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CHAPTER Env-C 200 RULES OF PRACTICE AND PROCEDURE

Statutory Authority: RSA 541-A:16, I

PART Env-C 201 PURPOSE AND APPLICABILITY

Env-C 201.01 Purpose.

(a) The purpose of the rules in Env-C 200 is to provide:

- (1) Uniform procedures for the conduct of adjudicative and non-adjudicative proceedings;
- (2) Uniform procedures for the submittal, review, and disposition of motions for reconsideration, rulemaking petitions, claims of confidentiality, and declaratory rulings;
- (3) Uniform criteria for suspending, revoking, or refusing to issue or renew licenses issued by the department of environmental services; and
- (4) Procedures for submitting requests to review department records and requests for determinations under RSA 72:12-a.

(b) These rules are intended to supplement the requirements of RSA 541-A and any procedures or criteria established under any statute implemented by the department of environmental services.

Source. #4653, eff 7-27-89; ss by #4834, eff 6-4-90; ss by #5265, eff 10-31-91; ss by #5860, eff 7-1-94; ss by #6960, eff 3-25-99; ss by #8851-A, eff 3-25-07

Env-C 201.02 Applicability.

(a) The definitions in Env-C 202 and rules in Env-C 203 shall apply to all administrative proceedings conducted by the department of environmental services as described in Env-C 204 through Env-C 212, and shall be in addition to applicable requirements of RSA 541-A and the rules set forth in Env-C 204 through Env-C 212 as applicable to a specific type of proceeding.

(b) In the event that other department rules exist in sub-titles Env-C, Env-A, Env-Wm, Env-Sw, Env-Hw, Env-Or, Env-Wr, Env-Ws, Env-Dw, Env-Wq, or Env-Wt that establish procedures for specific programs or divisions, a specific rule in this chapter shall apply if the program-specific rules do not address the specific issue addressed by the rule in this chapter.

Source. #4653, eff 7-27-89; ss by #5860, eff 7-1-94; ss by #6960, eff 3-25-99; ss by #8851-A, eff 3-25-07

PART Env-C 202 DEFINITIONS

Env-C 202.01 “Applicant” means the person who filed an application for a license or a request under RSA 72:12-a, as applicable to the proceeding.

Source. #5860, eff 7-1-94; ss by #6960, eff 3-25-99; ss by #8851-A, eff 3-25-07

Env-C 202.02 “Commissioner” means the commissioner of the department.

Source. #5860, eff 7-1-94; ss by #6960, eff 3-25-99; ss by #8851-A, eff 3-25-07

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Env-C 202.03 “Department” means the department of environmental services.

Source. #5860, eff 7-1-94; ss by #6960, eff 3-25-99; ss by #8851-A, eff 3-25-07

Env-C 202.04 “Division” means a “division”, as defined in RSA 21-G:5, VII, within the department that has primary responsibility for administering a statute, such as the air resources division, the waste management division, and the water division.

Source. #5860, eff 7-1-94; ss by #6960, eff 3-25-99; ss by #8851-A, eff 3-25-07

Env-C 202.05 “Hearing” means a component of a proceeding, through which the commissioner or designee receives testimony, evidence, or arguments, or any combination thereof.

Source. #5860, eff 7-1-94; ss by #6960, eff 3-25-99; ss by #8851-A, eff 3-25-07

Env-C 202.06 “Intervenor” means a person allowed by the presiding officer to intervene in an adjudicative proceeding pursuant to RSA 541-A:32.

Source. #8851-A, eff 3-25-07

Env-C 202.07 “License” means “license” as defined by RSA 541-A:1, VIII, namely “the whole or part of any agency permit, certificate, approval, registration, charter or similar form of permission required by law.”

Source. #8851-A, eff 3-25-07

Env-C 202.08 “License action” means an adjudicative proceeding initiated by the department to suspend, revoke, or refuse to renew a license.

Source. #8851-A, eff 3-25-07

Env-C 202.09 “Oral adjudicative hearing” means a trial-type hearing that is part of an adjudicative proceeding that is held at a specific time and location for the purpose of receiving live testimony from witnesses, together with any evidence and argument that is presented in conjunction with such witnesses.

Source. #8851-A, eff 3-25-07

Env-C 202.10 “Oral public hearing” means a legislative-type hearing that is part of a non-adjudicative proceeding that is held at a specific time and location for the purpose of receiving testimony from the public.

Source. #8851-A, eff 3-25-07

Env-C 202.11 “Participant” means:

- (a) For an adjudicative proceeding, a respondent, intervenor, or representative of the department for that adjudicative proceeding; or
- (b) For a non-adjudicative proceeding, any person who attends the hearing or submits comments in writing on paper or by e-mail, or both.

Source. #8851-A, eff 3-25-07

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Env-C 202.12 “Participants” means:

- (a) For an adjudicative proceeding, all respondent(s), intervenor(s), and representative(s) of the department for that adjudicative proceeding; or
- (b) For a non-adjudicative proceeding, the collective group of persons who attend the oral public hearing or submit comments in writing on paper or by e-mail, or both.

Source. #8851-A, eff 3-25-07

Env-C 202.13 “Person” means, for each proceeding, “person” as defined by the statute pursuant to which the department regulates the subject matter of the proceeding.

Source. #8851-A, eff 3-25-07

Env-C 202.14 “Proceeding” means the totality of the department’s handling of a matter, including the initiation, review, oral or record hearing, decision, and, if applicable, reconsideration of the matter. A proceeding is either adjudicative or non-adjudicative.

Source. #8851-A, eff 3-25-07

Env-C 202.15 “Record hearing” means:

- (a) For purposes of an adjudicative proceeding, the submittal by the participants of written testimony, evidence, and arguments prior to a specified deadline; or
- (b) For purposes of a non-adjudicative proceeding, the submittal by an applicant, a permittee, and/or the public, as applicable to the proceeding, of information relating to the subject of the proceeding in writing on paper or by e-mail.

Source. #8851-A, eff 3-25-07

Env-C 202.16 “Respondent” means:

- (a) For purposes of a license action, the person who holds a license or has applied for renewal of a license;
- (b) For purposes of an administrative fine proceeding, the person against whom the department proposes to impose an administrative fine; or
- (c) For any action initiated under Env-C 204.01(b), the person against whom the department proposes to take the action.

Source. #8851-A, eff 3-25-07

PART Env-C 203 PROVISIONS APPLICABLE TO ALL PROCEEDINGS

Env-C 203.01 Computation of Time.

- (a) Unless otherwise specified, all time periods shall be calendar days.
- (b) Computation of any period of time shall begin with the first day following the day on which the act that initiates such period of time occurs and include the last day of the period so computed.

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(c) For time periods not established in statute, if the last day of the period falls on a Saturday, Sunday, or state legal holiday, then the time period shall be extended to include the first state business day following the Saturday, Sunday, or state legal holiday.

(d) Time periods established in statute shall be determined as specified in the statute.

Source. #5860, eff 7-1-94; ss by #6960, eff 3-25-99; ss by #8851-A, eff 3-25-07

Env-C 203.02 Date of Issuance or Filing.

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

(b) All correspondence, petitions, applications, requests for findings of fact and conclusions of law, motions, requests for reconsideration, and any other written documents shall be deemed to have been filed with or received by the department on the actual date of receipt by the department, as evidenced by a date stamp placed on the document by the department in the normal course of business.

Source. #5860, eff 7-1-94; ss by #6960, eff 3-25-99; ss by #8851-A, eff 3-25-07

Env-C 203.03 Address Updates.

(a) Any respondent or intervenor in an adjudicative proceeding and any person who has filed a motion for reconsideration shall maintain a current mailing address and daytime telephone number and, if available, a fax number and e-mail address, on file with the presiding officer until completion of the matter.

(b) Notices mailed by first class mail, postage prepaid, to the address on file with the presiding officer shall be presumed to have been received by the addressee.

(c) For purposes of this section, “completion of the matter” means the later of:

- (1) The date compliance is achieved or the fine is paid, if applicable;
- (2) The expiration of the time period allowed by law for appealing the subject decision, if no appeal is filed within that time; or
- (3) The date of the final decision on the last appeal taken.

Source. #5860, eff 7-1-94; ss by #6960, eff 3-25-99; ss by #8851-A, eff 3-25-07

Env-C 203.04 Waiver of Rules.

(a) Subject to (g), below, any participant in an adjudicative or non-adjudicative proceeding or otherwise affected by the rules in Env-C 200 may request the presiding officer to waive any rule in Env-C 200 for good cause. If no presiding officer has been designated, the requestor shall direct the request to the commissioner.

(b) Waiver requests made in conjunction with an adjudicative proceeding shall be in the form of a motion that is filed and handled in accordance with Env-C 204.17.

