On Building Better Laws for New Mexico's Environment

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ON BUILDING BETTER LAWS FOR NEW MEXICO'S ENVIRONMENT

In 1971, the voters of New Mexico passed a constitutional amendment which proclaimed the fundamental importance of New Mexico's natural environment and charged the legislature with the duty to provide appropriate pollution controls. Legislators might best begin this task by considering the present administrative framework for standards promulgation and enforcement.

The 1971 Environmental Improvement Act promoted the old environmental services division of the health and social services department to the status of an agency within that department called the Environmental Improvement Agency (EIA). The EIA is intended to serve primarily as an enforcement body under the 1971 Act and as a constituent agency under the Water Quality Act. The 1971 Act also created a separate rule-making panel called the Environmental Improvement Board (EIB). The EIB is also the State Air Pollution Control Agency, the Radiation Protection Consultant for all agencies and institutions in the state, and an originator of health protection regulations. In addition to water pollution, air pollution, and radiation, the EIA and the EIB are also charged with duties in seven other areas of environmental protection. The authority

1. N.M. Const. art 10, § 21, Constitutional Amendment, proposed by S.J.R. 10 § 1 (Laws 1971, p. 1386) and adopted in a special election by a vote of 54,655 to 19,758.
2. N.M. Stat. Ann. §§ 12-12-1 to -13 (Supp. 1972). Separation of the EIA from the Department of Health and Social Services was provided for the following year by N.M. Stat. Ann. § 12-12-9 (1972) although no separation is yet in effect.
9. N.M. Stat. Ann. § 12-12-10 and 11 (Supp. 1972). While authorization is given for seventeen areas, ten can be singled out as having a significant effect on the environment. In addition to water pollution, air pollution and radiation, the seven areas are: 1) water supply, 2) liquid and solid waste, 3) noise control, 4) vector and commercial pest control operators, 5) environmental injury control, 6) toxic environmental chemicals, and 7) mobile home parks, public lodging places and housing conservation and rehabilitation. Conspicuous by its absence is any listing of land use planning. Apparently the legislature feels this area should be handled with separate subdivision legislation.

Since separate legislation has strengthened the EIA and EIB in regard to air pollution (see note 6, supra) water pollution (see note 7, supra) and radiation (see note 8, supra), this comment primarily concentrates on power of the EIA and EIB to act in these seven areas.
to act in these areas originates in the broad language of the Act itself.\textsuperscript{10}

Thus, the EIA and EIB are responsible in a significant sense for the protection and management of the environment.\textsuperscript{11} The legislative delegation of power to act in investigative, legislative, judicial and regulatory capacities is noticeably lacking, however, particularly when compared with the powers of other administrative bodies in New Mexico. This comment discusses these deficiencies and proposes reform.

**INVESTIGATIVE POWERS**

New Mexico's legislature has granted many agencies the power to investigate so that they may adequately fulfill their purpose. Investigative powers not only facilitate enforcement, but serve to establish administrative policy and provide factual bases for future legislation.\textsuperscript{12} The power to subpoena, for example, is generally included in administrative agencies' power to investigate.\textsuperscript{13} However, the legislature conspicuously failed to provide a similar power to the EIA and EIB under the Environmental Improvement Act.

The EIA must rely on the extremely broad language of N.M. Stat. Ann. 12-12-9 (Interim Supp. 1972) in which the legislature delegated "... such other powers as may be necessary and appropriate. ..." Legislation slated for the 1973 session was intended to make this delegation less broad.\textsuperscript{14}

The only information gathering tool the EIB is allowed by statute is the public hearing. "No regulation or amendment or repeal thereof

\textsuperscript{10} A similar interpretation of this act was made in an address by John G. Jaspar, Staff Attorney, Environmental Health Study Committee, N.M. Legislative Council Service, at the Environmental Law Seminar, Jan. 14, 1972.

\textsuperscript{11} N.M. Stat. Ann. §§ 12-12-10, -11 (Supp. 1972). Surprisingly no administrative links are provided by statute to ensure continual communication between the Board and the Agency.

\textsuperscript{12} K. Davis, Administrative Law, 51 (1965).


