a motion for reconsideration of any matter which has been determined by the council, if the rights of that person may be directly affected by such council action. A motion for reconsideration must be filed within 20 days of:

- (a) The promulgation by the council of a rule;
- (b) A decision of the council regarding a request for a variance; or
- (c) A decision of the council reviewing a decision of the director regarding the issuance, denial, suspension or revocation of a permit pursuant to this chapter.

Env-A 210.02 Content; New Evidence.

- (a) A motion for rehearing shall set forth the following, in detail;
 - (1) The basis of the petitioner's grievement;
 - (2) The findings, conclusions, or conditions to which the petitioner objects;
 - (3) The basis for the objection;
 - (4) New or additional evidence the petitioner wishes to present and the nature of such evidence to be offered; and
 - (5) The nature of the relief requested.
- (b) New or additional evidence may be permitted when offered to:

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

Env-A 210.03 Council Action.

(a) Within 10 days of receipt of a petition for rehearing and after appropriate notice, the council may:

- (1) Grant the petition in full or in part;
- (2) Order a public hearing; or
- (3) Dismiss the petition.

(b) Any public hearing held under this section shall be held within 30 days of the council's decision to hold such a hearing, and the council shall provide notice to interested persons.

(c) A council decision becomes final if no motion for rehearing is filed within the period specified above.

Env-A 210.04 Appeal to Superior Court.

(a) Within 30 days of a council decision on a motion for rehearing, any person whose rights are directly affected may appeal by petition to the Superior Court.

(b) The time for appeal of a decision of the council shall be computed from the date upon which the decision becomes final.