(c) A request to waive a rule not made in conjunction with an adjudicative proceeding shall:

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- (1) Be in written form, unless made in response to a matter asserted for the first time at an oral public hearing or on the basis of information which was not received in time to prepare a written request prior to the hearing at which the request is made;
- (2) Contain a clear and concise statement of the reason(s) why the waiver is being requested, including a statement of the impact on the requestor if the waiver is not granted; and
- (3) Be included in the record of the proceeding if in writing, or recorded in full in the record of the hearing if made at an oral public hearing.

(d) If the presiding officer finds that a request made orally at an oral public hearing requires additional information in order to be fully and fairly considered, the presiding officer shall direct the requestor to submit the request in writing, with supporting information, within 3 state business days of the date of the oral request. If other participants in the proceeding wish to respond to the request, the response(s) shall be filed no later than 7 days after the request is filed.

(e) The presiding officer shall rule upon a waiver request after full consideration of all factors relevant to the request.

(f) For purposes of this section, good cause shall be determined with reference to the rule for which the waiver is sought. If good cause is not specifically defined in the rule for which a waiver is sought, good cause shall be deemed to exist if:

- (1) Compliance with the rule cannot be achieved due to circumstances beyond the control of the person requesting the waiver and waiving the rule will not materially prejudice any other person;
- (2) Compliance with the rule would work a hardship on the person requesting the waiver and waiving the rule will not prejudice any other person; or
- (3) Compliance with the rule would otherwise be counterproductive to the purpose of the proceeding in which the waiver is sought, given the specific circumstances of the proceeding and the reason(s) for the waiver request.

(g) No waiver shall be granted to any rule that reflects a statutory or constitutional requirement without the consent of the person(s) to whose benefit the provision operates.

Source. #5860, eff 7-1-94; ss by #6960, eff 3-25-99; ss by #8851-A, eff 3-25-07

PART Env-C 204 ADJUDICATIVE PROCEEDINGS

Env-C 204.01 Applicability. The rules in Env-C 204 shall apply to any proceeding initiated by the department:

(a) Under its authority to suspend, revoke, or refuse to renew a license or impose an administrative fine, or both; or

(b) For which other departmental rules explicitly reference the adjudicative proceedings requirements of Env-C 200.

Source. #5860, eff 7-1-94; ss by #6960, eff 3-25-99; ss by #8851-A, eff 3-25-07

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Env-C 204.02 Presiding Officer. The presiding officer for an adjudicative proceeding shall be the commissioner or designee.

Source. #5860, eff 7-1-94; ss by #6960, eff 3-25-99; ss by #8851-A, eff 3-25-07

Env-C 204.03 Authority of Presiding Officer. The presiding officer in an adjudicative proceeding shall:

- (a) Regulate and control the course of the proceeding;
- (b) Administer oaths and affirmations at oral adjudicative hearings;
- (c) Receive relevant exhibits;
- (d) Dispose of procedural requests, including adjournments or continuances, at the request of a participant or on the presiding officer's own motion;
- (e) Rule on issues of evidence;
- (f) Question any person who testifies;
- (g) Cause a complete record of the proceeding to be made; and
- (h) Take any other action consistent with applicable statutes and rules necessary to conduct the proceeding and complete the record in a fair and timely manner.

Source. #5860, eff 7-1-94; ss by #6960, eff 3-25-99; ss by #8851-A, eff 3-25-07

Env-C 204.04 Withdrawal of a Presiding Officer.

- (a) A participant may request the presiding officer to withdraw from a matter for good cause.
- (b) A request for the presiding officer to withdraw shall be in the form of a motion that is filed and handled in accordance with Env-C 204.17.
- (c) For purposes of this section, good cause for withdrawal shall be that the presiding officer has an objectively-demonstrated bias for or against one or more of the participants. Good cause shall not include that the presiding officer is an employee of the department.
- (d) The person requesting the withdrawal of the presiding officer shall support the request with sworn testimony or other evidence submitted with the motion.
- (e) For purposes of this section, an "objectively-demonstrated bias" means that the person requesting the presiding officer to withdraw submits evidence that shows, by a preponderance of the evidence, that the presiding officer has had personal dealings with a participant that would cause a reasonable person to believe that as a result of the dealings, the presiding officer will discount or ignore evidence and law to find in favor of or against that participant.

Source. #5860, eff 7-1-94; ss by #6960, eff 3-25-99; ss by #8851-A, eff 3-25-07

Env-C 204.05 Burden and Standard of Proof.

(a) In all adjudicative hearings, the participant asserting a proposition shall bear the burden of proving the truth of the proposition by a preponderance of the evidence.

(b) In a hearing held to determine whether a license that has already been issued should be suspended, revoked, or not renewed, the department shall bear the overall burden of proof by a preponderance of the evidence.

(c) In a hearing held to determine whether an administrative fine should be imposed, the division that initiated the proceeding shall bear the overall burden of proof by a preponderance of the evidence.

(d) In any hearing held on a motion to reconsider a decision that was made in accordance with applicable legal procedures, the person seeking to overturn the decision shall bear the overall burden of proving that the decision was unlawful or unreasonable by a preponderance of the evidence.

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

Source. #5860, eff 7-1-94; ss by #6960, eff 3-25-99; ss by #8851-A, eff 3-25-07

Env-C 204.06 Notice.

(a) The department shall send notice of the initiation of an adjudicative proceeding to each respondent in accordance with (g), below.

(b) The notice sent pursuant to (a), above, shall state:

(1) The docket number assigned to the proceeding by the department;

(2) The action the department is proposing to take;

(3) The statutory authority for the department to take the action;

(4) The facts and law that support the proposed action; and

(5) That the respondent has the opportunity for a hearing prior to a final decision being made by the department.

(c) If the department has already scheduled an oral adjudicative hearing for the matter when the notice required by (a), above, is prepared, the notice shall also state:

(1) The date, time, and location of the oral adjudicative hearing;

(2) That the respondent has the right to have an attorney present to represent the respondent at the respondent's expense; and

(3) If the proceeding relates to the respondent's occupational license, that the respondent may request the department to provide a certified shorthand court reporter at the respondent's expense and that any such request shall be submitted in writing at least 10 days prior to the hearing.

(d) If the department schedules an oral adjudicative hearing subsequent to sending notice pursuant to (a), above, the department shall send a written notice that includes the docket number and the information specified in (c)(1) - (3), above, to each respondent and intervenor, if any, in accordance with (g), below.

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(e) If other persons who are not intervenors notify the department that they are interested in attending the hearing, the department shall send notice to such persons by first-class mail.

(f) If an oral adjudicative hearing is rescheduled for any reason, the department shall give written notice of the date, time, and place of the rescheduled hearing by delivery in hand or by first class mail to the respondent(s), any intervenor(s), and any person(s) who received notice of the original hearing pursuant to (e), above.

(g) The department shall send the notice required by (a) or (d), above, by certified mail, return receipt requested. If the certified mail is not accepted, the notice shall be delivered by any method that is allowed for serving civil writs or other process as specified in RSA 510:2, RSA 510:4, or RSA 510:8 -17, as applicable.

Source. #6960, eff 3-25-99 ; ss by #8851-A, eff 3-25-07

Env-C 204.07 Appearance and Representation.

(a) A participant may be represented by an attorney licensed to practice law in New Hampshire or such other individual as the person designates. The representative shall notify the presiding officer of such representation in writing by filing an appearance in accordance with (b), below.

(b) The appearance filed by the representative shall include the following information:

- (1) A brief identification of the matter in which the representative will appear;
- (2) A statement as to whether or not the representative is an attorney and if so, whether s/he is licensed to practice in New Hampshire; and
- (3) The representative's mailing address and daytime telephone number and, if available, an e-mail address and fax number.

(c) Nothing in these rules shall be construed to allow or encourage the unauthorized practice of law as defined by the New Hampshire supreme court or the New Hampshire general court.

Source. #6960, eff 3-25-99 ; ss by #8851-A, eff 3-25-07

Env-C 204.08 Filing and Service of Documents; Signatures.

(a) Any participant wishing to file any written document(s) for inclusion in the record of an adjudicative proceeding shall deliver the original and one copy of the document to the presiding officer.

(b) Any document so filed shall:

- (1) Specify the docket number assigned by the department to the matter; and
- (2) Be signed by the participant filing the document or by that participant's representative.

(c) The signature of the participant or participant's representative shall constitute certification that:

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

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(d) Any person filing any document as provided in (a), above, shall serve the document on all other participants of record by delivering a copy of the document to such participants by one of the methods specified in (f), below, at the time the document is filed.

(e) The person filing the document shall also file a statement certifying that copies have been or are being delivered to all other participants as required by this section.

(f) Delivery of documents pursuant to this section shall be by:

- (1) Delivery in hand to the recipient or, if the recipient is unavailable, to the recipient's representative, in which case the person delivering the document shall sign a statement indicating the date and time of delivery and the identity of the person receiving the document;
- (2) First class mail to the recipient, postage prepaid, in which case a certificate of mailing shall be obtained by the person sending the document;
- (3) Certified mail to the recipient, return receipt requested;
- (4) United States Postal Service express delivery service to the recipient; or
- (5) Private express delivery service, such as Federal Express® or UPS®, to the recipient.