\textsuperscript{14} The Public Health Act, Laws of New Mexico, Ch. 359 §§ 16-19 (1973) enacted legislation allowing searches and inspections for the Health and Social Services Department of which the EIA is a part. Similar amendments to the Environmental Improvement Act were never introduced.
shall be adopted until after a public hearing by the environmental improvement board within the area of the state concerned." The board thus assumes a passive stance imposed by the legislature. It cannot gather information on its own initiative, and it cannot subpoena anyone to bring information to its hearings. This means of gathering information appears inadequate to insure the EIB sufficient information to be able to promulgate regulations which accurately reflect the interplay of all interests.

Nevertheless, present members of the EIB do not feel that lack of subpoena power has had any appreciable negative impact on the board’s effectiveness. Mr. Kenneth Brown feels that the good working relationship between the EIB and the EIA, industry, and environmental groups makes the addition of any subpoena power unnecessary. Mr. Howard Rothrock considers the regulations proposed by the EIA as pro-environment, with the EIB hearings serving to balance its views against those of industry. Mr. William Atkins feels that environmental groups are able to adequately combat industrial views at EIB hearings without prompting by the EIB. However, he did mention that in at least one instance, an Environmental Protection Agency official refused to testify with the result that the subsequent EIB ruling was somewhat awkward.

Apparently the EIB has encountered little difficulty in obtaining the information it desires in its first few years of existence. Hopefully, diversity of viewpoint will always be available. But, if the attitude of the EIA shifts from its present pro-environmentalist orientation, if industry becomes more powerful or if environmental groups become less popular, the EIB could easily find itself presiding over one-sided hearings.

Lack of specific investigative power is a serious shortcoming of the Environmental Improvement Act which should be remedied. The best way to remedy it is to extend to the EIB the power to subpoena witnesses as it sees fit. The Board would then be able to gather information concerning the environment whenever it found it necessary to do so. Such a measure would obviously allow the board to assume a more active posture in environmental rule making and administration.

A proposed addition to Chapter 12, Article 12, N.M. Stat. Ann.

16. Although lobbyist pressure would exist under almost any circumstances, it may be stronger for the EIB. For example, El Paso Natural Gas recently opened a Santa Fe office to facilitate “communications” with agencies such as the EIB. Albuquerque Journal, Aug. 31, 1972, at G-1, col. 1.
17. Telephone interviews were conducted with Mr. Kenneth Brown, Mr. Howard Rothrock and Mr. William Brown on March 1, 1973.
(Supp. 1971) is offered in Appendix A. This addition is patterned on N.M. Stat. Ann. § 4-23-15 (A) (B) (C) (E) and (F) (Supp. 1971).

LEGISLATIVE POWERS

The legislature has given the EIB the duty to "... promulgate rules, regulations and standards..." pursuant to its responsibility for environmental management. Although no further standards are prescribed, the board is required to hold hearings prior to adopting any rules, regulations or standards. The hearings, conducted to acquire maximum input before final adoption of regulations, serve as a limitation on the EIB's power to legislate.

The Supreme Court of the United States has held that when an agency acts upon matters concerning the public in general, and not upon individuals or special groupings of individuals in particular, no hearing need be had at all.

The Constitution does not require all public acts to be done in town meeting or an assembly of the whole. General statutes... are passed that affect the person or property of individuals, sometimes to the point of ruin, without giving them a chance to be heard.

New Mexico's Environmental Improvement Act requires a hearing despite the Supreme Court holding and is a progressive statute in this regard. It also echoes the requirements of New Mexico's progressive Administrative Procedures Act, although like most of New Mexico's administrative agencies, it is not subject to its provisions.