Source. #6960, eff 3-25-99; ss by #8851-A, eff 3-25-07

Env-C 204.09 Prehearing Conference.

(a) Any participant may request a prehearing conference in accordance with RSA 541-A:31, V.

(b) In lieu of or in addition to a prehearing conference, the participants may submit motions in accordance with Env-C 204.17 for changes to or waivers of the standard procedures as specified in these rules or other matters concerning the conduct of the proceeding.

Source. #6960, eff 3-25-99; ss by #8851-A, eff 3-25-07

Env-C 204.10 Pre-hearing Exchange of Information.

(a) Unless otherwise agreed to at a prehearing conference, more than one week prior to the commencement of an oral adjudicative hearing each participant shall provide the following to each other participant:

- (1) A list identifying each witness the participant expects to call at the hearing with a brief description of that witness's anticipated testimony; and
- (2) A list of the exhibits the participant expects to present at the hearing.

(b) If a participant wishes to obtain information other than that specified in (a), above, from another participant, the requesting participant shall request the information in writing and shall deliver the request to the presiding officer and the other participants as provided in Env-C 204.08.

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

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

- (1) Providing the information requested;

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(2) Explaining why the information will not be provided; or

(3) Identifying a date and time when the information can be made available for inspection, which date and time shall be sufficiently in advance of the hearing on the matter that the information can be reasonably reviewed prior to the hearing.

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

(1) Confidential;

(2) Privileged;

(3) Not directly related to the matter at hand; or

(4) Excessively burdensome to produce.

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

(g) A participant who has requested information pursuant to (b), above, that is not provided may request the presiding officer to require the participant of whom the information was requested to provide the information. Such requests shall be in the form of a written motion that is filed and handled in accordance with Env-C 204.17.

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

(i) If in ruling on a motion filed pursuant to (h), above, the presiding officer determines that the requesting participant will be materially prejudiced in the case being heard by the lack of the requested information, and the participant asked to provide the information fails or refuses to provide it, the presiding officer shall fashion such remedy as is appropriate to the circumstances, including:

(1) Delaying the hearing until the information is provided;

(2) Ruling that such information shall not be admissible at the hearing on the matter or in any subsequent proceeding on the matter, unless the information is already a matter of public record; or

(3) Finding in favor of the requesting participant.

Source. #6960, eff 3-25-99; ss by #8851-A, eff 3-25-07

Env-C 204.11 Hearings in Adjudicative Proceedings.

(a) Subject to (e), below, the participants in an adjudicative proceeding may request the presiding officer to allow a record hearing in lieu of an oral hearing. Such a request shall be made by a motion filed in

accordance with Env-C 204.17 that includes a proposed schedule for submittal of written testimony, evidence, and arguments.

(b) The presiding officer shall allow a record hearing in lieu of an oral hearing only if:

- (1) All participants agree to the record hearing and waive their right to cross-examine on all testimony and evidence presented;
- (2) Resolution of the matter will not hinge on the credibility of any witness; and
- (3) The presiding officer believes that the record hearing will allow a full and fair consideration of the issues in dispute.

(c) If the participants agree to a record hearing, the presiding officer shall establish deadline(s) by which the participants must file their written testimony, evidence, and arguments and notify the participants of the deadline(s) in writing. Any requests for extension of the deadlines shall be filed and handled as specified in Env-C 204.21.

(d) Any written testimony provided as part of a record hearing shall be made under oath or affirmation.

(e) If the credibility of a witness is at issue in an adjudicative proceeding, the presiding officer shall conduct an oral hearing as required by Petition of Grimm, 138 N.H. 42 (1993).

Source. #6960, eff 3-25-99; ss by #8851-A, eff 3-25-07

Env-C 204.12 Record of the Proceeding.

(a) The record of an adjudicative proceeding for which the hearing is a record hearing shall comprise:

- (1) The notice(s) sent by the department pursuant to Env-C 204.06;
- (2) Any written response(s) to such notice(s);
- (3) All other correspondence between the department and a respondent or intervenor that relates to the proceeding;
- (4) All testimony, evidence, and arguments submitted by the participants;
- (5) All motions, objections or other responses to motions, and requests for findings of fact and rulings of law submitted by the participants;
- (6) Any information of which official notice was taken pursuant to Env-C 204.16(b); and
- (7) All rulings of the presiding officer.

(b) The record of an adjudicative proceeding for which the hearing is an oral adjudicative hearing shall comprise:

- (1) All information specified in (a), above; and
- (2) A tape recording or other verbatim record of the oral hearing.

(c) The record of an adjudicative proceeding shall be available for inspection by any person in accordance with Env-C 210.05.

Source. #6960, eff 3-25-99; ss by #8851-A, eff 3-25-07

Env-C 204.13 Opening an Oral Adjudicative Hearing. The presiding officer shall open an oral adjudicative hearing by describing in general terms the purpose of the hearing and procedures governing its conduct.

Source. #6960, eff 3-25-99; ss by #8851-A, eff 3-25-07

Env-C 204.14 Testimony at an Oral Adjudicative Hearing.

(a) All testimony at an oral adjudicative hearing shall be in accordance with RSA 541-A:33, I.

(b) Any individual offering testimony, evidence, or arguments shall state his/her name and address on the record. If the individual is representing another person, the person being represented shall also be identified by name and address.

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

(1) The department and such witnesses as the department calls;

(2) The respondent and such witnesses as the respondent calls; and

(3) Any intervenor(s) and such witnesses as the intervenor(s) call.

(d) Any person offering testimony shall be subject to cross-examination as provided in Env-C 204.15.

(e) Any person included within (c)(1) through (3), above, who wishes to submit written testimony at the hearing in addition to oral testimony shall do so to the presiding officer, provided the person signs and dates such testimony and the presiding officer determines, as required by RSA 541-A:33, II, that the interests of the other participants will not thereby be prejudiced substantially. The person submitting written testimony shall give a copy of such testimony to each party. All participants shall have the opportunity to cross-examine the witness on and offer rebuttal testimony to the testimony.

(f) The presiding officer shall terminate any comments, questions, or discussions that are not relevant to the subject of the hearing.

Source. #6960, eff 3-25-99; ss by #8851-A, eff 3-25-07

Env-C 204.15 Cross-Examination at an Oral Adjudicative Hearing.

(a) If necessary to clarify information presented by a witness or some other aspect of the matter at hand, the presiding officer at an oral adjudicative hearing shall question the witness during or at the conclusion of testimony of that witness.

(b) The presiding officer shall allow the participants or their representatives to cross-examine each witness at the conclusion of the testimony of the witness.

Source. #6960, eff 3-25-99; ss by #8851-A, eff 3-25-07

Env-C 204.16 Evidence.

(a) Evidence that is relevant and material to the subject matter of the adjudicative proceeding in which it is offered shall be admissible.

(b) Whenever necessary for a full and fair consideration of the matter, the presiding officer shall take official notice in accordance with RSA 541-A:33, V.

(c) The presiding officer or designee shall mark all documents, materials, and objects accepted as exhibits with the docket number and a number or other notation to identify the exhibits in a sequential manner.

(d) If the original of a document is not readily available, the documentary evidence shall be received in the form of copies or excerpts.

(e) All written testimony and documents, materials, and objects admitted into evidence at an oral adjudicative hearing shall be made available during the course of the hearing for examination by any participant. After the hearing, all such evidence shall be available for review in accordance with Env-C 210.05.

(f) In any proceeding involving an application, the division shall place into evidence the application, including any plans or other attachments and any amendments thereto but excluding any information determined to be confidential business information pursuant to Env-C 208.

(g) Any person who objects to a ruling of the presiding officer regarding evidence or procedure made during an oral adjudicative hearing shall state the objection and the grounds therefor at the time the ruling is made. Any person who objects to a ruling of the presiding officer regarding evidence or procedure made at a time other than during an oral adjudicative hearing shall file a written objection to the ruling in the form of a motion within 5 state business days of the date of the ruling. Nothing herein shall be construed as independent authorization for interlocutory appeal of rulings of the presiding officer on issues of evidence or procedure.

Source. #6960, eff 3-25-99; ss by #8851-A, eff 3-25-07

Env-C 204.17 Motions.

(a) Motions shall be in writing, unless made in response to a matter asserted for the first time at an oral adjudicative hearing or on the basis of information which was not received in time to prepare a written motion prior to the oral adjudicative hearing at which the motion is presented.

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

(c) All motions shall:

- (1) Contain a clear and concise statement of the facts and law that support the motion;
- (2) State the specific relief or ruling requested;
- (3) State whether the other participants concur with the motion; and
- (4) Be signed as required by Env-C 204.08.

(d) Any participant who did not concur with the motion in advance who wishes to respond to a written motion shall file the response no later than 7 days after the motion was filed.

(e) Motions made orally at an oral adjudicative hearing shall be recorded in full on the record of the hearing. Subject to (f), below, responses to oral motions shall be made orally during the hearing at which the motion is made.

(f) If the presiding officer finds that a motion made orally at an oral adjudicative hearing requires additional information in order to be fully and fairly considered, the presiding officer shall direct the participant who made the motion to submit the motion in writing, with supporting information, within 3 state business days of the date of the oral motion. If other participants in the proceeding wish to respond to the motion, the response(s) shall be filed no later than 7 days after the written motion is filed.

(g) The presiding officer shall rule upon a motion after full consideration of all factors relevant to the motion.

Source. #6960, eff 3-25-99; ss by #8851-A, eff 3-25-07

Env-C 204.18 Proposed Findings of Fact and Conclusions of Law.

(a) Any participant in an adjudicative proceeding may submit proposed findings of fact and conclusions of law to the presiding officer.

(b) For proceedings in which an oral adjudicative hearing is scheduled and a prehearing conference is held, the proposed findings of fact and conclusions of law shall be submitted by the date established at the prehearing conference.

(c) If all participants have not submitted proposed findings of fact and conclusions of law and the presiding officer determines that proposed findings of facts and conclusions of law would serve to clarify the issues presented in the proceeding, the presiding officer shall request the participants to submit proposed findings of fact and conclusions of law by a specified date, which date shall be no later than 10 days following the deadline for submittal for a record hearing or the date on which an oral adjudicative hearing was held.

(d) In any case where proposed findings of fact and conclusions of law are submitted, the decision shall include rulings on the proposals.

Source. #6960, eff 3-25-99; ss by #8851-A, eff 3-25-07

Env-C 204.19 Failure to Appear at an Oral Adjudicative Hearing. If any participant to whom notice of an oral adjudicative hearing has been given in accordance with Env-C 204.06 fails to appear at the hearing and fails to advise the presiding officer of such non-appearance in advance of the hearing, the presiding officer shall hear the evidence and testimony of the participant(s) attending the hearing and render an opinion based thereon, subject to Env-C 204.20.

Source. #6960, eff 3-25-99; ss by #8851-A, eff 3-25-07

Env-C 204.20 Reconvening of Oral Adjudicative Hearings.

(a) If an oral hearing is held in a participant's absence pursuant to Env-C 204.19, the participant may file a motion within 10 days after the date of the hearing to reconvene the hearing.

(b) The motion to reconvene the hearing shall include an explanation of why the participant did not attend the hearing and why the participant did not notify the presiding officer in advance of the hearing, which explanation shall be supported by affidavits or other evidence.

(c) If the submitted evidence shows that good cause exists to explain the participant's failure to appear at the hearing and to explain the participant's failure to notify the presiding officer in advance of the hearing, the hearing shall be reconvened and testimony and evidence offered by the participant shall be received.

(d) For purposes of this section, good cause shall be limited to circumstances beyond the control of the participant which render the participant unable to attend the hearing and unable to notify the presiding officer in advance of the hearing.

Source. #6960, eff 3-25-99; ss by #8851-A, eff 3-25-07

Env-C 204.21 Rescheduling or Continuing Oral Adjudicative Hearings; Extension of Deadlines in Record Hearings.

(a) Any participant in an adjudicative proceeding in which an oral adjudicative hearing has been scheduled or for which deadlines in a record hearing have been set may request the presiding officer to reschedule the hearing or extend the deadlines, as applicable, for reasonable cause. Reasonable cause shall include, but not be limited to, that an individual participant, a representative, or critical witness is unavailable or that the participants believe a settlement is possible and need more time to resolve the matter.

(b) Prior to requesting the rescheduling of an oral adjudicative hearing or the extension of deadlines in a record hearing, the participant shall seek concurrence with the request from the other participant(s).

(c) A request to reschedule an oral adjudicative hearing or to extend the deadlines in a record hearing shall:

(1) Be in writing;

(2) Be made as much in advance of the hearing or deadline, as applicable, as practicable given the reason for the request; and

(3) State whether the other participant(s) agree to the request.

(d) The participant making the request shall serve a copy of the request on each other participant in accordance with Env-C 204.08.

(e) The presiding officer shall notify the participants of his/her ruling on a request that is filed in accordance with (a) - (d), above, in advance of the hearing or deadline, as applicable. If the request is not received sufficiently in advance of the hearing or deadline, as applicable, to allow a decision to be mailed and received prior to the scheduled hearing date or deadline, as applicable, the presiding officer shall inform the participants of the ruling by telephone, fax, or e-mail.

(f) If the need for an oral adjudicative hearing to be continued arises after the start of the hearing or within such time of the hearing as to make filing a written motion impracticable, a participant may request a continuance orally on the record.

(g) The presiding officer shall grant the requested continuance if s/he determines that reasonable cause exists and that any prejudice caused by granting the request would be outweighed by any prejudice caused by denying the request.

(h) If the presiding officer grants a request for a continuance made orally on the record and the date, time, and place for the continued hearing are known at the time of the hearing that is being continued, the presiding officer shall state the new date, time, and place on the record. If such later date, time, and place are not known at the time of the hearing that is being continued, the presiding officer shall notify all participants, all representatives that have filed an appearance in accordance with Env-C 204.07, and all other persons who received the notice of the original hearing pursuant to Env-C 204.06(e), in accordance with (e), above.

Source. #6960, eff 3-25-99; ss by #8851-A, eff 3-25-07

Env-C 204.22 Close of the Record.

(a) In an adjudicative proceeding, the presiding officer shall not accept any evidence, testimony, exhibits, or arguments into the record, except as allowed by (b), below, or pursuant to Env-C 204.23, after:

- (1) The conclusion of an oral adjudicative hearing; or
- (2) The date specified pursuant to Env-C 204.11(b) for submittal of written testimony, evidence, and argument in a record hearing.

(b) Prior to the conclusion of an adjudicative oral hearing, a participant may request that the record be left open for a specified period of time to accommodate the filing of evidence, exhibits, or arguments not available at the hearing. If the other participants have no objection or if the presiding officer determines that such material is necessary to a full consideration of the issues raised in the appeal, the presiding officer shall designate a specific time period for the record to remain open to receive the material.

(c) The participant filing such additional material shall also serve a copy of all material filed to each other participant in accordance with Env-C 204.08.

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

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

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

Source. #6960, eff 3-25-99; ss by #8851-A, eff 3-25-07

Env-C 204.23 Reopening of the Record.

(a) At any time prior to the issuance of the decision on the merits of the issue(s) that form the subject of the adjudicative proceeding, the presiding officer on his/her own motion or on the motion of any participant shall reopen the record to receive relevant, material, and non-duplicative testimony, evidence, or arguments not previously received.

(b) If a request to reopen the record is not made while all participants are in attendance at an oral adjudicative hearing, the requesting participant shall put the request in writing and file the request with the presiding officer and serve the request on each other participant in accordance with Env-C 204.08.

(c) If the presiding officer determines that such testimony, evidence, or arguments are necessary to a full consideration of the subject of the proceeding, the presiding officer shall reopen the record to accept the offered items.

(d) To reopen the record, the presiding officer shall:

- (1) Give written notice of such further proceedings if the participants are no longer present;

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(2) Notify other interested persons in a manner as is appropriate to ensure that reasonable notice is given of the further proceedings; and

(3) Notify the other participants of the deadline by which they may respond to or rebut the items made part of the record.

Source. #8851-A, *eff 3-25-07*

Env-C 204.24 Decisions.

(a) The presiding officer shall make a decision on the merits only after full consideration of the record. In the event an oral adjudicative hearing is held pursuant to Env-C 204.19, no decision shall be made prior to the expiration of the 10-day period allowed for filing of a motion to reconvene the hearing.

(b) If the presiding officer is a designee of the person having the authority to make the decision in the case, the presiding officer shall submit a written recommendation to the decision-maker that contains the following:

- (1) The subject of the proceeding, including identification of the relevant statute(s) and rule(s);
- (2) The names and addresses of all participants;
- (3) The names and affiliations of all individuals who presented testimony either orally or in writing and a summary of the testimony received;
- (4) A description and discussion of all other evidence and argument presented;
- (5) Proposed findings and conclusions, including proposed rulings on any proposed findings of fact and rulings of law submitted by the participants; and
- (6) A recommended decision.

(c) After reviewing the record of the proceeding and the written recommendation submitted pursuant to (b), above, if applicable, the person having decision-making authority shall issue a written decision to all participants that:

- (1) Summarizes the nature of the proceeding;
- (2) States the decision;
- (3) States the findings and conclusions upon which the decision is based; and
- (4) If proposed findings of fact and conclusions of law were submitted, states the rulings made on the proposals.

Source. #8851-A, *eff 3-25-07*

Env-C 204.25 Retention of Decisions.