Promulgation of regulations is required in the State Rules Act, but the extent of publication is insufficient for environmental purposes. There is no requirement that the board publish its rules and regulations. Such a requirement is not a concept foreign to New Mexico law. New Mexico's Administrative Procedures Act requires

19. Adoption of any regulations outside the areas of air pollution, water pollution, and radiation control may be unconstitutional under N.M. Const. art 3, § 1. The legislature may not delegate power to an administrative body without furnishing reasonably adequate standards with which to use that power. Santa Fe v. Gamble-Skogmo, Inc., 73 N.M. 410, 389 P.2d 13 (1964); Holmes v. State Board of Finance, 69 N.M. 430, 367 P.2d 925 (1961).
publication of all rules and regulations of all agencies under its control.\textsuperscript{25}

The EIB is required to give written notice of any action it takes to "any person heard or represented at the hearing of the action of the board . . ."\textsuperscript{26} This requirement is inadequate. Without the requirement to publish, the law is less accessible to the public at large.\textsuperscript{27}

The public is informed of sensational environmental issues when they are accurately reported by the press. The EIA does try to keep an informal mailing list for those who specifically request to be notified of proposed and finalized regulations. Regional offices attempt to keep copies of the vast majority of the regulations and there are frequently extra copies available for public distribution. Nevertheless, widespread public knowledge of the specific activities of the EIA and EIB simply does not exist. Publication enables the public to utilize the law,\textsuperscript{28} and contributes to the whole concept of "openness" which is so important to the entire administrative process.\textsuperscript{29}

A proposed addition to Chapter 12, Article 12 of the N.M. Stat. Ann. (Supp. 1971) is offered in Appendix B. The addition is substantially the same as N.M. Stat. Ann. § 4-23-6 (Supp. 1971) and will provide for publication of the EIB's adopted rules and regulations.

**JUDICIAL POWERS**

The legislature has charged the EIA with the duty to "... maintain and enforce rules, regulations and standards"\textsuperscript{30} as promulgated by the EIB. The powers to carry out this responsibility are not extensive. The EIA is only empowered to take "... appropriate action in courts of competent jurisdiction."\textsuperscript{31}

Since the EIA is already required to give notice\textsuperscript{32} or to seek voluntary compliance\textsuperscript{33} in other environmental areas, there is a tendency to transfer these same procedures to the areas covered

\textsuperscript{26} N.M. Stat. Ann. § 12-12-13 (C) (Supp. 1972).
\textsuperscript{27} More than half the states are still deficient in failing to publish or otherwise to make conveniently accessible even the regulations that have the force of law. But recent movement in the right direction has been encouraging.
\textsuperscript{28} Davis, supra note 12 at 130.
\textsuperscript{29} "The private person or his lawyer is thus enabled to know where, to whom and in what manner he may apply." L. Jaffe and N. Nathanson, ADMINISTRATIVE LAW, 23 (1961).
\textsuperscript{30} For a full discussion of this concept see K. Davis, ADMINISTRATIVE LAW, 85 (1965).
excluding the Environmental Improvement Act. However, without the cooperation of the violator, the EIA is faced with a long court battle. Due to the limited resources of the EIA, virtually no pollutors have been forced by court action to pay fines. Even if a suit were initiated, the defendant would likely not be required to cease polluting during litigation. The EIA might attempt to obtain an injunction ordering a halt to particular activity pending final disposition of the case, but there is no express statutory authorization for this. The legislature could have made some provision comparable to one enacted for the Public Service Commission which gives the Commission authority to seek an injunction and specifies when and how this authority is to be used. The absence of such provisions plus the constraint that the EIA must utilize an already sluggish court system promotes minimal enforcement.

Some method should be devised through which those persons charged with violation of EIB regulations can have their cases expeditiously adjudicated. The environment would also be better protected if more violations of EIB regulations could be discovered. The legislature has handled an analogous situation in regard to alcohol licensing violations. The Department of Alcoholic Beverage Control has broad and sophisticated judicial authority. The system includes commissioning employees of the Department as peace officers in the performance of their duties, as well as allowing private citizens to lodge complaints to put the judicial machinery into action. Provision is also made for trial-like hearings, initiated by citation and terminated by issuance of a final order by a hearing officer. The legislature specifically granted all of these powers in detail and thereby gave the Department sufficient judicial power to fulfill its statutory obligations. That is not the case with the EIA and the EIB.