(a) Subject to (b), below, the department shall maintain on file such written decisions or orders as are issued pursuant to Env-C 204.24 as follows:

- (1) For decisions or orders that are not appealed, for no less than 5 years from the date of the decision or order; and

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(2) For decisions or orders that are appealed, for no less than 5 years from the date of the final decision on appeal.

(b) If the director of the division of records management and archives of the department of state sets a retention period, pursuant to rules adopted under RSA 5:40, for written decisions or orders issued pursuant to RSA 541-A:35 of longer than 5 years, the department shall maintain such written decisions or orders on file for such longer period.

Source. #8851-A, eff 3-25-07

Env-C 204.26 Roles in Disciplinary and Enforcement Proceedings. In any adjudicative proceeding, the following persons shall have the role(s) indicated:

(a) Intervenors shall participate as specified in the presiding officer's order issued pursuant to RSA 541-A:32, V;

(b) The individual designated to represent the department shall present testimony, evidence, and argument and otherwise serve as the department's point of contact for the proceeding;

(c) Other department staff shall present testimony and evidence only if called as a witness by a participant; and

(d) Complainants shall present testimony and evidence only if called as a witness by a participant.

Source. #8851-A, eff 3-25-07

PART Env-C 205 NON-ADJUDICATIVE PROCEEDINGS

Env-C 205.01 Applicability. These rules shall apply to proceedings conducted by the department to:

(a) Adopt, readopt, amend, or repeal rules;

(b) Review applications for licenses and issue decisions thereon;

(c) Review requests filed under RSA 72:12-a and issue decisions thereon; or

(d) Provide information and receive public comment in any other matter that is not an adjudicative proceeding covered by Env-C 204.

Source. #5860, eff 7-1-94; ss by #6960, eff 3-25-99; ss by #8851-A, eff 3-25-07

Env-C 205.02 Presiding Officer.

(a) The presiding officer for a non-adjudicative proceeding shall be the commissioner or designee.

(b) The presiding officer in a non-adjudicative proceeding shall:

(1) Receive relevant information and public comments;

(2) Cause a complete record of the proceeding to be made; and

(3) Take any other action consistent with applicable statutes and rules necessary to conduct the proceeding and complete the record in a fair and timely manner.

Source. #5860, eff 7-1-94; ss by #6960, eff 3-25-99; ss by #8851-A, eff 3-25-07

Env-C 205.03 Non-Adjudicative Oral Public Hearings.

(a) The department shall conduct an oral public hearing in a non-adjudicative proceeding:

- (1) When proposing to adopt, readopt, amend, or repeal rules;
- (2) To receive oral public comment on a license application if required by the statute or rules specific to such applications;
- (3) For any matter for which the department is required by law or by these rules to hold an oral hearing in a proceeding that is not an adjudicative proceeding pursuant to Env-C 204.01; and
- (4) For any other non-adjudicative matter for which the law does not require the department to hold an oral hearing but for which the department believes an oral public hearing would be of benefit.

(b) For any case in which an oral hearing is not required pursuant to (a), above, the department shall proceed with a record hearing.

Source. #5860, eff 7-1-94; ss by #6960, eff 3-25-99; ss by #8851-A, eff 3-25-07

Env-C 205.04 Notice. Notice of the date, time, and place of an oral public hearing shall be given as follows:

(a) For a rulemaking hearing held pursuant to RSA 541-A:3, IV, by publication as specified in RSA 541-A:6;

(b) For an oral public hearing held on a license application, as specified in the department's rules specific to such license; or

(c) For any other oral public hearing, by such means as the commissioner determines will notify those persons likely to be interested in the most cost-effective manner.

Source. #5860, eff 7-1-94; ss by #6960, eff 3-25-99; ss by #8851-A, eff 3-25-07

Env-C 205.05 Record of Non-Adjudicative Proceedings.

(a) The record of a non-adjudicative proceeding in which an oral public hearing is not held shall comprise:

- (1) The application or request, together with all supporting or supplemental information, filed by the applicant;
- (2) All correspondence between the department and the applicant or between the department and any other interested person(s) regarding the application or request;
- (3) A copy of the draft license, if one is required to be prepared and circulated for public comment by the departmental rules specific to the license; and
- (4) Any other information relevant to the application or request that is considered by the department in reaching a decision.

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(b) The record of a non-adjudicative proceeding for which an oral public hearing is held shall comprise:

- (1) All information specified in (a), above;
- (2) Copies of all notices of the oral public hearing that were published or otherwise distributed by the department;
- (3) Any exhibits or written testimony received pursuant to Env-C 205.07;
- (4) For rulemaking proceedings, a copy of all documents prepared and filed under RSA 541-A; and
- (5) Subject to (c), below, a tape recording or other method that provides a verbatim record of the oral public hearing or notes of the hearing prepared by the presiding officer or designee.

(c) If no member of the public attends an oral public hearing for which notice in accordance with Env-C 205.04 was given, the record of the oral hearing shall consist of a memo from the presiding officer stating that no member of the public was present.

(d) The record of a non-adjudicative proceeding shall be available for inspection by any person in accordance with Env-C 210.05.

Source. #6960, eff 3-25-99; ss by #8851-A, eff 3-25-07

Env-C 205.06 Opening an Oral Public Hearing.

(a) The presiding officer shall open an oral public hearing by describing in general terms the purpose of the hearing and procedures governing its conduct.

(b) If the purpose of the hearing is to provide information to the public, the presiding officer, department staff, or such other person as the presiding officer designates shall then present such information.

(c) After the opening statement and presentation of information, if any, the presiding officer shall open the hearing to receive comments and questions from the persons attending the hearing.

Source. #6960, eff 3-25-99; ss by #8851-A, eff 3-25-07

Env-C 205.07 Testimony at an Oral Public Hearing.

(a) Any individual wishing to submit exhibits or written testimony at an oral public hearing shall do so to the presiding officer, provided the individual signs and dates such testimony or exhibit(s).

(b) Any individual wishing to testify at an oral public hearing shall submit his/her name, address, and whom s/he represents, if anyone, in writing to the presiding officer. The presiding officer shall call each individual to present his/her testimony. The presiding officer shall encourage individuals who plan to testify orally to place their testimony in writing and to submit such written testimony to the presiding officer prior to the close of the record.

(c) At the conclusion of testimony of each individual, the individual shall remain available to answer questions from the presiding officer, who shall only ask such questions as are necessary to clarify the testimony given.

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(d) The presiding officer shall terminate any comments, questions, or discussions that are not relevant to the subject of the hearing.

Source. #6960, eff 3-25-99; ss by #8851-A, eff 3-25-07

Env-C 205.08 Closing the Hearing and the Record.

(a) The presiding officer shall close the oral public hearing when s/he determines that no one has further questions or comments that are relevant to the subject of the hearing.

(b) At an oral public hearing other than a rulemaking hearing, if additional time is requested to submit written testimony as specified in Env-C 205.07(b) or supplemental information which the presiding officer determines to be relevant to the subject of the hearing, the presiding officer shall designate a specific time period for the record to remain open to receive such information.

(c) For rulemaking hearings, the record shall remain open until the date specified in the notice published pursuant to Env-C 205.04(a).

Source. #6960, eff 3-25-99; ss by #8851-A, eff 3-25-07

Env-C 205.09 Continuances.

(a) Hearings on proposed rules shall be continued only in accordance with RSA 541-A.

(b) At any oral public hearing other than a hearing on proposed rules, if anyone requests a continuance and the presiding officer determines that the public will be best served by continuing the hearing and that any prejudice caused to any person as a result of the continuance is outweighed by the benefit to the public of granting the continuance, the presiding officer shall order that the hearing be continued to a later date, time, and place.

(c) If such later date, time, and place are known at the time of the hearing that is being continued, the presiding officer shall state the date, time, and place on the record.

(d) If such later date, time, and place are not known at the time of the hearing that is being continued, the presiding officer shall state how notice will be given of the date, time, and place of the continued hearing.

Source. #8851-A, eff 3-25-07

PART Env-C 206 MOTIONS FOR RECONSIDERATION

Env-C 206.01 Purpose. The rules in this part are intended to supplement any statutory provisions, such as RSA 541, that require or allow a person to request reconsideration of a decision of the department prior to appealing the decision. These rules do not create the right to request reconsideration of a decision where it does not otherwise exist under law.

Source. #6960, eff 3-25-99; ss by #8851-A, eff 3-25-07

Env-C 206.02 Applicability. The rules in this part shall apply whenever any person has a right under applicable law to request a reconsideration of a decision prior to filing an appeal of the decision with the applicable court or council having appellate jurisdiction.

Source. #6960, eff 3-25-99; ss by #8851-A, eff 3-25-07

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Env-C 206.03 Time for Filing. Any motion for reconsideration shall be filed no later than 30 days after the date the decision that is the subject of the motion was issued.

Source. #6960, eff 3-25-99; ss by #8851-A, eff 3-25-07

Env-C 206.04 Filing.

(a) Any person wishing to request reconsideration of a department decision shall file the original and 2 copies of a motion for reconsideration at the following address:

Office of the Commissioner, Legal Unit
Department of Environmental Services
29 Hazen Drive
P.O. Box 95
Concord, NH 03302-0095

(b) For purposes of this section, a “department decision” means a decision that is signed by the commissioner, by the assistant commissioner on behalf of the commissioner, or by a division director, alone or in any combination.

Source. #6960, eff 3-25-99; ss by #8851-A, eff 3-25-07

Env-C 206.05 Format and Content of Motion. The person filing a motion for reconsideration shall provide the following information:

(a) The exact legal name of each person requesting reconsideration and the mailing address of the person and, if available, a fax number and e-mail address for the person;

(b) If the person making the request is other than an individual, the name and daytime telephone number of the individual who can be contacted regarding the motion and, if available, a fax number and e-mail address for that individual;

(c) A clear and concise statement of the reason(s) why the person believes the decision to be in error;

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

(e) A clear and concise statement of the specific relief or ruling requested;

(f) A copy of the decision that is the subject of the motion; and

(g) Such other information as the party filing the motion deems pertinent and relevant, including sworn written testimony and other evidence that was not available for the hearing.

Source. #6960, eff 3-25-99; ss by #8851-A, eff 3-25-07

PART Env-C 207 RULEMAKING PETITIONS

Env-C 207.01 Applicability. The rules in this part shall apply to any petition submitted to the department pursuant to RSA 541-A:4.

Source. #6960, eff 3-25-99; ss by #8851-A, eff 3-25-07

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Env-C 207.02 Filing. Any person wishing to file a petition to adopt, amend, or repeal a department rule shall file the original and one copy of the petition with the commissioner at the following address:

Office of the Commissioner, Legal Unit
Department of Environmental Services
29 Hazen Drive
P.O. Box 95
Concord, NH 03302-0095

Source. #6960, eff 3-25-99; ss by #8851-A, *eff 3-25-07*

Env-C 207.03 Format and Content of Petition. The person filing a petition to adopt, amend, or repeal a department rule shall provide the following information:

- (a) The exact legal name of each person requesting the adoption, amendment, or repeal of the rule, with a mailing address of the person and, if available, a fax number and e-mail address for the person;
- (b) If the person making the request is other than an individual, the name and daytime telephone number of the individual who can be contacted regarding the motion and, if available, a fax number and e-mail address for that individual;
- (c) Whether the person is asking the department to adopt, amend, or repeal a rule;
- (d) If the petition is to adopt a rule:
 - (1) The chapter, part, and section, by alphanumeric code, where the person proposes the rule to be inserted; and
 - (2) The language that the person wants to have adopted as a rule;
- (e) If the petition is to amend a rule:
 - (1) The specific rule, by alphanumeric code, that is the subject of the petition; and
 - (2) The language that the person wants to have adopted as a rule;
- (f) If the petition is to repeal a rule, the specific rule, by alphanumeric code, that is the subject of the petition;
- (g) A clear and concise statement of why the petitioner wants the department to undertake the action requested; and
- (h) Such other information as the person filing the petition deems pertinent and relevant, including sworn written testimony.

Source. #6960, eff 3-25-99; ss by #8851-A, *eff 3-25-07*

Env-C 207.04 Processing of Rulemaking Petitions.

- (a) Upon receipt of a petition to adopt, amend, or repeal a rule, the commissioner shall proceed in accordance with RSA 541-A:4.
- (b) The commissioner shall grant the petition and initiate a rulemaking proceeding in accordance with RSA 541-A:4 if the commissioner determines that the department has authority to take the proposed action and the proposed action is:

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- (1) Consistent with state and federal law and policy; and
- (2) Necessary to the efficient and effective implementation of the rules that are the subject of the action or other programs implemented by the department.

Source. #6960, eff 3-25-99; ss by; ss by #8851-A, eff 3-25-07

PART Env-C 208 CLAIMS OF CONFIDENTIALITY

Env-C 208.01 Purpose. The purpose of this part is to establish the procedures by which a person who submits information to the department can protect confidential business information (CBI) or trade secrets.

Source. #6960, eff 3-25-99; ss by #8851-B, eff 3-25-07

Env-C 208.02 Applicability. Subject to Env-C 208.05, any person submitting information to the department may make a claim of confidentiality for all CBI, or any part thereof, pursuant to the criteria and procedures of this part.

Source. #6960, eff 3-25-99; ss by #8851-B, eff 3-25-07

Env-C 208.03 Definition.

(a) “Confidential business information (CBI)” means information that is exempt from disclosure under RSA 91-A:5, IV or any statute implemented by the department, including but not limited to any formula, pattern, device, or compilation of information used in the business of the person making the claim of confidentiality, that the person protects from disclosure and that gives the person an advantage over competitors who do not know of or use it.

Source. #6960, eff 3-25-99; ss by #8851-B, eff 3-25-07

Env-C 208.04 Initial Claim of Confidentiality.

(a) Any person who wishes to make a claim that information being submitted to the department is CBI shall assert that claim at the time the information is initially submitted to the department by stamping or otherwise marking each page of such information with the notation “confidential” or “confidential business information”. If the claimant believes that only part of the information on a page is CBI, the claimant shall identify all portions to which the claim applies at the time of submission, and shall designate only that portion of the page as “confidential”.

(b) If a claim of confidentiality is made for any information that falls within any category identified in Env-C 208.05, the department shall not treat the information as confidential.

(c) If the department determines pursuant to (b), above, that information claimed as confidential is not subject to a claim of confidentiality, the department shall send written notice to the person submitting the information of its determination.

(d) If the department receives information from another agency of the state or federal government that has been designated as CBI, the department shall exercise the same degree of confidentiality for the information as is exercised by the sending agency to the extent authorized by New Hampshire law.

Source. #6960, eff 3-25-99; ss by #8851-B, eff 3-25-07

Env-C 208.05 Non-Confidential Information. No claim of confidentiality shall be made with respect to the following:

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- (a) Any information for which no claim of confidentiality was made at the time of the initial submission;
- (b) Comments submitted by any person during the public comment period of any administrative proceeding of the department;
- (c) Information that is known by the department to be in the public domain, in which case the department shall identify the public domain source of the information;
- (d) Information that demonstrates that a violation of any statute implemented by the department or rules adopted or permits issued pursuant to such statutes has occurred;
- (e) A certificate of compliance as required by RSA 149-M:36; or
- (f) Information that is exempted from claims of confidentiality pursuant to any statute implemented by the department or rules adopted pursuant to such statutes that establish criteria or exceptions for claims of confidentiality.

Source. #6960, eff 3-25-99; ss by #8851-B, eff 3-25-07

Env-C 208.06 Release or Other Use of Information.

- (a) When the department receives a request for the release of information that has been designated by the person who submitted the information as CBI and that has not been determined to be non-confidential pursuant to Env-C 208.04(b), the department shall notify, in writing:
 - (1) The person requesting the information that the information is subject to a claim of confidentiality but will be released on a specified date unless an objection is received from the person who submitted the information; and
 - (2) The person asserting the claim of confidentiality that the information will be released pursuant to the request on a specific date unless the person submits a written objection with the department prior to the specified release date that clearly explains all of the reasons why the person believes the information should not be released.
- (b) The release date specified in the notices provided pursuant to (a), above, shall be no sooner than 10 days after the date of issuance of the notice.
- (c) If the department receives a written objection pursuant to (a)(2), above, the department shall:
 - (1) Provide a copy of the objection to the person(s) who requested the information; and
 - (2) Request assistance from the New Hampshire department of justice to resolve the dispute.
- (d) If the person who submitted the information does not file a written objection to the release with the department prior to the specified release date, the department shall release the information to the person who requested it and thereafter the information shall no longer be treated as confidential by the department.
- (e) The department shall have the use of any information submitted to it, regardless of whether a claim of confidentiality has been asserted with respect to the information, for any purpose whatsoever, including:
 - (1) Using the information for compiling surveys, statistics, or studies, so long as such use does not compromise the confidentiality of any information that is CBI; or

- (2) Ensuring compliance with applicable requirements.

Source. #6960, eff 3-25-99; ss by #8851-B, eff 3-25-07

PART Env-C 209 LICENSE DENIALS AND ACTIONS

Env-C 209.01 Definitions. For purposes of this part, the following definitions shall apply:

(a) “Applicable requirements” means all requirements that apply to a site, facility, or activity imposed by:

- (1) Any state statutory provisions for which the department is primarily responsible for implementation or enforcement;
- (2) Any rule adopted by the commissioner pursuant to statutory rulemaking authority;
- (3) Any license issued by the department pursuant to statutory authority;
- (4) Any federal statutory provisions or regulations, for which the United States Environmental Protection Agency (“US EPA”) is primarily responsible for implementation or enforcement, which are analogous to state statutes or rules implemented or enforced by the department; or
- (5) Any license issued by the US EPA which is analogous to a state license issued by the department.