The legislature's paltry grant of judicial power to the EIA and the EIB does not allow them to efficiently accomplish their required

34. See note 9, supra.
35. In an interview on November 17, 1972, Tom Baca, a regional director of the EIA, indicated that virtually all compliance with EIB regulations is obtained voluntarily. He did not know of any violations in the state that had been corrected through court action.
39. Id.
40. Delegation of power must be accompanied by strict standards. See note 19, supra. Although it may be unconstitutional to delegate power to a board to adjudicate controversies between private individuals, there is no authority to suggest that a controversy between the State and a private individual cannot be so resolved. See Hovey v. Mechem, 63 N.M. 250, 316 P.2d 1069 (1957).
objectives. Therefore, a proposed addition to New Mexico Statutes Ann. § 12-12 (Interim Supp. 1972) is offered in Appendix C. The recommendation is similar to N.M. Stat. Ann. §§ 4-32-10 through 13 (Supp. 1971) and § 46-6-4 (Supp. 1971).

Sections A through C of Appendix C reflect present operating procedure. Section D allows the director of the EIA to prosecute the alleged violator through an administrative hearing rather than file an action in the District Courts. Sections E through I concern notice requirements. Sections J and K allow the EIB hearing officer to impose fines. Sections L through Y concern fair hearings requirements and Section Z allows for appeal.

REGULATORY POWER

To adequately manage the environment, there must be some means of everyday supervision. Prevention of environmental damage is an integral part of the purpose of the Environmental Improvement Act. Yet, the legislature provided no method by which this might be accomplished. This does not mean that the EIA and EIB cannot regulate the environment at all. The EIA is able to coerce compliance through threat of court action. Similarly, the EIB can threaten to make stricter regulations. Both can act through legislation directed at air, water or radiation control.

The most effective method of regulation appears to be the recently delegated power to issue permits of air quality control. By allowing the EIA to grant or deny permits under certain conditions, and delegating to the EIB the power of review of agency action, prevention of environmental harm before it occurs seems possible.

Some system of licenses or permits is one of the primary methods by which other New Mexico agencies are able to regulate their respective areas. New Mexico's dental board, medical board,

42. For example, the EIA ordered the village of Mora to clean up its sewer and water systems, 2 BNA Environmental Rep. (Current Developments) 383 (1971) and the EIB included copper smelters, oil and gas burning power plants and sulfuric acid plants in New Mexico's clean-air regulations. Albuquerque Tribune, Jan. 11, 1972 at B-3, col. 1.
43. N.M. Stat. Ann. § 12-14-7 (Supp. 1972). During a telephone interview on March 1, 1973, Mr. William Atkins said that he felt the permit system was a workable one which could conceivably be extended to other areas of the environment. Another interview on the same day with Mr. Howard Rothrock indicated that he felt the permit system had excellent potential.
barber board,\textsuperscript{4,8} board of pharmacy,\textsuperscript{4,9} and department of alcoholic beverage control\textsuperscript{5,6} all utilize such systems. Licensing techniques can be very elaborate and are ordinarily not subject to judicial review.

The state has prescribed the terms under which it will grant such license and likewise the terms under which it may be revoked... the courts are powerless to interfere with its administrative orders, or question the wisdom or expediency of his administrative acts in issuing or revoking licenses.\textsuperscript{5,7}

Appendix D is an extension of the concept of permits embodied in the Air Quality Control Act.\textsuperscript{5,2} It is a proposed amendment to the Environmental Improvement Act\textsuperscript{5,3} which would effectively strengthen its regulatory powers.

CONCLUSIONS

The EIA and EIB comprise a weak administrative agency whose duty it is to police a large and vitally important area of every citizen's life. It has little power to investigate, adjudicate or regulate. Even its rule making power is considerably weakened by the fact that there is no provision for publication. These areas need immediate attention if the EIA and EIB are to be a meaningful force in ensuring "...an environment that in the greatest possible measure... will confer optimum health, safety, and comfort and economic and social well-being on its inhabitants; will protect this generation as well as those yet unborn from threats posed by the environment,..."\textsuperscript{5,4}

Each appendix provides a means of strengthening them. A more expedient means would be the adoption of an amendment subjecting both the EIA and the EIB to the Administrative Procedures Act.\textsuperscript{5,5}

In any event, legislators should realize that: "A new public sensiti-
tivity to issues of environmental protection has imposed new responsibilities on...the legislature and the administrative agencies."\textsuperscript{5,6} It is time New Mexico's legislature faced up to these responsibilities and helped the EIA and EIB do the same.

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\begin{footnotes}
\item[51.] Yaraborough v. Montoya, 54 N.M. 91, 95, 214 P.2d 769, 771 (1950).
\item[56.] Welford v. Ruckelshaus, 439 F.2d 598, 603 (D.C. Cir. 1971).
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\end{footnotes}
APPENDIX A

Subpoenas A. The Environmental Improvement Board, hereinafter “the board,” conducting a hearing as provided in New Mexico Statutes Annotated § 12-12-13 (Supp. 1972) may, subject to rules of privilege and confidentiality recognized by law, require the furnishing of information, the attendance of witnesses and the production of books, records, papers or other objects necessary and proper for the purposes of the proceeding. The board, in any proceeding, or any party to an adjudicatory proceeding before it, may take the depositions of witnesses, including parties, within or without the state, in the same manner as provided by law for the taking of depositions in civil actions in the district court, and they may be used in the same manner and to the same extent as permitted in the district court.

B. In furtherance of the powers granted by subsection A of this section, the board may issue subpoenas requiring upon reasonable notice, the attendance and testimony of witnesses and the production of any evidence, including books, records, correspondence or documents relating to any matter in question in the proceeding. The board may administer oaths and affirmations, examine witnesses and receive evidence. The power to issue subpoenas may be exercised by any member of the board or by any person or persons designated by the board for the purpose.

C. The board may prescribe the form of subpoena, but it shall adhere, in so far as practicable, to the form used in civil actions in the district court unless another manner is provided by any law. Witnesses summoned shall be paid the same fees for attendance and travel as in civil actions in the district court unless otherwise provided by any law.

D. Any witness summoned may petition the board or the district court of the county where he resides or, in the case of a corporation, the county where it has its principal office, to vacate or modify a subpoena served on the witness. The board shall give prompt notice to the party, if any, who requested issuance of the subpoena. After investigation if the board considers it appropriate, it may grant the petition in whole or in part upon a finding that the testimony or the evidence whose production is required does not relate with reasonable directness to any matter in question, or that a subpoena for the attendance of a witness or the production of evidence is unreasonable or oppressive, or has not been issued a reasonable period in advance of the time when the evidence is requested, or for any other reason that justice requires.

E. In case of disobedience to any subpoena issued and served under this section or to any lawful board requirement for information, or for the refusal of any person to testify to any matter regarding which he may be interrogated lawfully in a proceeding before the board, the Environmental Improvement Agency may apply to the district court in the county of the person's residence for an order to compel compliance with the subpoena of the furnishing of information or the giving of testimony. Forthwith, the district court shall cite the respondent to appear and shall hear the matter as expeditiously as possible. If the disobedience or refusal is found to be unlawful, the district court shall enter an order requiring compliance in full or as modified. Disobedience of the court order shall be punished as contempt of the district court in the same manner and by the same procedure as provided for like conduct committed in the course of judicial proceedings.

APPENDIX B

Publication of Rules A. The Environmental Improvement Board:

(1) shall compile and publish all effective rules adopted by the board.
(2) shall publish a monthly bulletin setting forth the text of all rules filed during the preceding month.

B. Bulletins and compilations shall be made available upon request to state agencies, institutions and political subdivisions free of charge and to other persons at prices fixed by the state records administrator to cover mailing and publication costs.

APPENDIX C

A. Proceeding on Complaints. Whenever any person shall lodge any signed, written complaint with the EIA that any person or corporation has done any act which is in violation of
the Environmental Improvement Act, the EIA shall assign an environmentalist to investigate such complaint.

B. The environmentalist so assigned shall immediately proceed to make a diligent investigation of such complaint and shall make a written report to the director of the EIA stating the alleged complaint and whether or not in his opinion probable cause exists for filing charges for fining the alleged violator.

C. Whenever any environmentalist shall witness or learn of any person or corporation doing any act which he has cause to believe is in violation of the Environmental Improvement Act, he shall make an investigation and report of that matter similar to that required in subsection B of this section.