(b) “Chronic non-complier” means a person who:

- (1) Has committed, within 3 years of the date of application or of the violation(s) for which a license action has been initiated, as applicable:
 - a. More than 2 violations that remain uncorrected after the department or the US EPA has notified the respondent, in writing, of the violations and the need to correct them, which demonstrates that the respondent is unable or unwilling to comply with applicable requirements; or
 - b. More than 3 violations that are corrected by the respondent after the department or the US EPA has notified the respondent, in writing, of the violations and the need to correct them, but recur with a frequency that demonstrates that the respondent is unable or unwilling to maintain compliance with applicable requirements; or
- (2) Has been the subject, within 3 years of the date of the application or of the violation(s) for which a license action has been initiated, as applicable, of 2 or more administrative or civil enforcement actions or one criminal enforcement action that have not been overturned on appeal for violations of any applicable requirements pertaining to any of the respondent’s activities.

(c) “Enforcement action” means a proceeding initiated by or at the request of the department or the US EPA against a person who is believed to have violated any applicable requirements, which is intended to cause the person to comply with applicable requirements or to impose a monetary penalty, or both, or to incarcerate the person.

(d) “License holder” means the person to whom the department has issued a license.

(e) "Person" means "person" as defined by the statute or rules applicable to the application or license at issue.

Source. #6960, eff 3-25-99; ss by #7562, eff 9-26-01; ss by #8851-A, eff 3-25-07

Env-C 209.02 Grounds for Denying a License Application. In addition to such grounds for denying a license application as are identified in the rules that are specific to the license for which an application was filed, the following shall constitute good cause to deny a license application:

(a) The applicant owes any fees to the department, unless the fees are being paid in accordance with a payment schedule and the applicant is current with all payments;

(b) The applicant owes any administrative fines to the department, unless the fines are being paid in accordance with a payment schedule and the applicant is current with all payments;

(c) The applicant has failed to comply with any administrative order issued by the department, unless the applicant is complying in accordance with a compliance schedule and is current with all items;

(d) The applicant owes any civil or criminal penalties imposed as a result of a judicial action taken to enforce any statute or rule implemented by the department, unless the penalties are being paid in accordance with a payment schedule and the applicant is current with all payments;

(e) The applicant has failed to comply with any civil or criminal restoration or restitution order imposed as a result of a judicial action taken to enforce any statute or rule implemented by the department, unless the applicant is complying in accordance with a compliance schedule and is current with all items; and

(f) The applicant is a chronic non-complier.

Source. #6960, eff 3-25-99; amd by #7562, eff 9-26-01; ss by #8851-A, eff 3-25-07

Env-C 209.03 Grounds for Suspension, Revocation, or Refusal to Renew. In addition to such grounds for suspending, revoking, or refusing to renew a license as are identified in the rules that are specific to the license at issue, the following shall constitute good cause to suspend, revoke, or refuse to renew a license issued by the department:

(a) The license holder owes any fees to the department, unless the fees are being paid in accordance with a payment schedule and the license holder is current with all payments;

(b) The license holder owes any administrative fines to the department, unless the fines are being paid in accordance with a payment schedule and the license holder is current with all payments;

(c) The license holder has failed to comply with any administrative order issued by the department, unless the license holder is complying in accordance with a compliance schedule and is current with all items;

(d) The license holder owes any civil or criminal penalties imposed as a result of a judicial action taken to enforce any statute or rule implemented by the department, unless the penalties are being paid in accordance with a payment schedule and the license holder is current with all payments;

(e) The license holder has failed to comply with any civil or criminal restoration or restitution order imposed as a result of a judicial action taken to enforce any statute or rule implemented by the department, unless the license holder is complying in accordance with a compliance schedule and is current with all items; and

(f) The license holder is a chronic non-complier.

Source. #6960, eff 3-25-99; amd by #7562, eff 9-26-01; ss by #8851-A, eff 3-25-07

Env-C 209.04 Relevance of Prior Violations.

(a) The department shall not base a decision to suspend, revoke, or refuse to renew a license or to deny a license application on prior violation(s) not documented by one or more enforcement actions that arose in a program other than the program to which the license application or license pertains unless the prior violations(s) can reasonably be found to be relevant to the license or application under consideration.

(b) Any prior violation(s) arising in the same program as the license or application under consideration shall be deemed to be relevant to the pending license action.

Source. #6960, eff 3-25-99; ss by #7562, eff 9-26-01; ss by #8851-A, eff 3-25-07

Env-C 209.05 Determination to Deny a License Application or to Suspend, Revoke, or Refuse to Renew a License.

(a) The determination of whether to deny a license application or to suspend, revoke, or refuse to renew a license shall be made in accordance with the procedural rules specific to the type of license at issue.

(b) If the respondent has not already had the opportunity to contest, through an adjudicative proceeding, the prior violation(s) on which the department proposes to base a decision to deny a license application or to suspend, revoke, or refuse to renew a license, the respondent shall have the opportunity to contest such prior violation(s) through an adjudicative proceeding prior to a final decision being made.

(c) In any proceeding under (b) above, the division shall bear the burden of proof on any alleged prior violation(s) not documented by one or more enforcement actions in the same manner as would have been true if an adjudicative proceeding had been initiated at the time of discovery of the prior violation(s).

Source. #7562, eff 9-26-01; ss by #8851-A, eff 3-25-07

Env-C 209.06 License Conditions.

(a) The department shall include conditions in a license whenever it determines that such conditions are necessary to:

- (1) Provide greater assurance that the license holder will comply with applicable requirements; or
- (2) Minimize the potential for harm to public health or the environment from any violations of applicable requirements.

(b) Any conditions so added shall relate directly to the site, facility, or activity for which the license is issued and shall be no more than reasonably necessary to achieve the criteria in (a), above.

(c) The determination of whether such conditions are reasonably necessary shall be made based on:

- (1) The nature and scope of the license being issued; and
- (2) The compliance history of the applicant, including whether the applicant is a chronic non-complier.

(d) The license holder may appeal any conditions included in a license pursuant to this section in accordance with existing appeal routes established under the statute which authorizes the department to issue the license to which the conditions were attached.

Source. #7562, eff 9-26-01; ss by #8851-A, eff 3-25-07

PART Env-C 210 RECORD RETENTION AND REVIEW

Env-C 210.01 Purpose. The rules in this part are intended to clarify the department's policies on retaining records and specify the procedures by which the public can request to review or receive copies of such records.

Source. #8851-A, eff 3-25-07

Env-C 210.02 Applicability. Env-C 210 shall apply to all records maintained by the department.

Source. #8851-A, eff 3-25-07

Env-C 210.03 Definitions.

(a) "Electronic record" means "electronic record" as defined in RSA 294-E:2, VII, namely "a record created, generated, sent, communicated, received, or stored by electronic means."

(b) "Electronic signature" means "electronic signature" as defined in RSA 294-E:2, VIII, namely "an electronic sound, symbol, or process attached to or logically associated with a record and executed or adopted by a person with the intent to sign the record."

(c) "Record" means "record" as defined in RSA 294-E:2, XIII, namely "information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form."

Source. #8851-A, eff 3-25-07

Env-C 210.04 Retention of Department Records.

(a) The department shall retain an electronic record received from any individual or entity outside the department in the record's original electronic format or in such other electronic format as is compatible with technology within the department's possession.

(b) If necessary in order to conserve physical storage space, the department shall convert non-electronic records to electronic format and thereafter retain the electronic format. Any record so converted shall not be required to be retained in its non-electronic format.

Source. #8851-A, eff 3-25-07

Env-C 210.05 Review of Department Records.

(a) Any person who wishes to review department records shall submit a written request that contains the information specified in (b), below, to:

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

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(b) The request filed pursuant to (a), above, shall:

(1) Specify the name, mailing address, and daytime telephone number of the individual making the request and, if available, a fax number and e-mail address;

(2) Identify the record(s) the person wishes to review with as much specificity as possible, including as applicable:

- a. The docket number assigned to an adjudicative proceeding;
- b. The file number or permit number assigned to an application proceeding;
- c. The complete address of the property that is the subject of the records requested; and
- d. If a specific division is believed to have the requested record(s), the name of the division.

(c) Requested records shall be made available during normal business hours at the department's offices in Concord or in such field office as is the normal repository for the requested record.

Source. #8851-A, eff 3-25-07

Env-C 210.06 Oral Hearing Records.

(a) Copies of the recording of an oral adjudicative hearing or an oral public hearing shall be provided to any person upon request and payment of the costs of the tape(s), or at no charge if the person supplies enough blank tapes to copy the hearing tape(s).

(b) If any person desires a transcript of the recording of an oral adjudicative hearing or an oral public hearing, the department shall prepare or cause to be prepared a transcript provided the actual cost of the transcription is paid by the person(s) requesting the transcript. If the department hires an outside person to prepare the transcript, the person requesting the transcript shall be billed directly by and shall directly pay the person preparing the transcript.