D. If the director believes from such reports that probable cause exists for filing charges, he shall file such charges against the alleged violator with the EIB, stating the nature of the alleged act and the name and address of the alleged violator. The EIB shall keep a permanent file of all charges filed by the director of the EIA.

E. The chairman of the EIB shall appoint a member of the EIB as a hearing officer within five (5) days from the date of the receipt of the charges.

F. (1) The hearing officer shall then have served upon the violator, in the same manner as is provided by law for service of process out of the district courts, a copy of the charge and an order to show cause at least ten (10) days before the date set for the appearance of the alleged violator, before him to show cause why he should not be fined.

(2) Current with such order, the hearing officer may issue an order to cease any activity specified in the charge pending final disposition of the case.

(3) Such copy of the charge and the aforementioned order(s) may be served upon the violator by any agent or inspector of the board, or by any sheriff, constable or member of the state police. The persons serving such charge and order(s) shall make a return on the back of a copy of each in the following form:

"RETURN

On this __________ day of ________________, 19____, I, ________________________________, (state official capacity, if any) did deliver a copy of this document to ________________________________, at or about __________ o'clock M., at the city of ________________________________, in the county of ________________________________, New Mexico.

Signature of official"

After such service of such documents, and after making out the returns on the copies thereof, as above required, the person making the service shall convey the copies on which the returns of service are made to the hearing officer for permanent filing with the originals of which they are copies.

G. The hearing officer shall be at the place mentioned in the order to show cause on the hour and date designated therein for the hearing. The director or his attorney complaint.

H. If the alleged violator shall fail to appear at the place designated in the order to show cause within one (1) hour after the time set for the hearing, the hearing officer shall then and there order the nonappearance of the violator to be entered in the record of the hearing and shall order the alleged violator fined on all of the grounds alleged in the charge and cause the record of hearing to show the particulars in detail. In such a case there shall be no reopening or appeal or review of the proceedings whatever, except in case that violator's failure to appear was due to matters beyond his control and not through any negligence on his part. In such case, the person may within a reasonable time apply to the EIB to reopen the proceeding, and the EIB, upon finding the cause sufficient, shall immediately fix a time and place for hearing and give the person notice. At the time and place fixed, a hearing shall be held in the same manner as would have been employed if the person had appeared in response to the original notice of hearing.
I. If at or before the hearing on the order to show cause, the alleged violator shall appear before the hearing officer and admit guilt on all grounds set out in the charge, the hearing officer shall thereupon order the alleged violator fined, and cause a record of hearing to be made up showing the facts and particulars of his order of the fine of the violator. In such a case there shall be no review or appeal of the proceedings whatever.

J. If the alleged violator shall appear at the hearing and remain mute or deny guilt of any or all of the grounds urged for the fine, the hearing shall proceed as follows:

1. The hearing officer shall administer oaths to all witnesses, shall cause all of the testimony and evidence in support of the grounds alleged in the charge to be presented in the presence of the alleged violator, allowing the alleged violator or his attorney to cross-examine all witnesses.

2. The alleged violator shall then be allowed to present any and all testimony and evidence he may have at the place of the hearing in denial or disproof or in mitigation of the grounds in support of which evidence has been introduced.

3. The director or attorney representing him shall have the right to cross-examine the alleged violator or any witness testifying in his favor.

4. The director shall then present any evidence or testimony in rebuttal of that produced by the violator.

5. After the presentation of the surrebuttal testimony or evidence, no more evidence or testimony shall be received on behalf of either party.

6. The hearing officer shall then make a finding on each ground alleged, and in support of which evidence and testimony has been presented and received, finding the guilt or innocence of the violator on each such ground.

7. If the violator shall be found guilty on any ground alleged and proved, the hearing officer shall thereupon make his order of the fine.

K. In conducting this adjudicatory proceeding, the hearing officer shall afford all parties an opportunity for full and fair hearing. Unless otherwise provided for by any law, the hearing officer:

1. May make informal disposition of any adjudicatory proceeding by stipulation, agreed settlement, consent order or default;

2. May limit the issues to be heard or vary the procedures prescribed by subsection J if the parties agree to the limitation or variation;

3. Shall allow any person showing that he will be substantially and specifically affected by the proceeding to intervene as a party in the whole or any portion of the proceeding, and may allow any other interested person to participate by presentation of argument orally or in writing, or for any other limited purpose the agency may order; and

4. Shall upon demand by any party require any or all parties, including the EIA, to advise the names of witnesses it proposes to call at any adjudicatory hearing, together with the list of testimony or type of testimony expected to be elicited from each witness. Any party shall likewise be required upon demand to advise of and produce for examination or copying any exhibits the party anticipates using. Such demanded information shall be made available at least ten (10) days prior to the hearing.

L. The record in adjudicatory proceedings shall include:

1. All pleadings, motions and intermediate rulings;
2. Evidence received or considered;
3. A statement of matters officially noticed;
4. Questions and offers of proof, objections and rulings thereon;
5. Proposed findings and conclusions; and
6. Any decision, opinion or report by the agency conducting the hearing.

M. The hearing office need not arrange to transcribe notes or sound recordings unless requested by a party. The cost of the transcript to parties shall not exceed the cost provided by law chargeable by official court reporters.

N. Findings of fact shall be based exclusively on the evidence presented and on matters officially noticed.

O. In the above described adjudicatory proceedings irrelevant, immaterial or unduly repetitious evidence shall be excluded. The rules of evidence as applied in nonjury civil actions in the district courts shall be followed. When necessary to ascertain facts not reason-
ably susceptible of proof under those rules, evidence not admissible thereunder may be admitted, except where precluded by statute, if it is a type commonly relied upon by reasonably prudent men in the conduct of their affairs. The hearing officer shall give effect to the rules of privilege recognized by law. Objections to evidentiary offers may be made and shall be noted in the record. No greater exclusionary effect shall be given any rule or privilege than would obtain in an action in the district court. Subject to these requirements, when a hearing will be expedited and the interests of the parties will not be prejudiced substantially, any part of the evidence may be received in written form.

P. All evidence, including any records, investigation reports and documents in the possession of the EIA, of which it desires to avail itself as evidence in making a decision, shall be offered and made a part of the record in the proceeding, and no other factual information or evidence shall be considered, except as provided in the subsections Q and R of this section. Documentary evidence may be received in evidence in the form of copies or excerpts, or by specific citation to page numbers in published documents.

Q. As provided in section J above, every party may call and examine witnesses, introduce exhibits, cross-examine witnesses who testify and submit rebuttal evidence.

R. Official notice may be taken of all facts of which judicial notice may be taken and of other facts within the specialized knowledge of the hearing officer, but whenever the hearing officer takes official notice of a fact, the noticed fact and its source shall be stated at the earliest practicable time, before or during the hearing, but before the final report or decision, and any party shall, on timely request, be afforded an opportunity to show the contrary.

S. The experience, technical competence and specialized knowledge of the hearing officer and his staff may be utilized in the evaluation of the evidence.

T. Any party may be represented by counsel licensed to practice law in the state or by any other person authorized by law.

U. Where relief or procedure is not otherwise provided for, rules of practice and procedure applicable to civil actions in the district court may be utilized by the parties at any stage of any proceeding, and if refused by the hearing officer, then upon application to any district court having jurisdiction of the place of the alleged violation for the entry of an order providing for such relief or procedure.

V. Prior to each decision, the parties shall be afforded a reasonable opportunity to submit briefs including proposed findings of fact and law, together with supporting reasons therefor including citations to the record and of law for the consideration of the hearing officer.

W. The record shall include all briefs, proposed findings and exceptions and shall show the ruling upon each finding, exception or conclusion presented. All decisions at any stage of any proceeding become a part of the record and shall include a statement of findings and conclusions, as well as the reasons or basis therefor, upon all material issues of fact, law or discretion involved, together with the appropriate rule, order, sanction, relief or the denial thereof.