Source. #8851-A, eff 3-25-07

PART Env-C 211 REQUESTS UNDER RSA 72:12-a

Env-C 211.01 Purpose. The rules in this part are intended to clarify the procedures by which a person can apply to the department for a determination under RSA 72:12-a.

Source. #8851-B, eff 3-25-07

Env-C 211.02 Definition.

(a) "Installation" means the treatment facility, device, appliance, or installation that is the subject of the application.

Source. #8851-B, eff 3-25-07

Env-C 211.03 Application Filing.

(a) The applicant shall submit a written application that contains the information specified in Env-C 211.04 to:

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

(b) As required by RSA 72:12-a, II, the applicant shall provide a copy of the complete application to the appropriate taxing authorities.

Source. #8851-B, eff 3-25-07

Env-C 211.04 Contents of Request. The application filed pursuant to Env-C 211.03 shall include:

- (a) The name, mailing address, and daytime telephone number of the applicant;
- (b) If the applicant is other than an individual, the name, mailing address, and daytime telephone number of an individual who can be contacted regarding the application and, if available, a fax number and e-mail address for that individual; and
- (c) For each installation, the following:
 - (1) A brief description of the installation;
 - (2) A process flow diagram or other engineering plan and specifications for the installation, or a reference to the record(s) already on file with the department that contain(s) such information;
 - (3) An explanation of how the installation operates to reduce, control, or eliminate a source of air or water pollution;
 - (4) Whether the installation is wholly or only partially for the purpose of reducing, controlling, or eliminating any source of air or water pollution; and
 - (5) Any other information believed by the applicant to be relevant to the application.

Source. #8851-B, eff 3-25-07

Env-C 211.05 Department Review and Decision.

- (a) The department shall review each request received as provided in RSA 72:12-a, III.
- (b) The department shall issue a written decision on each request in accordance with RSA 72:12-a, IV.
- (c) The decision issued pursuant to (b), above, shall state the reasons for the decision.

Source. #8851-B, eff 3-25-07

PART Env-C 212 DECLARATORY RULINGS

Env-C 212.01 Purpose and Applicability.

(a) The purpose of the rules in this part shall be to establish a mechanism whereby a person who is uncertain of the applicability of a particular statute implemented by the department or rule adopted by the department may request a decision in advance of taking an action that might be subject to such statute or rule.

(b) These rules shall not be used to circumvent other established methods of adjudication, such as an appeal to a council created under RSA 21-O, in cases where the department has already made a determination, such as by issuing or denying a permit or by initiating an enforcement action.

Source. #9133, eff 4-19-08

Env-C 212.02 Filing. Any person seeking a declaratory ruling from the department shall file the original and one copy of a written petition for declaratory ruling as specified in Env-C 212.02 at the following address:

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

Source. #8851-A, eff 3-25-07 (from Env-C 212.01)

Env-C 212.03 Form and Content of Petition. A petition for a declaratory ruling shall include the following:

(a) The name, mailing address, and daytime telephone number of each petitioner and, if the petitioner is other than an individual, the name, mailing address, and daytime telephone number of an individual who can be contacted regarding the petition and, if available, a fax number and e-mail address for that individual;

(b) A precise and complete citation to the statute or administrative rule, or identifying information concerning the order, for which the petitioner seeks a ruling;

(c) A clear and concise statement explaining the background, facts, and considerations which led to the petition, in order for the department to understand the nature and specific reasons for the petition and why the ruling is being requested;

(d) If the petition requests a ruling that will affect specifically-identified property owned by someone other than the petitioner, certification that the petition has been served in accordance with Env-C 212.04(c) and (d); and

(e) Such other information as the person filing the petition deems pertinent and relevant, including exhibits, maps, illustrations, and sworn affidavits.

Source. #8851-A, eff 3-25-07 (from Env-C 212.02)

Env-C 212.04 Signature; Service.

(a) Every petition for declaratory ruling shall be signed by the individual(s) submitting the petition or, if the petition is filed on behalf of an entity, by a duly-authorized representative of the entity.

(b) The signature(s) shall constitute a certification that:

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

(c) Any person who files a petition requesting a ruling that will affect known and specifically-identified interests of another, such as property owned by someone other than the petitioner, shall serve a copy of the petition on such other person and any other person known by the petitioner to have a substantial interest in the matter.

(d) Service as required by (c), above, shall be made on or before the date of filing of the petition with the department by any method specified in Env-C 204.08(f).

Source. #8851-A, *eff* 3-25-07 (from Env-C 212.03)

Env-C 212.05 Processing of Petitions for Declaratory Rulings.

(a) Upon receipt of a petition requesting a ruling that will affect known and specifically-identified interests of another, the department shall notify the person(s) served by the petitioner of the date by which a written response to the petition may be filed, which date shall not be less than 25 days from the date of the notice.

(b) Within 25 days of receipt of a petition for declaratory ruling, the department shall review the petition to determine:

- (1) Whether additional information or explanation is needed; and
- (2) Whether the complexity of the petition, including but not limited to the issue in question and the legal implications thereof, will cause the department to seek assistance from the department of justice.

(c) The department shall inform the petitioner in writing of the results of its review under (b), above. If additional information or explanation is needed, the department shall identify the needed information or explanation and shall establish a deadline for the petitioner to provide the information, which shall be no sooner than 25 days after the date of the notice. If the department will be seeking assistance from the department of justice, the department shall inform the petitioner of the anticipated amount of time that will be needed to obtain such assistance.

Source. #8851-A, *eff* 3-25-07 (from Env-C 212.04)

Env-C 212.06 Decision on Petitions for Declaratory Rulings.

(a) The department shall issue its decision on the petition in writing.

(b) If assistance from the department of justice is not required, the department shall issue a response to the person filing the petition for declaratory ruling within 90 days following:

- (1) Receipt of a complete petition, if no response is requested pursuant to Env-C 212.05(a); or
- (2) The deadline for receipt of a response, if a response is requested pursuant to Env-C 212.05(a).

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(c) If assistance from the department of justice is required, the department shall issue a written response to the person filing the petition for declaratory ruling within 30 days following receipt of such assistance from the department of justice.

(d) Declaratory rulings issued by the department shall be filed with the director of legislative services in accordance with RSA 541-A:16, II(b).

Source. #8851-A, *eff* 3-25-07 (from Env-C 212.05)

APPENDIX

Rule Section(s)	State Statute(s) Implemented
Env-C 201	RSA 541-A:16, I; RSA 541-A:30-a, III; all other statutes identified in this table
Env-C 202	RSA 541-A:16, I; RSA 541-A:30-a, III; all other statutes identified in this table
Env-C 203	RSA 541-A:16, I(a) and (b); RSA 541-A:30-a, III; all other statutes identified in this table
Env-C 204	RSA 541-A:16, I(b)(2); RSA 541-A:30, II; RSA 125-C:15, I-b; RSA 125-D:4; RSA 125-I:3-a; RSA 125-J:8, I-a; RSA 141-E:16; RSA 146-A:15; RSA 146-C:10-a; RSA 147-A:17-a; RSA 149-M:16; RSA 149-M:37, IV; RSA 482:79-a; RSA 482:89, II; RSA 482-A:13; RSA 483-B:18, III(c); RSA 485:58, IV; RSA 485-A:22,V; RSA 485-A:28, II; RSA 485-A:43,V; RSA 485-A:54,V; RSA 485-C:18; and RSA 487:7, II
Env-C 205	RSA 541-A:16, I(b); RSA 541-A:11, I
Env-C 206	RSA 541-A:16, I(a) and (b); RSA 541-A:30-a, III; all other statutes identified in this table
Env-C 207	RSA 541-A:4; RSA 541-A:16, I(c)
Env-C 208	RSA 541-A:16, I(a) and (b)
Env-C 209	RSA 541-A:16, I(a) and (b); RSA 541-A:30, II; RSA 125-C:11; RSA 125-I:3, I; RSA 146-A:11-c; RSA 146-C:4; RSA 147-A:4; RSA 147-A:6; RSA 149-M:9; RSA 332-E:6; RSA 482:5; RSA 482:7; RSA 482:9; RSA 482:29; RSA 482:31; RSA 482-A:3; RSA 482-B:8, II; RSA 485:3; RSA 485:3-a; RSA 485-A:4, IX-b, IX-c, XVI-a and XVI-b; RSA 485-A:7-c; RSA 13, I(a); RSA 485-A:26, I; RSA 485-A:29; RSA 485-A:35, I; RSA 485-A:36, I; RSA 485-A:47; RSA 485-C:6-a; RSA 485-C:13
Env-C 210	RSA 541-A:16, I(a) and (b); RSA 91-A
Env-C 211	RSA 541-A:16, I(a) and (b); RSA 72:12-a
Env-C 212	RSA 541-A:16, I(d)