X. No hearing officer shall:

(1) participate in a final decision in an adjudicatory proceeding unless he has heard the evidence or read the record. A final or tentative decision shall include findings of fact and conclusions of law, separately stated. Findings of fact, if set forth in statutory language, shall be accompanied by a concise and explicit statement of the underlying facts supporting the findings. If a party submits proposed findings of fact and conclusions of law, the hearing officer shall rule upon each proposed finding and conclusion. Parties shall be notified either personally or by mail of any decision or order. A copy of the decision or order shall be delivered or mailed forthwith to each party or to his attorney of record; or

(2) impose any sanction or substantive rule or order except within jurisdiction delegated to the EIA and EIB as authorized by law.

Y. Ex Parte Consultations. No party or representative of a party or any other person shall communicate off the record about the case with any board member who participates in making the decision in any adjudicatory proceeding unless a copy of the communication is sent to all parties to the proceeding. No board member or representative of the board shall communicate off the record about the adjudicatory proceedings with any party or repro-
sentative of a party or any other person unless a copy of the communication is sent to all parties in the proceeding.

Z. Each party may appeal by filing a notice of appeal within thirty (30) days after the date of the decision to the district court having jurisdiction of the place of the alleged violation. The appeal must be on the record made at the hearing which must be furnished at the expense of the applicant.

APPENDIX D

A. By regulation the EIB may declare any category within its responsibility of environmental management to be critical and thereby require permits for the introduction or modification of any source of contamination within that category.

B. Such permits shall be issued by the EIA upon application and submission of plans, specifications and other relevant information which it deems necessary.

C. The EIA may deny any application for a permit if:
   (1) it appears that the introduction or modification will not meet applicable regulations;
   (2) the new source will emit a hazardous pollutant or contaminant in excess of a federal standard of performance or a state regulation;
   (3) it appears that the new source may result in any federal or state standard being exceeded; or
   (4) any provision of the Environmental Improvement Act.

D. The EIA shall within thirty days after the filing of an application for a permit either grant or deny the permit for the construction or modification of a new source.

E. This section does not authorize the EIA to require the use of machinery, devices or equipment from a particular manufacturer if the federal standards of performance and state regulations may be met by machinery, devices or equipment otherwise available.

F. The EIB may provide by regulation a schedule of fees for permits, not exceeding the estimated cost of inspection and issuance of permits. Fees are to be paid at the time the application for the permit is filed. Fees collected pursuant to this section shall be deposited in the general fund.

G. The issuance of a permit does not relieve any person from the responsibility of complying with the provisions of the Environmental Improvement Act regulations of the EIB.

H. If the EIA denies a permit or grants the permit subject to conditions, the EIA must notify the applicant by certified mail of the action taken and the reasons therefore. If the applicant is dissatisfied with the action taken by the EIA, he may request a hearing before the EIB. The request must be made in writing to the director of the EIA within thirty days after notice of the EIA's action has been received by the applicant. Unless a timely request for hearing is made, the decision of the EIA shall be final.

I. If a timely request for hearing is made, the EIB shall hold a hearing within thirty days after receipt of the request. The EIA shall notify the applicant by certified mail of the date, time and place of the hearing. In the hearing the burden of proof shall be upon the applicant. The EIB may designate a hearing officer to take evidence in the hearing. Based upon the evidence presented at the hearing, the EIB shall sustain, modify or reverse the action of the EIA.

J. If the applicant requests, the hearing shall be recorded at the cost of the applicant. Unless the applicant requests that the hearing be recorded, the decision of the EIB shall be final.

K. An applicant may appeal the decision of the EIB by filing with the court of appeals a notice of appeal within thirty days after the date the decision is made. The appeal must be on the record made at the hearing. The applicant shall certify in his notice of appeal that arrangements have been made with the EIB for preparation of a sufficient number of transcripts of the record of the hearing on which the appeal depends to support his appeal to the court, at the expense of the applicant, including two copies which he shall furnish to the EIB. Upon appeal, the court of appeals shall set aside the decision of the EIB only if found to be:
   (1) arbitrary, capricious or an abuse of discretion;
   (2) not supported by substantial evidence in the record; or
(3) otherwise not in accordance with law.

L. Notwithstanding any other provision of law, a final decision on a permit under this section by the EIA, EIB or court of appeals that a new source will or will not meet applicable state and federal air pollution standards and regulations shall be conclusive and is binding on every other state agency and as an issue before any other state agency shall be deemed resolved in accordance with that final decision.